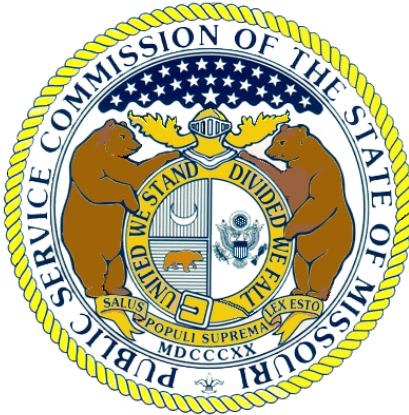


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of a Proceeding Under)
Section 393.137 (SB 564) to Adjust the)
Electric Rates of The Empire District)
Electric Company)

File No. ER-2018-0366

REPORT AND ORDER

Issue Date: August 15, 2018

Effective Date: August 25, 2018

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The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

The Commission opened this case on June 6, 2018¹, to adjust the electric rates of The Empire District Electric Company (Empire) pursuant to Section 393.137 of Missouri's statutes, passed during the 2018 session as part of Senate Bill 564 (SB564). That statute gives the Commission one-time authority to order an adjustment to the electric rates of an electrical corporation in light of the recently enacted federal Tax Cut and Jobs Act of 2017.

As provided in the approved procedural schedule, Empire prefiled direct testimony of Christopher Krygier and Charlotte North, Staff prefiled rebuttal testimony of Sarah Lange and Mark Oligschlaeger, and Public Counsel prefiled direct testimony of John Riley. Each of these witnesses testified at the hearing, as did Steve Williams for Empire, who did not prefile testimony. Surrebuttal and additional rebuttal testimony were presented live at the hearing. Empire, Staff, Public Counsel, and the Midwest Energy Consumers Group (MECG) filed post-hearing briefs. The other parties to the case did not participate in the hearing, and have not filed briefs.²

¹ All dates are 2018, unless otherwise specified.

² The parties to this case that did not participate are: The City of Joplin; Renew Missouri Advocates d/b/a Renew Missouri; and the Missouri Department of Economic Development – Division of Energy.

On June 25, Empire filed a Motion to Dismiss or for Summary Determination in which it argues that by its terms, section 393.137 (SB564) does not apply to Empire and, therefore, the Commission has no authority to proceed in this case. That motion has been thoroughly argued by the parties and is addressed in this Report and Order.

The parties were unable to agree on a list of issues before the hearing, but, after reviewing the testimony and arguments of the parties, the Commission finds that five issues must be resolved, as described below.

I. Does Section 393.137, RSMo (SB564) apply to Empire?

Findings of Fact

1. Empire is a Missouri certificated electrical corporation as defined by Section 386.020(15), RSMo 2016, and is authorized to provide electric service to portions of Missouri.

2. Section 393.137, which was enacted as part of SB564, gives the Commission one-time authority to adjust the rates of electrical corporations “that do not have a general rate proceeding pending before the commission as of the later of February 1, 2018, or June 1, 2018,” the latter of which was the date the Governor signed the bill into law. Public Counsel and MECG contend the statute applies to Empire. Empire and Staff argue it does not. This contention is also the basis for Empire’s Motion to Dismiss or for Summary Determination.

3. The basis for the disagreement is the existence of Commission File No. ER-2018-0228. Empire and Staff assert that file is a general rate proceeding that was pending on June 1, and, therefore, section 393.137, by its terms, does not apply to Empire. Public

Counsel and MECG argue both that ER-2018-0228 is not a general rate proceeding and that it was not pending on June 1. Therefore, they contend, section 393.137 applies to Empire.³

4. The Commission issued an order opening File No. ER-2018-0228 on February 21, 2018, in response to Staff's motion filed on February 16.⁴ Although the Commission's order purported to open the file, the filing of Staff's motion previously caused the file to be shown as open in the Commission's electronic filing and information system (EFIS), an administrative tool used to manage filings in cases before the Commission, beginning on February 16.⁵

5. The Commission's February 21 order directed Empire to "show cause, if any, why the Commission should not order it to promptly file tariffs reducing its rates for every class and category of electric service to reflect the percentage reduction in its federal-state effective income tax rate." The order also directed Empire to quantify and track all impacts of the tax reduction from January 1, 2018, going forward, and to quantify and track its excess protected and unprotected accumulated deferred income tax (ADIT) for possible future flow back to ratepayers.⁶

³ Aside from Empire, Missouri's other electrical corporations are Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company (GMO), and Union Electric Company d/b/a Ameren Missouri. KCP&L (File No. ER-2018-0145) and GMO (File No. ER-2018-0146) have pending general rate cases before the Commission. Ameren Missouri did not have a pending general rate case and its rates have been adjusted pursuant to section 393.137 in File No. ER-2018-0362.

⁴ *Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why Its Rates Should Not Be Adjusted*. File No. ER-2018-0228, February 21, 2018.

⁵ *Motion to Open Rate Case and to Require Company to Show Cause*, File No. ER-2018-0228, February 16, 2018.

⁶ *Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why Its Rates Should Not Be Adjusted*. File No. ER-2018-0228, February 21, 2018.

6. Empire responded to the show cause order on March 19, contending its rates could only be adjusted after due consideration of all relevant factors.⁷

7. On April 24, Staff, Empire, MEEG, Renew Missouri, and Division of Energy filed a non-unanimous stipulation and agreement in ER-2018-0228, in conjunction with File No. ER-2018-0092, a case established to consider Empire's proposed customer savings plan concerning its proposal to undertake additional wind-powered electrical production. As it applied to ER-2018-0228, that stipulation and agreement required Empire to adjust its rates going forward, beginning on October 1, and required it to track its excess ADIT for rate adjustments to be made in a future rate case. It did not require any adjustment of Empire's rates for the period between January 1 and October 1.⁸

8. Public Counsel objected to that stipulation and agreement,⁹ but Staff and Empire continue to adhere to its provisions as the basis for their positions in this case.¹⁰ The same non-unanimous stipulation and agreement was filed in this case and in ER-2018-0228 on July 17,¹¹ and Public Counsel again objected to it.

9. Staff filed a Voluntary Dismissal in ER-2018-0228 on May 17 at 9:06 a.m., following the passage of SB564 on May 16. Staff's dismissal described its concern that ER-2018-0228 might be interpreted as a general rate case that would potentially make the provisions of section 393.137 inapplicable, if it were open when the statute took effect when,

⁷ *Response to Show Cause Motion and Order*, File No. ER-2018-0228, March 19, 2018.

⁸ *Non-Unanimous Stipulation and Agreement*, File No. ER-2018-0228, April 24, 2018.

⁹ *The Office of the Public Counsel's Objection to the Non-Unanimous Stipulation and Agreement filed April 24, 2018*. File No. ER-2018-0228, April 26, 2018.

¹⁰ See. North Direct, Ex. 2, Pages 3-5, and Oligschlaeger Rebuttal, Ex. 3, Page 7, Lines 16-17.

¹¹ The new non-unanimous stipulation and agreement was signed by Empire, Staff, and the City of Joplin.

and if, signed by the Governor. For that reason, Staff purported to voluntarily dismiss that case.¹²

10. The same day it received Staff's Voluntary Dismissal, the Commission issued a Notice Acknowledging Dismissal and Closing File.¹³ That action caused the file to be shown as closed in EFIS.

11. Later on May 17, Staff filed a withdrawal of its voluntary dismissal,¹⁴ which again caused the file to be shown as open in EFIS.

12. The Commission did not acknowledge Staff's withdrawal of its dismissal and has not issued any further orders in ER-2018-0228 since May 17. The Commission did proceed with an oral argument on May 24 in that file, as well as the other files created to address tax cut impacts on the rates of other utilities, to consider the issuance of accounting authority orders to address the effect of federal tax cuts.¹⁵

13. File No. ER-2018-0228 is currently shown as open in EFIS, as it has been since it was reopened by Staff's filing on May 17. In particular, it was shown as open in EFIS on June 1, when Governor Greitens signed SB564.

14. On June 1, another rate case involving Empire was shown as open in EFIS. As Empire noted in its June 25 motion to dismiss, Empire's last general rate case, ER-2016-

¹² *Voluntary Dismissal*, File No. ER-2018-0228, May 17, 2018.

¹³ *Notice Acknowledging Dismissal and Closing File*, File No. ER-2018-0228, May 17, 2018.

¹⁴ *Withdrawal of Voluntary Dismissal*, File No. ER-2018-0228, May 17, 2018.

¹⁵ *Order Scheduling Oral Argument Regarding the Issuance of Accounting Authority Orders to Address the Effect of Federal Tax Cuts*, File No. ER-2018-0228, April 18, 2018. The other cases in which that order was issued are ER-2018-0226, concerning the electric rates of Union Electric Company d/b/a Ameren Missouri; GR-2018-0227, concerning the natural gas rates of Union Electric Company d/b/a Ameren Missouri; GR-2018-0229, concerning the natural gas rates of Empire; GR-2018-0230, concerning the natural gas rates of Summit Natural Gas of Missouri, Inc.; HR-2018-0231, concerning the steam rates of KCP&L Greater Missouri Operations Company; and HR-2018-0232, concerning the steam rates of Veolia Energy Kansas City, Inc.

0023, was also shown as an open case by EFIS on June 1.¹⁶ That general rate case had been resolved on August 8, 2016 when the Commission approved a stipulation and agreement, for which compliance tariffs were approved on September 6, 2016. Additional tariffs were approved by the Commission in that file on May 31, 2017, and the file was closed on June 2, 2017.¹⁷ It again opened in EFIS on May 31, 2018, when Empire filed notice that it had completed a study ordered in that case.¹⁸ That file was shown as open in EFIS until again closed by Commission order on June 14.¹⁹

15. The Commission's Staff has not invested significant effort to begin consideration of all relevant ratemaking factors in File No. ER-2018-0228. Mark Oligschlaeger, manager of the Commission's audit staff,²⁰ testified that he was assigned to investigate the income tax impact on Empire's revenue of the federal tax cuts.²¹ No one else was formally assigned to work on that case.²² Staff did not issue the standard data requests that it customarily issues at the start of a general rate proceeding because it was focusing on the tax cut impacts.²³ To date, Staff has not performed an all-relevant-factors review of Empire's rates.²⁴

¹⁶ *Empire's Motion to Dismiss or for Summary Determination with Suggestions in Support*, File No. ER-2018-0366, Footnote 6.

¹⁷ *Order Approving Demand-Side Management Tariff and Granting Motion for Expedited Treatment*, File No. ER-2016-0023, May 31, 2017.

¹⁸ *Notice of Completion of PAYS Study*, File No. ER-2016-0023, May 31, 2018.

¹⁹ *Order Closing Case*, File No. ER-2016-0023, June 14, 2018. The file actually opened again in EFIS on June 28, 2018, when Public Counsel filed a response to Empire's notice of completion of the study. The Commission closed the file once again later that day.

²⁰ Oligschlaeger Rebuttal, Ex. 3, Page 2, Lines 7-9.

²¹ Transcript, Page 236, Lines 1-7.

²² Transcript, Page 236, Lines 8-13.

²³ Transcript, Page 236, Lines 14-24.

²⁴ Transcript, Page 237, Lines 20-23.

Conclusions of Law

A. Subsection 386.020(15), RSMo 2016, defines “electrical corporation” as including:

every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, ... owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others;

Empire is an “electrical corporation” as defined by the statute.

B. Section 393.137 of the Missouri statutes, which became effective with an emergency clause when signed by the Governor on June 1, states that it “applies to electrical corporations that do not have a general rate proceeding pending before the commission as of the later of February 1, 2018, or June 1, 2018.”²⁵

C. Section 393.137 does not define the term “general rate proceeding,” or its synonym “general rate case.” However, as used at this Commission, a “general rate proceeding” or a “general rate case” means a proceeding in which the Commission considers all relevant factors when setting a utility’s rates. That is the way the Commission has defined “general rate proceeding” within its regulations, as in its Electric Utility Fuel and Purchased Power Cost Recovery Mechanisms rule, 4 CSR 240-20.090, where “general rate proceeding” is defined as “a general rate increase proceeding or complaint proceeding before the commission in which all relevant factors that may affect the costs, or rates and charges of the electric utility are considered by the commission.”²⁶

²⁵ Section 393.137.1.

²⁶ Commission Rule 4 CSR 240-20.090(1)(D).

D. A “general rate proceeding,” or “general rate case” in which all relevant factors are considered is different than a rate case that does not consider all relevant factors. The latter would constitute single-issue ratemaking, which is forbidden, except as allowed by statute.²⁷

E. In Missouri, single-issue rate making has been authorized by statute in certain circumstances. For example, section 386.266.1²⁸ gives the Commission authority to approve periodic rate adjustment of fuel and purchased power costs outside a general rate proceeding through what is generally known as a Fuel Adjustment Clause or an FAC. The authority granted in section 393.137 to adjust rates in response to the federal tax reduction is another example of statutorily authorized single-issue ratemaking.

Decision

While Empire claims File No. ER-2018-0228 shields it from application of section 393.137, that case is not a “general rate proceeding” within the meaning of section 393.137 because it was not intended to adjust Empire’s rates after considering all relevant factors. Rather, that case was created for the narrow purpose of attempting to determine how the Commission might best deal with the impact of the federal tax cut on Missouri’s regulated utilities. It required Empire to track the impact of that tax cut and directed the company to consider whether the effect of that tax cut could be used to adjust its rates without considering all relevant factors in an extended general rate case. Empire responded to that order by asserting its rates could not be modified without considering all relevant factors. Thereafter, aside from inviting arguments about whether an accounting authority order could

²⁷ See, *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Com’n*, 585 S.W.2d 41, (Mo banc 1979). See also, *State ex rel. Public Counsel v. Public Serv. Com’n*, 397 S.W.3d 441, 448, (Mo. App. W.D. 2013).

²⁸ RSMo (2016).

be issued, the Commission took no further steps to adjust Empire's rates through File No. ER-2018-0228.

Even if File No. ER-2018-0228 was a "general rate proceeding" within the meaning of section 393.137, it was not pending before the Commission on June 1, 2018. The Commission initially opened that file for its own purposes and issued a notice closing that file on May 17, 2018. No party had a legally or constitutionally protected interest in the continued existence of that file such that they would have a right to appeal the Commission's decision to close it. Therefore, the Commission was under no obligation to give its notice closing the file a ten-day effective date. The fact that various parties made filings in the case after it was closed, causing EFIS to automatically change the status of the case to "open," does not mean it was once again pending before the Commission.

EFIS is merely an administrative tool. It cannot override an order of the Commission. The problem with according EFIS definitive authority to determine whether a given file is pending before the Commission is amply illustrated by EFIS' treatment of Empire's last general rate case, File No. ER-2016-0023. Undeniably, EFIS showed that file, which was a general rate proceeding, to be open on June 1, 2018. Emphatically, that does not mean that ER-2016-0023 was a pending general rate proceeding within the meaning of section 393.137 so as to remove Empire from the application of that statute. To suggest otherwise would be to hand Empire the means of avoiding the application of the statute by the simple expedience of filing a pleading in an old rate case just before the Governor signed the legislation, not allowing the Commission enough time to reclose the file in EFIS before the law took effect.

After considering the facts and the applicable law, the Commission finds that Empire did not have a "general rate proceeding" within the meaning of section 393.137 pending before the Commission on June 1, 2018. For that reason, section 393.137 does apply to

Empire. Consequently, Empire's Motion to Dismiss or for Summary Determination will be denied and the Commission will consider adjustments to Empire's rates in this case.

II. How Should Empire's Rates be Adjusted Prospectively?

Findings of Fact

16. The reduction in the federal income tax rate from 35 percent to 21 percent has the effect of reducing the amount of Empire's going-forward revenue requirement. Empire calculated the appropriate amount for the reduction of its annual base rate revenue requirement at \$17,837,022.²⁹ Staff accepted that calculation as reasonable and acceptable for ratemaking purposes.³⁰ The Commission finds Empire's calculation to be credible and reasonable.

17. Public Counsel calculated the appropriate reduction in Empire's annual base rate revenue requirement at the slightly lower amount of \$17,469,270.³¹

18. The difference between the calculations resulted because Public Counsel's witness used a slightly different composite tax rate than that used by Empire's witness. Empire's witness, Charlotte North, agreed the difference was not material.³²

19. Empire and Staff agree the revised rates reflecting the reduction in Empire's annual base rate revenue requirement should go into effect on October 1, 2018. That date is contained within their non-unanimous stipulation and agreement to which Public Counsel objected.³³ Aside from the fact that they agree that such date is reasonable, Empire and Staff do not offer any basis for the use of that date. Public Counsel and MECG argue the

²⁹ North Direct, Ex. 2, Page 4, Lines 3-12, and Schedule 1.

³⁰ Oligschlaeger Rebuttal, Ex. 3, Lines 7-17.

³¹ Riley Corrected Direct, Ex. 5, Page 2, Lines 13-15.

³² Transcript, Page 158, Lines 5-8.

³³ North Direct, Ex. 2, Pages 3-4, Lines 17-23, 1-2, Oligschlaeger Rebuttal, Ex. 3, Pages 3-4, Lines 16-23, 1-15.

revised rates should go into effect on August 30, 2018, which is the date contemplated in section 393.137.3, RSMo.

Conclusions of Law

F. Section 393.137.3 provides in part:

If the rates of any electrical corporation to which this section applies have not already been adjusted to reflect the effects of the federal 2017 Tax Cut and Jobs Act, Pub. L. No. 115-97, 94 Stat. 2390, the commission shall have one time authority that shall be exercised within ninety days of June 1, 2018, to adjust such an electrical corporation's rates prospectively so that the income tax component of the revenue requirement used to set such an electrical corporation's rates is based upon the provisions of such federal act without considering any other factor as otherwise required by section 393.270. ...

This statute gives the Commission authority to adjust Empire's rates on a going-forward basis.

G. Commission Rule 4 CSR 240-2.115(2)(D) states:

A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.

Thus, although Staff and Empire may continue to support the positions they agreed to in their objected-to stipulation and agreement, the existence of that agreement is not binding on the Commission and provides no additional support for the adoption of that position.

Decision

Empire's rates should be adjusted prospectively to reflect a reduction in its annual base rate revenue requirement of \$17,837,022. That reduction shall take effect on August 30, 2018, as allowed by the authority granted to the Commission in section 393.137.3.

III. How Should the Flow-Back of Excess ADIT be Handled?

Findings of Fact

20. Excess Accumulated Deferred Income Tax (ADIT) occurs when there has been a change in tax rates between when the original ADIT was determined and when the ADIT will subsequently become payable taxes.³⁴ The enactment of the federal tax cut act on December 22, 2017 resulted in the creation of excess ADIT on Empire's accounts.³⁵ All parties agree excess ADIT must be returned to ratepayers in some manner.

21. Excess ADIT must be divided into two categories; protected and unprotected. The return of protected excess ADIT to ratepayers is subject to Internal Revenue Service (IRS) normalization rules. The Commission has discretion to control the return of unprotected excess ADIT to ratepayers.³⁶

22. Empire's calculation of the amount of protected excess ADIT must be determined using the Average Rate Assumption Method (ARAM) if the taxpayer possesses the book and tax vintages of assets placed in service,³⁷ which Empire does.

23. The objective of ARAM is to match depreciation deductions for booked and tax purposes on each individual asset over the course of history. That determines when the excess deferred income taxes associated with that asset are released for refund to customers.³⁸

24. The complex computations required to calculate the amounts of protected and unprotected excess ADIT involve matching book and tax assets, stripping out the differences in depreciation that are not related to methods and lives and then projecting those balances

³⁴ Transcript, Page 186, Lines 17-21.

³⁵ Transcript, Page 187, Lines 3-4.

³⁶ Transcript, Page 122, Lines 7-14.

³⁷ Transcript, Page 184, Lines 20-22, see *also*, Ex. 10.

³⁸ Transcript, Pages 184-185, Lines 22-25, 1-3.

forward to see when in future years the book depreciation begins to exceed the tax depreciation. Excess ADIT must be returned over the remaining book life of the assets and, since utility asset lives may exceed 40 or 50 years, those calculations may stretch out for many years. Empire currently does not have the technological means to make those calculations.³⁹

25. Improperly calculating the return of protected excess ADIT could result in a mismatch that could result in a normalization violation under IRS regulations.⁴⁰ The penalty for a normalization violation would eliminate Empire's ability to use accelerated depreciation in the future, and would require the company to pay a penalty tax.⁴¹

26. Empire is currently implementing the Deferred Income Tax module of the Power/Plan property management software suite. That software will allow the company to confirm that it is subject to ARAM, determine the amount of the protected ADIT balance, and determine a projected amortization schedule of that balance.⁴²

27. Empire's failure to have the Deferred Income Tax module in place before the passage of the federal tax reduction is reasonable in that excess ADIT, and the need to separate protected from unprotected ADIT, will generally only result from the passage of a federal tax reduction, and such events are rare.⁴³

³⁹ Transcript, Pages 188-189, Lines 24-25, 1-18.

⁴⁰ Transcript, Page 193, Lines 8-13.

⁴¹ Transcript, Page 193, Lines 2-13. In its brief, Public Counsel asked the Commission to take administrative notice of several IRS documents that it attached to its brief for the purpose of arguing that Empire's risk of incurring a normalization penalty is low. Those documents are not in evidence, nor are they something about which the Commission can take administrative notice.

⁴² Ex. 10.

⁴³ Transcript, Pages 193-194, Lines 21-25, 1-11.

28. Empire expects to have calculated final total excess ADIT figures and separated protected and unprotected excess ADIT numbers by September 15, 2018.⁴⁴

29. Public Counsel's witness, John Riley, sent a data request to Empire asking the company to estimate its total excess ADIT figures and to further break that amount into protected and unprotected categories.⁴⁵ He then adjusted the figures provided by Empire to make a determination of protected and unprotected ADIT,⁴⁶ upon which Public Counsel bases its proposal to immediately adjust Empire's rates going forward to start flowing excess ADIT back to customers.

30. The excess ADIT amounts proposed by Mr. Riley are unreliable because they are based on mere estimates prepared by Empire at Public Counsel's request. In addition, some of the adjustments made by Mr. Riley are themselves unreasonable. In particular, his estimate of excess ADIT includes both the Missouri wholesale allocations, which are subject to FERC jurisdiction, and retail allocations, thereby overstating the balances that are subject to the jurisdiction of the Commission.⁴⁷ When asked about this on cross-examination, Riley agreed that if the wholesale numbers are FERC jurisdictional, his calculations should be adjusted.⁴⁸

31. Empire's witness, Stephen Williams, described additional errors in Mr. Riley's calculations during his testimony at the hearing that further call into question the reliability of those calculations.⁴⁹

⁴⁴ Transcript, Page 191, Lines 8-11.

⁴⁵ Ex. 6.

⁴⁶ Transcript, Page 295, Lines 5-17.

⁴⁷ Transcript, Page 195, Lines 12-17.

⁴⁸ Transcript, Page 310, Lines 10-18.

⁴⁹ Transcript, Pages 195-198.

32. Rather than make an immediate adjustment to Empire's rates to begin flowing excess ADIT back to customers, Empire and Staff propose⁵⁰ that Empire record a regulatory liability for the difference between the excess ADIT balances included in current rates, which is calculated using the 35 percent federal corporate income tax rate, versus the now lower federal corporate income tax rate of 21 percent. The calculation of the regulatory liability of excess ADIT is to begin as of January 1, 2018.⁵¹

33. ADIT is booked as a reduction to Empire's rate base, meaning the company earns a return on a lower amount of rate base as ADIT increases. In effect, ratepayers are earning a return on the amount booked as ADIT. Thus, the delay in returning excess ADIT to ratepayers does not require inclusion of carrying costs to make ratepayers whole.⁵²

34. Witnesses for Empire, Staff, and Public Counsel all agree the passage of the federal tax cut act meets the Commission's standards for issuance of an accounting authority order in that it is unusual, unique, non-recurring and material.⁵³

Conclusions of Law

H. As previously noted, Section 393.137.3 provides in part:

If the rates of any electrical corporation to which this section applies have not already been adjusted to reflect the effects of the federal 2017 Tax Cut and Jobs Act, Pub. L. No. 115-97, 94 Stat. 2390, the commission shall have one time authority that shall be exercised within ninety days of June 1, 2018, to adjust such an electrical corporation's rates prospectively so that the income tax component of the revenue requirement used to set such an electrical corporation's rates is based upon the provisions of such federal act without considering any other factor as otherwise required by section 393.270. ...

⁵⁰ MECG accepted this recommendation in its brief.

⁵¹ *Non-Unanimous Stipulation and Agreement*, File Nos. ER-2018-0228 and ER-2018-0366, July 17, 2018.

⁵² Transcript, Pages 255-256, Lines 4-25, 1-15.

⁵³ Transcript, Page 249, Lines 7-17, Pages 172-173, and Page 316, Lines 4-21.

In the context of this issue, this provision gives the Commission authority to adjust Empire's rates for the effect of excess ADIT. The statute gives the Commission authority to make that adjustment in this case.

I. Section 393.137.4 further provides:

Upon good cause shown by the electrical corporation, the commission may, as an alternative to requiring a one-time rate change and deferral under subsection 3 of this section, allow a deferral, in whole or in part, of such federal act's financial impacts to a regulatory asset starting January 1, 2018, through the effective date of new rates in such electrical corporation's next general rate proceeding. The deferred amounts shall be included in the revenue requirement used to set the electrical corporation's rates in its subsequent general rate proceeding through an amortization over a period determined by the commission.

In the context of this issue, this provision gives the Commission authority to direct Empire to defer the effect of the tax reduction on the company's excess ADIT for consideration in its next general rate proceeding.

J. Aside from the specific authority granted by section 393.137.4, Missouri's courts have recognized the Commission's authority to defer certain costs and revenues for consideration in a future rate case through the use of an accounting authority order (AAO), if such costs (or revenues) are "unusual and nonrecurring, and therefore extraordinary."⁵⁴

Decision

The testimony established that Empire cannot immediately and reliably determine the amount of protected and unprotected excess ADIT that must be flowed back to its ratepayers. The Commission finds it is highly unlikely that the calculations of protected and unprotected excess ADIT, upon which Public Counsel relies for its proposed adjustments to Empire's rates, are accurate.

⁵⁴ *State ex rel. Office of Public Counsel v. Public Serv. Com'n*, 858 S.W. 2d 806, 811, (Mo App. W.D. 1993).

The inability to immediately and reliably determine protected and unprotected excess ADIT, resulting from Empire's lack of appropriate software, is good cause for the Commission to utilize the provision in section 393.137.4 to direct Empire to defer the effect of the tax reduction on the company's excess ADIT for consideration in its next general rate proceeding. Doing so will not harm ratepayers, and will protect the interests of both Empire and its ratepayers in avoiding possible IRS penalties for a normalization penalty.

Even if it is found that section 393.137.4 does not apply to Empire, it would still be appropriate for the Commission to exercise its authority to order Empire to establish an accounting authority order to account for its excess ADIT.

IV. What Should be Done Regarding Empire's Earnings Between January 1 and August 30, 2018?

Findings of Fact

35. The lower federal tax rate took effect on January 1, and new rates resulting from this order will take effect on August 30. That leads to the question of what should be done for the period between January 1 and August 30. Staff and Empire contend the Commission should take no action to recover any excess earnings Empire may have gained during that period. Public Counsel and MECG contend section 393.137 requires those excess earnings be deferred for recovery by ratepayers in a future general rate proceeding.

36 Public Counsel's witness calculated the amount of excess earnings during the period between January 1 through August 30, as \$11,582,365, which he calculated as $\frac{242}{365}$ multiplied by Public Counsel's calculated reduction of Empire's annual base rate revenue requirement of \$17,469,270. Neither Empire, nor Staff disagreed with that calculation.⁵⁵

⁵⁵ Transcript, Page 134, Lines 15-20.

37. August 30 is the 241st day of the year. If it is assumed that Empire's new rates will go into effect on August 30, the correct numerator in the calculation is 240. Using the reduction of Empire's annual base rate revenue requirement of \$17,837,022 as calculated by Empire and adopted in this order, the result of the calculation $240/365 \times \$17,837,022$ is \$11,728,453.

38. Witnesses for Empire, Staff, and Public Counsel all agreed the passage of the federal tax cut act meets the Commission's standards for issuance of an accounting authority order in that it is unusual, unique, non-recurring and material.⁵⁶

Conclusions of Law

K. The relevant portion of Section 393.137.3 requires the Commission to require:

electrical corporations to which this section applies, ... to defer to a regulatory asset the financial impact of such federal act on the electrical corporation for the period of January 1, 2018, through the date the electrical corporation's rates are adjusted on a one-time basis as provided for in the immediately preceding sentence. The amounts deferred under this subsection shall be included in the revenue requirement used to set the electrical corporation's rates in its subsequent general rate proceeding through an amortization over a period determined by the commission.

In the context of this issue, this portion of the statute requires the Commission to require Empire to defer the amount of excess earnings it earned due to the impact of the federal tax cut during the period between January 1 and August 30.

L. Aside from the specific authority granted by section 393.137.3, Missouri's courts have recognized the Commission's authority to defer certain costs and revenues for consideration in a future rate case through the use of an accounting authority order, an AAO, if such costs (or revenues) are "unusual and nonrecurring, and therefore extraordinary."⁵⁷

⁵⁶ Transcript, Page 249, Lines 7-17, Pages 172-173, and Page 316, Lines 4-21.

⁵⁷ *State ex rel. Office of Public Counsel v. Public Serv. Com'n*, 858 S.W. 2d 806, 811, (Mo App. 1993).

M. Staff expresses concern that an attempt by the Commission to require Empire to return excess earnings resulting from the tax rate reductions to its ratepayers would constitute retroactive ratemaking, which is barred by the constitutions of the United States and of Missouri.⁵⁸ However, the issuance of an AAO is not the same as a ratemaking decision. Rather, the purpose of an AAO is to defer a final decision on current extraordinary costs until a rate case is in order.⁵⁹ By issuing an AAO in this case, the Commission is not making any ratemaking decision about whether Empire's excess earnings resulting from the tax rate reductions can, or should, be returned to the company's ratepayers. That decision will be made in Empire's next general rate proceeding, and a decision about the constitutionality of any ordered rate reduction also will be made at that time.

Decision

Having found that section 393.137.3 applies to Empire, the Commission must comply with that statute by ordering Empire to establish a regulatory liability to account for its excess earnings during the period of January 1 through August 30, 2018. Even if section 393.137.3 does not apply to Empire, it would still be appropriate for the Commission to exercise its authority to order Empire to establish an AAO for that period.

V. How Should Revised Rates be Implemented?

Findings of Fact

39. Staff witness Sarah Lange proposed specific percentage adjustments to the rates for each of Empire's customer classes to allocate the going-forward rate reduction.

⁵⁸ *State ex rel. Utility Consumers Council of Missouri v. Public. Serv. Com'n*, 585 S.W.2d 41, 58, (Mo. banc 1979).

⁵⁹ *Missouri Gas Energy v. Public Serv. Com'n*, 978 S.W.2d 434, 438 (Mo. App. 1998).

Those percentages were set forth in an appendix to the objected-to non-unanimous stipulation and agreement.⁶⁰

40. Lange further proposed the rate reduction be allocated in the same manner as was employed in the stipulation and agreement that resolved a similar proceeding regarding the rates of Union Electric Company d/b/a Ameren Missouri.⁶¹ That proposal provided that the revenue requirement reduction applicable to each rate class as a result of the proposed percentage adjustments should be divided by the total kilowatt-hour billing units stated for that class. The result of this calculation will be a cents-per-kilowatt-hour rate for each service classification that will be applied to all billed usage of customers taking service under those classifications (stated as a separate line item on the customer's bills) to yield separate line item bill credits. The tariff sheets for each of the above service classifications shall be updated to include reference to the cents-per-kilowatt-hour rates and resulting credits derived in the prior step. No other charges or other terms or conditions of service that are currently stated on those sheets should be modified.⁶² The Commission finds Lange's proposal to be reasonable.

41. Public Counsel's witness, John Riley, recommends the rate reduction be made effective entirely by reducing Empire's customer charge for each rate class because doing so would best ensure that ratepayers will realize the benefits of the tax cut. Customer charges are finite and predictable, unlike volumetric rates that may vary based on consumption.⁶³

⁶⁰ Non-Unanimous Stipulation and Agreement, Appendix B, File No. ER-2018-0366, July 17, 2018.

⁶¹ Commission File No. ER-2018-0362.

⁶² Lange Rebuttal, Ex. 4, Pages 2-3, Lines 12-29, 1-10.

⁶³ Riley Corrected Direct, Ex. 5, Page 8, Lines 10-22.

Riley did not calculate the actual reduction in the various customer charges that would result from his proposal.⁶⁴

42. Public Counsel's proposed reduction in the customer charge for all rate classes would not be reasonable for all customer classes, in that customer classes other than the residential class are billed in a more complicated manner, including demand charges and other facilities charges. As a result, it would not be appropriate to simply adjust the customer charge for those classes.⁶⁵ Further, reducing the customer charge by too great an extent could cut into the company's actual cost of providing service to its customers and create a misimpression that there is no cost to having a customer on the system in and of itself.⁶⁶

Conclusions of Law

There are no additional conclusions of law for this issue.

Decision

The Commission finds that Staff's proposed allocation of the going-forward rate reduction as set forth in Appendix B to the non-unanimous stipulation and agreement filed on July 17, 2018, is appropriate.

THE COMMISSION ORDERS THAT:

1. The Empire District Electric Company's Motion to Dismiss or for Summary Determination is denied.

2. The Empire District Electric Company shall adjust its rates prospectively, effective August 30, 2018, to reflect a reduction in its annual base rate revenue requirement of \$17,837,022.

⁶⁴ Transcript, Page 320, Lines 18-20.

⁶⁵ Transcript, Page 276, Lines 4-13.

⁶⁶ Transcript, Page 275, Lines 8-25.

3. The Empire District Electric Company shall record a regulatory liability for the difference between the excess ADIT balances included in current rates, which is calculated using the 35 percent federal corporate income tax rate, versus the now lower federal corporate income tax rate of 21 percent. The calculation of the regulatory liability of excess ADIT shall begin as of January 1, 2018. Recovery of the amounts deferred through the regulatory liability shall be determined in Empire's next general rate proceeding.

4. The Empire District Electric Company shall record a regulatory liability for the financial impact of the Tax Cut and Jobs Act of 2017 on the electrical corporation for the period of January 1, 2018, through August 30, 2018. Recovery of the amounts deferred through the regulatory liability shall be determined in Empire's next general rate proceeding.

5. The Empire District Electric Company shall file a tariff, to be effective August 30, 2018, to implement the provisions of this order.

6. This report and order shall become effective on August 25, 2018.

BY THE COMMISSION



A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Hall, Chm., Kenney, Rupp, Coleman, and
Silvey, CC., concur;
and certify compliance with the
provisions of Section 536.080, RSMo 2016

Dated at Jefferson City, Missouri,
on this 15th day of August, 2018.

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 15th day of August 2018.




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

August 15, 2018

File/Case No. ER-2018-0366

**Missouri Public Service
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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.