

**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)	Case No. ER-2018-0366
Electric Rates of The Empire District)	
Electric Company)	

**THE OFFICE OF THE PUBLIC COUNSEL’S
RESPONSE TO EMPIRE’S REPLY SUGGESTIONS**

COMES NOW the Office of the Public Counsel and, within the ten days allotted by rule 4 CSR 240-2.080(16), hereby responds to The Empire District Electric Company’s (“Empire”) *Reply Suggestions in Support of Empire's Motion to Dismiss or for Summary Determination*, filed on July 12, and respectfully states the following:

The Grounds for Good Cause to Dismiss the Proceeding Are Insufficient

Empire argues good cause under Commission Rule 2.116(4) to dismiss this case file. In considering “good cause” for subsection 4 dismissal, the Commission cites that “[g]ood cause means a good faith request for reasonable relief.”¹ “Dismissal for failure to cite law or fact in support of requested relief is within that standard.”² The Commission has also identified such motions are within the discretion of the Commission to grant. 4 CSR 240-2.116(4) (“A case may be dismissed for good cause...”) The Commission has noted that “may” “means an option, not a

¹ *Roman Dzhurinskiy and Zinaida Dzurinskaya v. Union Electric Company d/b/a Ameren Missouri*, ORDER INCORPORATING STIPULATION AND AGREEMENT, DISMISSING COMPLAINT, AND CANCELING HEARING, EC-2016-0001, pg. 2 (Jan. 16, 2016). Citing *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207 (Mo. App. W.D. 1996).

² *In the Matter of the Application of Old National Bank for Authority to Seize the Assets of Tri-States Utility, Inc.*, ORDER DISMISSING APPLICATION AND INITIATING INVESTIGATION, WM-2012-0314 (Nov. 17, 2012).

mandate, and thus signifies Commission discretion. Discretion's bounds are careful consideration, the logic of the circumstances, and justice.”³

In previous applications of 116(4), the Commission has dismissed proceedings for good cause in the following circumstances: (1) failure to appear at a prehearing conference⁴, (2) failure to appear at a scheduled hearing⁵, (3) failure to file a complaint pleading or file an amended complaint or application⁶, (4) failure to state a claim where relief can be granted⁷, (5) failure to comply with a Commission order⁸, (6) failure to exercise a conditional certificate within a year⁹, (7) where the withdrawal of an intervener that was the only adversarial party to the proceeding should render the case non-contested¹⁰, (8) where a corporate ratepayer was not represented by legal counsel and incapable to prosecuting a complaint¹¹, (9) where relief requested has been adjudicated in a separate proceeding¹², (10) where the requested relief was provided without a Commission order¹³, (11) where a case file was inadvertently promulgated¹⁴, (12) where the utility in question is no longer within the jurisdiction of the Commission¹⁵, (13) the adverse health of the complainant¹⁶, (14) where the resolution of the proceeding is to the satisfaction of

³ *Nexus Communications, Inc., v. Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri*, ORDER TO SHOW CAUSE, TC-2011-0132 (Jan. 5, 2011).

⁴ GC-2007-0267

⁵ EC-2007-0146, EC-2013-0521, EC-2012-0050

⁶ TC-2001-379, TK-2003-0196, WA-2008-0400

⁷ XM-2009-0121, XM-2011-0027, WM-2012-0314, WC-2007-0015

⁸ EO-2008-0031, EC-2010-0285, GC-2009-0163, EC-2011-0247, EC-2009-0112, GC-2009-0132, EC-2009-0112, GC-2009-0132

⁹ TA-2000-359

¹⁰ SA-2010-0063

¹¹ WC-2014-0358

¹² SC-2005-0083, WC-2006-0079, WC-99-34. While Empire argues that another proceeding, ER-2018-0228, dealt with the same issue, this argument does not substantiate cause for dismissal as (1) there was no resolution ordered in the case file and (2) that proceeding was not promulgated under the Commission's express authority to address the 2017 Tax Cut and Jobs Act under Section 393.137, RSMo.

¹³ EO-2013-0413

¹⁴ XN-2012-0400

¹⁵ TC-2002-331, TC-2002-336, WC-2001-417, TM-2008-0023, TO-2009-0111

¹⁶ GC-2011-0232

the complainant¹⁷, and (15) where motions to dismiss are unsupported by evidence and argument¹⁸.

In review of previous applications, in this proceeding (1) no party has been alleged to have failed to participate in pre-hearing conferences, (2) no hearing has occurred yet, so consideration on dismissal for failure to appear at a hearing is not yet ripe to allege, (3) it has not been alleged that any party has missed a filing requirement, (4) it has not been alleged that there is a failure to state a claim upon which relief may be granted, (5) it has not been alleged that any party has failed to comply with a Commission order, (6) no certificate is at controversy in this proceeding, (7) OPC has objected to the Non-Unanimous Stipulation and Agreement filed in this proceeding, so the case remains contested, (8) parties are duly represented by counsel, (9) the controversy has not been resolved by a final order in a separate proceeding, (10) the relief sought has not been voluntarily provided without a Commission order, (11) this case file was not inadvertently promulgated, (12) Empire is still within the Commission's jurisdiction, (13) no party has alleged health concerns that would prohibit the resolution of this proceeding, (14) a unanimous resolution has not been reached by the parties to the proceeding, and (15) the Commission will commence a hearing to receive evidence on this controversy.

In applying the Commission's standards for reviewing such motions, Empire has failed to allege sufficient factual circumstances that would permit dismissal of this contested case. Accordingly, the Commission should deny Empire's motion failure to submit facts or citations sufficient to support its claim. Even if the Commission finds cause for Empire's claim, the Commission should exercise its discretion and permit the proceedings to continue to ensure the

¹⁷ EC-2016-0001, EC-2001-443, TC-2002-333, TC-2002-338, TC-2002-324, TC-2002-325, TC-2002-330, TC-2002-319, TC-2002-327, TC-2007-0413, MC-2016-0021, GC-2008-0045

¹⁸ WC-2009-0277

Legislature’s intent in providing rate relief to ratepayers as a result of the 2017 Tax Cut and Jobs Act as soon as lawfully permissible.

ER-2018-0228 is not a General Rate Proceeding

ER-2018-0228 is not a “general rate proceeding” because it was not promulgated to consider all relevant factors to set utility rates. Section 393.150, RSMo., identifies three general mechanisms to initiate a general rate proceeding; (1) by the utility filing a new tariff schedule,¹⁹ (2) upon complaint of a party,²⁰ or (3) “upon [the Commission’s] initiative without complaint”.

The Commission did not initiate a general rate proceeding when it solicited information and comment regarding the prospective treatment of corporate tax rate reductions and other related matters. In its initiating motion, in explaining the Commission’s authority, Staff Counsel argues that single-issue ratemaking may be appropriate under certain circumstances “without the necessity of considering all relevant factors in an extended general rate case.” The extent of the evaluation in ER-2018-0228 has solely focused on the impact of a single factor, the impact of the federal tax reduction, and is clearly distinguishable from the all relevant factors consideration of a general rate case. State ex rel. Utility Consumers Council, Inc. v. Public Service Com., 585 S.W.2d 41, 56 (Mo. 1979) (“Although the quoted section of the statute refers to “complaints”, the requirement that all relevant factors be considered is of course applicable under the file and suspend method also.”) Kan. City Power & Light Co.'s Request v. Mo. Pub. Serv. Comm’n, 509 S.W.3d 757, 782 (Mo. App. W.D. 2016) (“When a proposed rate schedule is suspended pursuant

¹⁹ 4 CSR 240-2.065 articulates the standard for rate cases initiated by tariff schedules. (“When a public utility submits a tariff which constitutes a general rate increase request...). Notably, no such circumstance occurred in ER-2018-0228. Empire did not initiate the proceeding through filing tariff schedules.

²⁰ 4 CSR 240-2.070 details the standards for filing initiating a rate case through filing a complaint. Valid complaints must identify some utility act done in “violation of any provision of law or of any rule or order or decision of the commission.” 4 CSR 240-2.070 (4). ER-2018-0228 was not initiated by complaint, because none identified a violation of law, rule, order or Commission decision.

to section 393.150.1, the PSC must provide notice to the affected parties, hold a full hearing, and consider all relevant factors before approving any new rate.”) State ex rel. Office of Pub. Counsel v. Mo. PSC, 331 S.W.3d 677, 690, 2011 (Mo. App. W.D. 2011) (“The General Assembly understood that the role of full rate case proceedings is to set base rates upon a consideration of all relevant factors.”) State ex rel. AG Processing, Inc. v. Pub. Serv. Comm’n, 311 S.W.3d 361, 366, (Mo. App. W.D. 2010) (the court quoted the Commission’s order that an interim adjustment mechanism must be established in a general rate proceeding “...considering all relevant factors[.]”) ER-2018-0228 was not initiated to consider “all relevant factors,” as acutely noted by the Commission’s order exploring its authority to change rates “without considering all relevant factors in an extended general rate case.”²¹ Pg 2 Para 4. Because the case file was never intended to consider all relevant factors, ER-2018-0228 should not be determined to be a general rate proceeding.

OPC’s recommendation comports with other statutory uses and the Commission’s rules of the operative term. Section 386.266, RSMo., states “The commission shall...after providing the opportunity for a full hearing in a general rate proceeding, including a general rate proceeding initiated by complaint. The commission may approve such rate schedules after considering all relevant factors...” Commission Rule 4 CSR 240-20.090 defines that “General rate proceeding” “means 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.”

²¹ *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company, ORDER OPENING RATE CASE, DIRECTING NOTICE, ESTABLISHING TIME TO INTERVENE, AND REQUIRING COMPANY TO SHOW CAUSE WHY ITS RATES SHOULD NOT BE ADJUSTED, ER-2018-0228* (Feb. 21, 2018).

OPC argues that there does not exist any ambiguity about the term “general rate proceeding”, and Empire’s averments to the contrary are unsubstantiated. ER-2018-0228 is not a “general rate proceeding” because it was not opened to consider all relevant factors to set utility rates.

The Commission’s Authority to Investigate Utilities is Broader than § 393.150, RSMo.

Empire asserts that Staff Counsel’s argument implies that the Commission’s authority to investigate utilities is limited to “[w]ithin a rate case[.]”²² However, the Commission’s investigatory authority extends well beyond Empire’s insinuation.

First, Empire is mistaken in its characterization of the record. Empire’s arguments rely heavily on Staff Counsel’s filing to support Empire’s interpretation of the Commission’s authority. The Commission’s order directing Empire to respond to the impact of the tax issues does not assert its authority under Section 393.150, RSMo. Staff’s motion to initiate the proceeding is not an exercise of the Commission’s authority, and is not determinative to the manner in which the Commission conducts itself.

Second, the Commission’s authority to investigate regulated utilities is not limited to general rate case proceedings. Section 393.140.5, RSMo., permits the Commission to “[e]xamine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business.” A case file examining methodologies to address the corporate tax rate reduction falls squarely within the Commission’s statutory authority, without the necessity of a rate case. As occurred in this case, the Commission exercised its authority to solicit information from

²² Staff Counsel quoting *State ex rel. Utility Consumers’ Counsel of Missouri, Inc. v. PSC*, 585 S.W.2d 41, 48 (Mo. banc 1979).

regulated utilities. To accept Empire's argument that the Commission may only conduct such inquiries within the confines of a rate case ignores the Commission's clear statutory authority under Section 393.140, RSMo.

ER-2018-0228 Was Dismissed Prior to the Effective Date of SB 564

The operative provisions of Section 393.137, RSMo., pertaining to the 2017 Tax Cut and Jobs Act do not apply to electric utilities with general rate proceedings pending before the Commission at the effective date of the statute. SB 564 included an emergency clause that only pertained to Section 393.137, wherein the Legislature authorized that the tax provision of the bill would take effect upon signature of the Governor. The bill was signed on June 1, 2018. Empire argues that ER-2018-0228 was an active general rate proceeding as of June 1, 2018. On May 17, 2018, upon motion by Staff, and properly citing its authority under 4 CSR 240-2.116(1), the Commission issued its *Notice Acknowledging Dismissal and Closing File*, by order in writing. *See Attachment A*. Empire has countered that there is no rational basis for Public Counsel's position, and that the parties continued filings in EFIS are relevant to this issue.

Section 386.280, RSMo., states that every order for the Commission "shall be in writing and entered on the records of the commission[.]" On May 17, the Commission issued an order to dismiss the proceeding. Subsequent to that order, parties made filings in EFIS in ER-2018-0228. The Commission has never issued an order opening the case file. Only the Commission has the authority to issue orders, so whether or not parties continued to make filings into a closed case file is irrelevant. Similarly, Empire asserts that since no party objected to a discussion of ER-2018-0228, through acquiescence the case file was reauthorized. There is no basis in Chapters 536, 386 or 393, RSMo., that permit the parties to promulgate orders by conspiracy through

filing pleadings in closed files. Parties can file applications²³, complaints²⁴, and motions.

Notably, Empire has not filed a response or a motion objecting to the Commission's order to dismiss ER-2018-0228.²⁵

Further, the Company cites to the transcript of a proceeding from May 24 that involved related inquiries in seven case files, and specifically to a comment made at the proceeding regarding the status of this case.²⁶ The remarks of a member of the Commission is not a written order, and is insufficient to initiate a proceeding.²⁷ Since no written order from the Commission subsequent to its dismissal of ER-2018-0228 has been filed, it is Public Counsel's position that ER-2018-0228 was not before the Commission at the effective date of Section 393.137, RSMo., and therefore Empire's claims are unsubstantiated and its motion should be denied.

Empire Failed to Properly File its Motion for Summary Determination

4 CSR 240-2.117 sets out the applicability and filing requirements for summary determination. The rules require that:

“Motions for summary determination shall state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue as to such facts. Each motion for summary determination shall have attached thereto a separate legal memorandum explaining why summary determination should be granted and testimony, discovery or affidavits not previously filed that are relied on in the motion.” 4 CSR 240-2.117(1)(B).

²³ 4 CSR 240-2.060

²⁴ 4 CSR 240-2.070

²⁵ 62 days from the date of this filing.

²⁶ Omitted from Empire's review of the transcript was Public Counsel's position that ER-2018-0228 was not a general rate proceeding. Tr. 1, Pg. 25 lns. 13-21.

²⁷ The transcript is insufficient to be defined as a written order under 386.280, as it would not meet the statutory requirements as the document was not certified by a Commissioner or filed under seal of the by the Secretary of the Commission.

Empire's motion fails to identify the material facts of which it alleges there is no issue. Empire's motion did not append a legal memorandum as required by the rule. The Commission should reject Empire's motion for Summary Determination for its failure to comply with the published filing requirements of 4 CSR 240-2.117.

WHEREFORE, the Office of the Public Counsel submits this response for the Commission's information and requests that the Commission *deny* Empire's motion to dismiss and motion for summary determination.

Respectfully submitted,

/s/ Hampton Williams

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 18th day of July 2018.

/s/ Hampton Williams

