

**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                                )  
**Case No. ER-2018-0366**

**STAFF’S BRIEF**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Brief*, states herein as follows:

**INTRODUCTION**

***The Issues resulting from the Tax Cuts and Jobs Act of 2017:***

On January 1, 2018, the *Tax Cuts and Jobs Act of 2017* (“TCJA”) became effective, reducing the federal corporate income tax rate from 35% to 21%. The immediate effect of the TCJA was to render unjust and unreasonable the Commission-approved rates of every large utility company in Missouri, including those of The Empire District Electric Company (“Empire”), all of which were set on the basis of a 35% federal income tax rate.<sup>1</sup> Public utility rates include an allowance for the utility’s income tax liability, which is calculated by multiplying the rate by a factor representing the composite federal and state income tax rate. Since the TCJA became effective, Empire has continued to bill its customers, and to collect payments from its customers, predicated on a federal income tax rate of 35%, although Empire’s actual federal income tax liability is only 21%. In the absence of Commission action to reduce the

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<sup>1</sup> Empire’s existing rates are based on a composite federal-state effective tax rate of 38.39% in calculating current and deferred income tax expense. The impact of the TCJA on the composite effective tax rate is a reduction from 38.39% to 25.45%, amounting to a reduction of 12.94% or approximately one-third of the prior effective tax rate.

income tax component of Empire's rates to reflect Empire's now-reduced federal income tax liability, Empire will retain the excess amounts collected from its customers as profit.

Compounding the issue is the fact that the federal tax code allows utilities to defer a portion of their annual income tax liability and to use the associated revenue provided by customers as capital. This money is referred to as "Accumulated Deferred Income Tax" ("ADIT"). ADIT is subtracted from Empire's rate base when its rates are calculated, reflecting the fact that it was contributed by Empire's customers. Under federal tax rules, on the effective date of the *TCJA*, a portion of Empire's ADIT became excess ADIT, that is, ADIT that would never be paid over to the IRS in satisfaction of Empire's income tax liability.

Under the IRS rules, excess ADIT falls into two categories, "protected" and "unprotected." Protected ADIT is the portion associated with accelerated depreciation tax timing differences that must be "normalized" for ratemaking purposes. "Tax normalization" effectively means the utility receives an immediate benefit from the accelerated depreciation tax timing difference, with that benefit then being gradually passed on to customers over the estimated life of the utility asset giving rise to the accelerated depreciation deduction. The Commission is restricted from flowing back protected excess ADIT to customers in rates any more quickly than over the estimated average remaining life of the assets that gave rise to the ADIT. This amortization period is expected to be quite lengthy, 20 years or more depending on the assets involved. Unprotected excess ADIT is the portion of Empire's deferred tax reserve that resulted from normalization treatment of tax timing differences other than accelerated

depreciation deductions. The Commission can return unprotected excess ADIT to customers through an amortization period of the Commission's choosing.

***Staff's Response to the Issues resulting from the TCJA:***

Understanding that the *TCJA* had been signed by the President and would become effective on January 1, 2018, Staff moved on December 22, 2017, to open a working docket “for the purpose of determining the actual impact of the Tax Cuts and Jobs Act of 2017 upon Missouri public utilities and their ratepayers[.]”<sup>2</sup> Staff followed its initial motion with a second motion, filed on December 27, 2017, requesting that the Commission direct all large Missouri utilities to respond to certain questions.<sup>3</sup> The Commission opened Case No. AW-2018-0174 on January 3, 2018, and directed all large Missouri utilities to respond by January 31, 2018, to the questions proposed by Staff.<sup>4</sup> Responses were filed by various utilities through January 31 and, on February 13, 2018, Staff filed its *Report*, recommending that the Commission open utility-specific “R” dockets by issuing “show cause” orders “as to why the Commission should not issue an order reducing its rates across the board by the percentage estimated by the utility, or take some other action deemed necessary to effectuate the applicable provisions of

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<sup>2</sup> ***In the Matter of the Revenue Effects upon Missouri Utilities of the Tax Cuts and Jobs Act of 2017***, Case No. AW-2018-0174 (***Staff's Motion to Open a Working Docket***, filed Dec. 22, 2017) p. 1.

<sup>3</sup> ***In the Matter of the Revenue Effects upon Missouri Utilities of the Tax Cuts and Jobs Act of 2017***, Case No. AW-2018-0174 (***Staff's Motion to Solicit Input***, filed Dec. 27, 2017) p. 1.

<sup>4</sup> ***In the Matter of the Revenue Effects upon Missouri Utilities of the Tax Cuts and Jobs Act of 2017***, Case No. AW-2018-0174 (***Order Opening A Working Proceeding Regarding the Effects Upon Missouri Utilities of the Tax Cuts of 2017 and Directing Response***, issued Jan. 3, 2018).

the *TCJA*.<sup>5</sup> The Commission closed Case No. AW-2018-0174 two days later on February 15, 2018.<sup>6</sup>

Also included in Staff's *Report* was its legal analysis,<sup>7</sup> in which Staff considered well-settled principles of law stating that excess profits collected by a public utility pursuant to Commission-approved rates belong to the utility and cannot be taken from it;<sup>8</sup> that the Commission is without authority in any case to order refunds;<sup>9</sup> and that the Commission's only lawful and effective response to over-earning by a public utility is to redetermine its prospective rates with due consideration of all relevant factors via a prolonged contested case proceeding.<sup>10</sup> Staff also reviewed the possibility that the reduction of utility income tax rates pursuant to the *TCJA* might be "different in nature" from variations in other utility operating expenses such that the Commission could order a prospective rate reduction without a lengthy consideration of all relevant factors.<sup>11</sup>

Staff concluded:

In summary, given that the *TCJA* will likely result in windfall profits for all Missouri regulated public utilities and in view of the legal constraints outlined above, the only response available to the Commission is to redetermine rates for each regulated public utility as promptly as possible. It may be that this rate reduction need not include the consideration of all relevant factors in a lengthy general rate case. In 1986-87, the

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<sup>5</sup> *In the Matter of the Revenue Effects upon Missouri Utilities of the Tax Cuts and Jobs Act of 2017*, Case No. AW-2018-0174 (*Staff Report*, filed Feb. 13, 2018) p. 1.

<sup>6</sup> *In the Matter of the Revenue Effects upon Missouri Utilities of the Tax Cuts and Jobs Act of 2017*, Case No. AW-2018-0174 (*Notice Closing File*, issued Feb. 15, 2018).

<sup>7</sup> *In the Matter of the Revenue Effects upon Missouri Utilities of the Tax Cuts and Jobs Act of 2017*, Case No. AW-2018-0174 (*Staff Report*, filed Feb. 13, 2018) pp. 4-6.

<sup>8</sup> *Lightfoot v. City of Springfield*, 236 S.W.2d 348, 354 (Mo. 1951).

<sup>9</sup> *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943).

<sup>10</sup> *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 58-59 (Mo. banc 1979) ("*UCCM*").

<sup>11</sup> *State ex rel. Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470, 478 (Mo. App., W.D. 1998), citing *UCCM* and *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75 (Mo. 1960).

Commission's response took the form of negotiated rate reductions under the threat of a Staff overearnings complaint. That approach resulted in prompt rate reductions.

***The Opening of Case ER-2018-0228:***

On February 16, 2018, just three days after Staff had filed its *Report* in Case No. AW-2018-0174 and implementing its recommendation contained in that *Report*, Staff filed its *Motion to Open Rate Case and to Require Company to Show Cause* directed at Empire.<sup>12</sup> In its *Motion*, Staff requested that the Commission do the following:

(A) Giving such notice as it deems appropriate, open a rate case on its own motion in order to investigate the propriety of Empire Electric's rates for electric service in light of the enactment of the *TCJA*, and to set the prospective just and reasonable rates therefor;

(B) Make Staff, the Office of the Public Counsel, and all intervenors that were parties to Empire Electric's last rate case parties to the new rate case;

(C) Direct Empire Electric to show cause, if any it has, why the Commission should not forthwith order it to file tariffs reducing its rates for every class and category of service by the percentage reduction in the federal-state effective income tax rate stated in this *Motion*;

(D) Direct Empire Electric to quantify and track all *TCJA* rate impacts from January 1, 2018, going forward;

(E) Direct Empire Electric to quantify and track its excess protected and unprotected ADIT for future flow back to ratepayers and to advise the Commission how best that flow-back might be accomplished;

(F) Direct Empire Electric to advise the Commission whether or not the impact of the *TCJA* is like the gross receipts tax analyzed in ***Hotel Continental*** and the natural gas commodity costs considered in ***Midwest Gas Users' Association*** and whether the Commission may order a reduction in utility rates without the necessity of considering all relevant factors in an extended general rate case;

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<sup>12</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (***Motion to Open Rate Case and to Require Company to Show Cause***, filed Feb. 16, 2018).

(G) Direct Empire Electric to identify and quantify all other impacts of the *TCJA* not already discussed herein[.]<sup>13</sup>

On February 21, 2018, the Commission granted Staff's *Motion* and opened a rate case to examine the continued propriety of Empire's rates in view of the *TCJA*.<sup>14</sup>

The Commission explained the nature and purpose of the case:

The Commission's Staff filed a motion on February 16, 2018, asking the Commission to open a rate case to consider the rates charged by The Empire District Electric Company, for electric service. Staff's motion explains that Empire's existing rate schedules may no longer be just and reasonable in light of the recently enacted Tax Cuts and Jobs Act of 2017, which reduced the federal corporate income tax rate from 35 percent to 21 percent.<sup>15</sup>

Thereafter, various parties intervened and, on March 19, 2018, Empire filed its *Response* to the Commission's show-cause order.<sup>16</sup> Therein, Empire stated its opinion that its rates could only be adjusted, prospectively, upon the filing of an overearnings complaint and a contested case proceeding in which all relevant factors were considered.<sup>17</sup> Empire expressed its willingness to discuss the matter with Staff and other interested parties.<sup>18</sup>

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<sup>13</sup> *Id.*, pp. 7-8.

<sup>14</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (***Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why Its Rates Should Not be Adjusted***, issued Feb. 21, 2018).

<sup>15</sup> *Id.*, p. 1.

<sup>16</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (***Response to Show Cause Motion and Order***, filed Mar. 19, 2018).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

At the same time that Staff filed its motion directed at Empire, it also filed similar motions directed at other Missouri large utility companies.<sup>19</sup> Certain other companies were excluded from these filings because they already had open rate cases in which the effects of the *TCJA* were addressed.<sup>20</sup> Contemporaneous developments were also occurring in the Missouri statehouse, where electric utilities were again pushing for the enactment of various beneficial provisions they had sought, without success, for several years.<sup>21</sup> Inevitably, the issues raised by the *TCJA* were caught up in the political give and take.<sup>22</sup> As passed, the bill (SB 564) included a mechanism authorizing the Commission to return to ratepayers the windfall resulting from the *TCJA*.<sup>23</sup>

On April 18, 2018, the Commission scheduled an oral argument including all of the companies to which show-cause orders were directed.<sup>24</sup> That argument was set for May 24, 2018. The Commission's *Order* stated:

The Commission opened these rate cases to address concerns that the specified electric, gas, and steam utilities' existing rate schedules may no longer be just and reasonable in light of the recently enacted Tax Cuts and Jobs Act of 2017, which reduced the federal corporate income tax rate from 35 percent to 21 percent.

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<sup>19</sup> Case No. ER-2018-0226, Ameren Missouri (electric); Case No. GR-2018-0227, Ameren Missouri (Gas); Case No. GR-2018-0229, The Empire District Gas Company (Gas); Case No. GR-2018-0230, Summit Natural Gas of Missouri, Inc.; Case No. HR-2018-0231, KCP&L Greater Missouri Operations Company (Steam); and Case No. HR-2018-0232, Veolia Energy Kansas City, Inc. (Steam).

<sup>20</sup> Case Nos. GR-2017-0215 and GR-2017-0216, Spire Missouri, Inc. (Gas); Case No. WR-2017-0285, Missouri-American Water Company (Water and Sewer); Case Nos. ER-2018-0145 and ER-2018-0146, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (Electric).

<sup>21</sup> *This year, Ameren seeks just a little bit of regulatory relief. The case isn't strong*, St. Louis Post-Dispatch, Jan. 24, 2018; Internet, retrieved July 25, 2018.

<sup>22</sup> David Nicklaus, *Ameren's \$133 million tax windfall should go to consumers*, St. Louis Post-Dispatch, Apr. 15, 2018; Internet, retrieved July 25, 2018 (suggesting that Ameren was using the tax windfall as a bargaining chip in its effort to secure the passage of desired legislation).

<sup>23</sup> Codified at § 393.137, RSMo.

<sup>24</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (***Order Scheduling Oral Argument Regarding The Issuance Of Accounting Authority Orders To Address The Effect of Federal Tax Cuts***, issued Apr. 18, 2018).

The Commission ordered each of the utilities to show cause why the Commission should not order them to promptly file tariffs to reduce their rates for every class and category of service to reflect the percentage reduction in its federal-state effective income tax rate. Each utility responded by arguing that the Commission could require them to adjust their rates only as part of a general rate case in which all relevant factors are considered rather than through isolated consideration of the single issue of income tax rates.

The Commission will schedule an oral argument to address the question of whether the Commission should issue an accounting authority order in each of these cases to preserve any excess revenues resulting from the income tax rate changes for possible adjustment in these or future rate cases.<sup>25</sup>

Prior to the oral argument by about a month, on April 24, 2018, Empire, Staff, MEEG, and other intervenors entered into a *Stipulation and Agreement*, which was filed in both Case No. ER-2018-0228 and another pending case, EO-2018-0092.<sup>26</sup> Most of the *Stipulation and Agreement* related to Case No. EO-2018-0092, but Paragraphs 24-26 provided for resolution of the issues relating to the *TCJA*, as follows:

- On October 1, 2018, Empire would file tariffs reducing its prospective rates by recalculating the income tax component based on a federal tax rate of 21% rather than 35%. Attached Appendix B shows the allocation of the reduced revenue requirement to the individual rate classes.<sup>27</sup>
- Empire would record a regulatory liability for the difference between the excess ADIT balances included in current rates, which was calculated using the 35% federal corporate income taxes, versus the now lower federal corporate income tax rate of 21%, beginning January 1, 2018, and will propose a methodology for returning the excess ADIT to customers in its next rate case, compliant with IRS normalization rules.<sup>28</sup>

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<sup>25</sup> *Id.*, p. 2.

<sup>26</sup> ***In the Matter of the Application of The Empire District Electric Company for Approval of Its Customer Savings Plan***, Case No. EO-2018-0092 (***Stipulation and Agreement***, filed Apr. 24, 2018) (hereinafter "***The First Stipulation and Agreement***").

<sup>27</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (***Stipulation and Agreement***, filed Apr. 24, 2018), ¶ 24.

<sup>28</sup> *Id.*, ¶ 25.



- Rate design remains to be determined.<sup>29</sup>

On April 26, 2018, the Office of the Public Counsel (“OPC”) filed its objection to the *Stipulation and Agreement*.<sup>30</sup> By Commission rule, 4 CSR 240-2.115(2)(D), 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.”

**Senate Bill 564:**

On May 17, 2018, the Missouri legislature passed SB 564.<sup>31</sup> That bill included an emergency clause, the effect of which was that the mechanism concerning the *TCJA* tax impact would become effective as soon as the Governor signed the bill (assuming that he did sign the bill, which was unknown on May 17). A feature of that mechanism, now codified at § 393.137.1, is that the legislation applied *only* 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.” Therefore, on May 17, 2018, Staff filed its *Voluntary Dismissal* in Case Nos. ER-2018-0226 and ER-2018-0228, the only cases initiated by motion on February 16, 2018, that concerned companies otherwise subject to § 393.137. By dismissing those cases, Staff intended to bring

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<sup>29</sup> *Id.*, ¶ 26.

<sup>30</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*The Office of the Public Counsel’s Objection to the Non-Unanimous Stipulation and Agreement Filed on April 24, 2018*, filed Apr. 26, 2018).

<sup>31</sup> Jacob Barker & Bryce Gray, *BUSINESS: Legislature passes Ameren-backed bill that critics say will raise rates*, St. Louis Post-Dispatch, May 17, 2018; Internet, retrieved July 25, 2018 (“Ameren and other utilities are allowed to recoup their taxes through customer bills and are required to adjust rates when taxes go down. But that adjustment has been held up and is being dealt with through the legislation, which consumer groups contend held a required rate cut hostage as a bargaining chip to pass the bill.”).

Ameren Missouri (electric) and Empire (electric) within the scope of § 393.137, the mechanism created by SB 564 to deal with the impact of the *TCJA*.

Upon Staff's filing of its *Voluntary Dismissal* in Case No. ER-2018-0228, the Commission issued its *Acknowledgement*.<sup>32</sup> Later on the same day, Staff withdrew its *Voluntary Dismissal*, stating "[b]ecause other parties raised concerns that Staff had thereby changed its position with respect to the *Stipulation & Agreement* filed herein on April 24, 2018, Staff will now withdraw its *Voluntary Dismissal*. Staff remains fully committed to the position stated in the *Stipulation & Agreement* filed herein on April 24, 2018."<sup>33</sup> Why did this unusual series of filings occur? Simply because Staff was determined to bring Ameren Missouri and Empire under the mechanism created by SB 564 regarding the impact of the *TCJA*, without regard to its execution of the *Stipulation and Agreement* filed in Case Nos. EO-2018-0092 and ER-2018-0228.<sup>34</sup> Therefore, Staff filed its *Voluntary Dismissal* in Case Nos. ER-2018-0226 and ER-2018-0228. When Empire questioned Staff's inconsistency in this regard, Staff filed its *Withdrawal of Voluntary Dismissal*.

***Written and Oral Arguments in Case No. ER-2018-0228:***

By its April 18, 2018, *Order Scheduling Oral Argument Regarding The Issuance Of Accounting Authority Orders To Address The Effect of Federal Tax Cuts*, issued in

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<sup>32</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (*Voluntary Dismissal*, filed May 17, 2018); ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (*Notice Acknowledging Dismissal of Application and Closing Case*, issued May 17, 2018).

<sup>33</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (*Withdrawal of Voluntary Dismissal*, filed May 17, 2018) p. 1.

<sup>34</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (*Transcript of Oral Arguments, May 24, 2018*, filed June 12, 2018) p. 22 (hereinafter "Transcript").

each of the several cases opened in response to Staff's *Motion* of February 16, the Commission invited the parties to file written arguments by May 17. Accordingly, Staff, Empire and OPC filed written arguments in Case No. ER-2018-0228.<sup>35</sup> In its *Written Argument*, Staff pointed out that § 393.140(8) provides that the Commission shall ". . . power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited." Thus, the Commission certainly is authorized to order the deferral, from January 1, 2018, onward, of the excess receipts collected by Empire following the effective date of the *TCJA*.<sup>36</sup> Staff further outlined a procedure whereby the deferred receipts could be returned to ratepayers.<sup>37</sup>

Staff's oral presentation on May 24, 2018, generally followed its *Written Argument*, with the addition of a proposal that the Commission employ both a deferral of excess revenues from January 1, 2018, onward, and an interim-subject-to-refund rate reduction, followed by an extended contested case proceeding in which all relevant factors could be considered.<sup>38</sup> At the conclusion of that proceeding, of course, the Commission would order final, permanent rates. Staff pointed out, in the course of its argument, that "[e]ach of these cases is a rate case."<sup>39</sup>

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<sup>35</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*Staff's Written Argument*, filed May 17, 2018); *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*[Empire's] Response to Commission Order*, filed May 7, 2018); *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*Public Counsel's Argument in Support of Commission's Authority*, filed May 17, 2018).

<sup>36</sup> Although not necessarily to return them to ratepayers as is explained later.

<sup>37</sup> Based on *State ex rel. Midwest Gas Users' Ass'n v. PSC*, 976 S.W.2d 470, 478 (Mo. App., W.D. 1998).

<sup>38</sup> Tr. pp. 9-24.

<sup>39</sup> *Id.*, p. 12, lines 20-21.

### ***The Opening of Case No. ER-2018-0366:***

On June 1, 2018, then-Governor Greitens signed SB 564, creating § 393.137. On June 4, 2018, OPC promptly moved the Commission to open a rate case under the authority granted in § 393.137 to adjust Empire's electric rates and return the *TCJA* windfall to ratepayers.<sup>40</sup> Instead, the Commission on June 5, 2018, opened Case No. ER-2018-0366 on its own motion as a proceeding under § 393.137 to adjust Empire's rates and address the tax impact of the *TCJA*.<sup>41</sup> In its initial procedural order in Case No. ER-2018-0366, the Commission stated:

Section 393.137 of Missouri's statutes, passed as part of Senate Bill 564 during the second regular session of the 99th General Assembly, gives the Commission one-time authority to order an adjustment to the electric rates of an electrical corporation in light of the recently enacted Tax Cuts and Jobs Act of 2017. Because it contains an emergency clause, that section became effective on June 1, 2018, when Senate Bill 564 was signed by the Governor. The section allows the Commission only ninety days after its effective date to act on the granted authority.<sup>42</sup>

Section 393.137.3 provides, "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 electrical corporation's rates prospectively so that the income tax

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<sup>40</sup> *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0365 (*Motion to Open an Electric Rate Case Proceeding*, filed June 4, 2018).

<sup>41</sup> *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0365 (*Notice Closing File*, issued June 6, 2018) and see *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0366 (*Notice Opening File*, issued June 5, 2018)

<sup>42</sup> *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0366 (*Order Opening Case, Directing Notice, Establishing Time To Intervene, And Scheduling A Procedural Conference*, issued June 6, 2018) p. 1.

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.”<sup>43</sup> Therefore, Case ER-2018-0366 has proceeded on an expedited basis while Case No. ER-2018-0228 has been largely dormant.

On July 11, 2018, the Commission issued its *Report & Order* in Case No. EO-2018-0092, in which the Commission declined the opportunity to adopt the resolution to the issues raised by the *TCJA* proposed in the *First Stipulation and Agreement* filed both in that case and in Case No. ER-2018-0228, saying:

With regard to the reduction in federal taxes, the Joint Position calls for Empire to make a tariff filing proposing new electric rates to be effective October 1, 2018, reflecting a reduction in base rate revenue associated with the Tax Cuts and Jobs Act of 2017. The Commission will decline the opportunity to order a change in rates in this case, and will consider that issue in one of two proceedings where Empire’s taxes are at issue, File No. ER-2018-0228 or File No. ER-2018-0366.<sup>44</sup>

One result of the above order is that on July 17, 2018, Empire, together with Staff and the City of Joplin, filed a new *Non-Unanimous Stipulation and Agreement* in Case Nos. ER-2018-0228 and ER-2018-0366.<sup>45</sup> This *Second Stipulation and Agreement* essentially repeats the provisions related to the *TCJA* set out in the *Stipulation and Agreement* filed in Case Nos. EO-2018-0092 and ER-2018-0228 and therefore they need not be recapitulated here. However, it’s important to note that Staff’s analysis related to the *First Stipulation and Agreement* is equally valid with

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<sup>43</sup> There is also a subsection 4 that authorizes alternative treatment for good cause shown.

<sup>44</sup> ***In the Matter of the Application of The Empire District Electric Company for Approval of Its Customer Savings Plan***, Case No. EO-2018-0092 (*Report & Order*, issued July 11, 2018).

<sup>45</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (*Non-Unanimous Stipulation and Agreement*, filed July 17, 2018) (hereinafter “*The Second Stipulation and Agreement*”).

respect to the *Second Stipulation and Agreement*. OPC filed its objection to this *Non-Unanimous Stipulation and Agreement* on July 24, 2018.<sup>46</sup> MCEG did not file an objection to the *Second Stipulation and Agreement*.

Case No. ER-2018-0366 culminated in an evidentiary hearing on July 20 and 23. The Commission heard from six witnesses and received fifteen exhibits.

## **ARGUMENT**

### **A. Staff's Position Statement:**

Staff joined with Empire in both stipulations filed in Case Nos. ER-2018-0228 and ER-2018-0366 and its positions in this matter are consistent with those agreements. Staff's positions on the issues are as follows:

**1. Should Empire District's rates be adjusted prospectively to reflect the reduction in the federal corporate income tax rate from 35% to 21% due to the Tax Cuts and Jobs Act?**

Yes. (Oligschlaeger Direct, p. 4, lines 9 – 15).

**a. If yes, what should be the amount and timing of such rate reduction?**

Rates should be reduced by \$17,827,022 on an annual basis, effective October 1, 2018. (Ibid., page 4, line 16 to page 5, line 17).

**2. Should Empire District's rates be adjusted prospectively to reflect a flow-back of "protected" excess accumulated deferred income taxes ("ADIT") to customers due to the TCJA?**

No. (Ibid., page 5, line 18 to page 6, line 13).

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<sup>46</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*The Office of the Public Counsel's Objection to the Non-Unanimous Stipulation and Agreement Filed July 17, 2018*, filed July 24, 2018).

**a. If yes, what is the correct balance of protected excess ADIT as 12/31/2017 to be subject to amortization?**

Staff does not recommend that Empire District's rates be reduced in this proceeding to flow-back protected excess ADIT. Staff's understanding is that Empire District has not completed the work necessary at this time to accurately quantify its balances of protected and unprotected excess ADIT as of December 31, 2017. (Ibid.)<sup>47</sup>

**b. If yes, what is the appropriate amortization period for protected excess ADIT?**

Staff does not recommend that Empire District's rates be reduced in this proceeding to flow-back protected excess ADIT. Staff's understanding is that Empire District has not completed the work necessary at this time to accurately quantify the period of time over which to flow back protected excess ADIT to customers in compliance with the normalization provisions of the federal tax code. (Ibid.).

**3. Should Empire District's rates be adjusted prospectively to reflect a flow-back of "unprotected" excess ADIT to customers due to the TCJA?**

No. (Ibid.).

**a. If yes, what is the correct balance of unprotected excess ADIT as of 12/31/2017 to be subject to amortization?**

Staff does not recommend that Empire District's rates be reduced in this proceeding to flow-back unprotected excess ADIT. Staff's understanding is that Empire District has not completed the work necessary at this time to quantify its balances of protected and unprotected excess ADIT as of December 31, 2017. (Ibid.).

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<sup>47</sup> See below, p. 29 n. 83.

**b. If yes, what is the appropriate amortization period for unprotected excess ADIT?**

Staff does not recommend that Empire District's rates be reduced in this proceeding to flow-back unprotected excess ADIT. (Ibid.) In the event that the Commission does order in this proceeding an immediate rate reduction to flow back unprotected excess ADIT to customers, Staff recommends a 10-year amortization period be used for this item.

**4. Should the financial impact of the TCJA corporate income tax rate reduction from 35% to 21% be deferred by Empire District from January 1, 2018, forward to the date customer rates are adjusted to reflect this impact?**

No, as long as the impact of the reduced corporate income tax rate is passed on prospectively to Empire District customers in this proceeding. (Ibid., page 6, line 14 to page 7, line 14).<sup>48</sup>

**5. Should the financial impact of the amortization of protected excess ADIT be deferred by Empire District from January 1, 2018, forward to the date customer rates are adjusted to reflect this impact?**

Yes. (Ibid., page 4, lines 9 - 15). However, in the event that the Commission orders a prospective rate reduction in this proceeding due to a protected excess ADIT amortization, Staff does not recommend deferring the financial impact of the protected excess ADIT amortization back to January 1, 2018.

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<sup>48</sup> It is Staff's position that the Commission has authority to order such a deferral, but should not do so.



**6. Should the financial impact of the amortization of unprotected excess ADIT be deferred by Empire District from January 1, 2018, forward to the date customer rates are adjusted to reflect this impact?**

Yes. (Ibid., page 4, lines 9 - 15). However, in the event that the Commission orders a prospective rate reduction in this proceeding due to an unprotected excess ADIT amortization, Staff does not recommend deferring the financial impact of the unprotected excess ADIT amortization back to January 1, 2018.

**7. What modifications should be made to Empire’s tariff to implement the revenue requirement reduction?**

Consistent with its position in EO-2018-0092 and ER-2018-0228, Staff recommends that a reasonable allocation of the revenue requirement reduction to the classes is provided below:

<b>Schedule</b>	<b>Tariff ID</b>	<b>Allocation</b>
Residential	RG	48.08%
Commercial	CB	8.87%
Small Heating	SH	2.38%
General Power	GP	18.29%
Praxair	SC-P	0.92%
Total Electric Bldg	TEB	8.46%
Feed Mill and Grain Elevator	PFM	0.02%
Large Power	LP	11.54%
Power Transmission	MS	0.002%
Municipal Street Lighting	SPL	0.61%
Private Lighting	PL	0.80%
Special Lighting	LS	0.02%

For ease of administration and consistency with the Ameren Missouri approach, Staff recommends that the revenue requirement reduction applicable to each rate class be divided by the total kilowatt-hour (“kWh”) billing units stated for that class. The result of this calculation is 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 customers' bills) to yield separate line item bill credits. The tariff sheets for each of the above service classifications will be updated to include reference to the cents per kilowatt-hour rates and resulting credits derived in the prior step. If Empire's billing system cannot easily accommodate printing a separate line item on the customers' bills, Staff does not object to Empire consolidating the value of the credit into a net energy charge or a net bill; however, Staff recommends that the existing tariffed energy rates be maintained. (Lange Direct, p. pg. 2, citing *Nonunanimous Stipulation and Agreement* filed in EO-2018-0092, p. 3, lines 6 to 10.)

**B. Empire is not subject to § 393.137:**

On June 25, 2018, Empire moved to dismiss Case No. ER-2018-0366, or alternatively, for summary determination, on the grounds that § 393.137 does not apply to it pursuant to § 393.137.1, because it had a "general rate proceeding" pending on the later of February 1, 2018, or June 1, 2018."<sup>49</sup> OPC responded on June 27, 2018, arguing that, first, Case No. ER-2018-0228 was not a "general rate case" because Staff did not intend that the Commission consider all relevant factors in it and, second, that Case No. ER-2018-0228 was not an open, active case on June 1, 2018, because it had been voluntarily dismissed by Staff on May 17.<sup>50</sup> Empire replied on July 12, 2018, asserting in response to OPC's first argument that Case No. ER-2018-0228 was indeed a "general rate case" because it was opened to consider the propriety of Empire's rates

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<sup>49</sup> *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0366 (*Empire's Motion to Dismiss or for Summary Determination with Suggestions in Support*, filed June 25, 2018).

<sup>50</sup> *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0366 (*Response in Opposition to Motion to Dismiss or for Summary Determination*, filed June 27, 2018).

and, further, that another “general rate case,” Case No. ER-2016-0023, was also open on June 1, 2018, by virtue of Empire having made a filing to it the day before.<sup>51</sup> OPC responded to Empire’s reply on July 18, 2018, arguing, first, that Empire had not shown “good cause” for dismissal as required by Commission Rule 4 CSR 240-2.116(4); second, repeating its argument that Case No. ER-2018-0228 was not a “general rate case” because “it was not promulgated to consider all relevant factors to set utility rates”; third, that Case No. ER-2018-0228 was dismissed by Staff on May 17 and never officially resurrected; and fourth, that Empire’s *Motion for Summary Determination* was fatally defective since it lacked numbered paragraphs setting forth the material facts as to which there is no dispute, as required by Rule 4 CSR 240-2.117(B).<sup>52</sup>

Staff has not previously weighed in on this dispute. Staff notes that Empire’s core assertion is that the Commission lacks statutory authority (what used to be referred to as “subject matter jurisdiction”) to proceed under § 393.137 because that statute, by its plain terms, does not apply to it. Section 393.137.1 provides, “[t]his section 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.” No one doubts that Empire is an “electrical corporation” and no one disagrees that June 1, 2018, is the date on which it must be determined whether or not there was pending a “general rate case” involving Empire. Did Empire have a “general rate case” pending on June 1, 2018?

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<sup>51</sup> *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0366 (*Reply Suggestions in Support of Empire's Motion to Dismiss or for Summary Determination*, filed July 12, 2018).

<sup>52</sup> *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0366 (*The Office of the Public Counsel's Response to Empire's Reply Suggestions*, filed July 18, 2018).

Staff responds that, although not much has happened in Case No. ER-2018-0228 since the oral argument on May 24, 2018, and that SB 564 and Case No. ER-2018-0366 have stolen the limelight, Case No. ER-2018-0228 was, and is, a general rate case. Furthermore, it was certainly pending on June 1, 2018.

**Case ER-2018-0228 was, and is, a “general rate case”:**

What is a “general rate case”? The *Public Service Commission Act* does not define it.<sup>53</sup> Some of the parties rely on a definition promulgated by the Commission in its Fuel Adjustment Clause (“FAC”) rules at 4 CSR 240-20.090(1)(D):

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[.]”

Counsel for the Missouri Energy Consumers Group (“MECG”), for example, argued as follows:

As OPC has pointed out repeatedly, general rate proceeding is a phrase that has been defined in certain PSC regulations. Recognizing that the General Assembly chose to use this exact term that has already been defined, it is likely that they used that term consistent with the Commission's existing definition. So what is that definition? The definition routinely used by the Commission is that, quote, general rate proceeding means a general rate increase proceeding or complaint proceeding before the Commission in which all relevant factors that may affect the cost or rates and charge of the electric utility are considered by the Commission, end quote. All relevant factors are considered. \* \* \* Given the statutory limitations for filing a general rate proceeding, that case can only be created by a utility application or tariffs or through a complaint proceeding. Certainly Staff's initiating pleading in 390-- or in ER-2018-0228 did not meet any of these statutory mechanisms. Furthermore, Staff's pleading itself did not contemplate a, quote, all relevant factors review required to initiate general rate proceeding. In fact, Staff's initiating pleading in that case, as well as the Commission's subsequent order, clearly indicates that

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<sup>53</sup> Tr. 2, p. 54, ll. 7-9: “CHAIRMAN HALL: Is there anything in statute that defines general rate proceeding? MR. WOODSMALL: I don't believe so.”

the case was never contemplated to be an all relevant factors review but a single issue review.<sup>54</sup>

In fact, it is not only unlikely but contrary to the accepted rules of statutory construction to assume that the legislature intended in SB 564, without expressly saying so, to adopt a definition from the Commission's FAC rule. At the hearing on July 20, 2018, counsel for Staff explained:

[A] general rate case is not a rate case where all relevant factors are considered. A general rate case is a rate case in which the rates charged to each class of customer is [SIC] adjusted. The factors that are considered in a rate case depend on many circumstances. That's why the language is all relevant factors. Sometimes there's a lot of factors that are relevant. Sometimes, as in the case of *Hotel Continental* that Staff pointed to in its motion, there's only one factor that's relevant. That doesn't change whether it's a general rate case or not. General rate case has to do with the change of rates for all classes of customer.<sup>55</sup>

Staff's explanation at the hearing was inartful. Ultimately, while the scope of the factors considered and the breadth of the Commission's order are important indicators, a general rate case is one in which the Commission exercises its general ratemaking authority rather than any of several special, limited ratemaking authorities.<sup>56</sup> The Commission, a.k.a the P.S.C., is an administrative agency of the State of Missouri; a "creature of statute."<sup>57</sup> It has no authority except that expressly delegated by its organic

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<sup>54</sup> Tr. 2, p. 41, line 5, through p. 42, line 16.

<sup>55</sup> *Id.*, p. 34, ll. 9-22.

<sup>56</sup> The Commission's "special" ratemaking authorities include the Fuel Adjustment Clause ("FAC") for electric utilities at § 386.266.1; the Environmental Compliance Cost Recovery Mechanism ("ECRM") for electric, gas and water utilities at § 386.266.2; the Revenue Stabilization Mechanism ("RSM") for gas utilities at § 386.266.3; the Infrastructure System Replacement Surcharges ("ISRS") for Missouri-American Water Company in St. Louis County at §§ 393.1000 – 393.1006 and for gas utilities at §§ 393.1009 – 393.1015; the Renewable Energy Standard for electric utilities at §§ 393.1020 – 393.1050; and the Missouri Energy Efficiency Investment Act ("MEEIA") at § 393.1075.

<sup>57</sup> *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979) ("*UCCM*"); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958). "Whatever power the [Commission] has must be warranted by the letter of law or such clear implication flowing therefrom as is necessary to render the

statutes, the Public Service Commission Law.<sup>58</sup> A “general rate case,” therefore, is described by the statutes that authorize the Commission to make rates using traditional cost-of-service ratemaking. These “general rate case” statutes have been described by the Missouri Supreme Court:

Pursuant to § 393.150, a utility may file a schedule stating a new rate or charge, rule or regulation, which shall become valid unless suspended by the commission, . . . on its own motion or upon complaint of interested parties as authorized by the statute. If suspended, the commission must within a specified period hold a hearing concerning the propriety of the new rate, charge, rule or regulation. Section 393.150. A hearing may also be had without the filing of a new rate, if a complaint is filed, or on motion of the commission, §§ 393.260, 386.390. The commission may investigate any matter as to which a complaint may be filed, or in order to enable it to ascertain facts requisite to the exercise of any powers conferred upon it. Section 393.270(1). At the conclusion of any hearing and investigation, the commission shall set the maximum price to be charged for the electricity, §§ 392.270(2), 393.270(3). An interim rate increase may be requested where an emergency need exists, . . . § 393.150.<sup>59</sup>

Elsewhere, the Court added a gloss upon the above description, stating “[e]ven under the file and suspend method, by which a utility's rates may be increased without requirement of a public hearing, the commission must of course consider all relevant factors including all operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended.”<sup>60</sup>

A general rate case is thus a rate proceeding based on the Commission's general ratemaking authority rather than on any of its several special ratemaking

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power conferred effective.” *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 335 Mo. 448, 457-58, 73 S.W.2d 393, 399 (*banc* 1934).

<sup>58</sup> “The Public Service Commission is an administrative agency or committee of the Legislature, and as such is vested with only such powers as are conferred upon it by the Public Service Commission Law, by which it was created.” *State ex rel. Laundry, Inc. v. Public Service Com'n*, 327 Mo. 93, \_\_\_, 34 S.W.2d 37, 43 (1931).

<sup>59</sup> *UCCM*, *supra*, 585 S.W.2d at 48 (case citations omitted).

<sup>60</sup> *Id.*, at 49; and see p. 56.

authorities. Necessarily, it is a case that results in new base rates for all classes and services. Consideration of “all relevant factors” is required,<sup>61</sup> which only means due consideration of whatever factors are relevant in the circumstances.<sup>62</sup> As the cases cited by Staff in its *Motion to Open Rate Case and Require Company to Show Cause*<sup>63</sup> make plain, where the element of expense that has changed is found to be “different in nature,” the consideration of the universe of factors may not be necessary, even though the Commission is relying on its general ratemaking authority.<sup>64</sup> A general rate case may be commenced by complaint, by filing tariffs, or by the Commission on its own motion,<sup>65</sup> as was Case No. ER-2018-0228.<sup>66</sup> Although nothing much has happened in Case No. ER-2018-0228 so far, it was opened as a general rate case as described

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<sup>61</sup> *Id.*

<sup>62</sup> ***State ex rel. Missouri Water Company v. Public Service Commission***, 308 S.W.2d 704, 718-719 (Mo. 1957): “Each case must be determined upon its own facts and, oftentimes, varying factors that may be peculiarly relevant to a reasoned determination of the issue of ‘just and reasonable’ rates under conditions then existing. ... The statute (§ 393.270, Par. 4) says that the Commission may consider all facts which in its judgment ‘have any bearing upon a proper determination of the question [of the prices to be charged for water], with due regard, among other things, to a reasonable average return upon capital actually expended’, etc. ‘Due regard’ to one factor, ‘among other things’, simply requires consideration of that factor. It is not preclusive of other relevant factors. Indeed, the phrase ‘among other things’ clearly denotes that ‘proper determination’ of such charges is to be based upon *all* relevant factors.” (Emphasis in original; case citations omitted).

<sup>63</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (*Motion to Open Rate Case and Require Company to Show Cause*, filed Feb. 16, 2018) pp. 6-7.

<sup>64</sup> ***State ex rel. Midwest Gas Users’ Association v. Public Service Commission***, 976 S.W.2d 470, 478 (Mo. App., W.D. 1998), citing ***UCCM*** and ***State ex rel. Hotel Continental v. Burton***, 334 S.W.2d 75 (Mo. 1960).

<sup>65</sup> *Id.*, at 48. A rate case opened by the Commission on its own motion is in the nature of a complaint. *Id.*

<sup>66</sup> ***In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company***, Case No. ER-2018-0228 (*Motion to Open Rate Case and Require Company to Show Cause*, filed Feb. 16, 2018) pp. 2-3: “The Commission may, on its own motion, open a rate proceeding to determine the reasonableness of the rates and charges of any electrical, gas, heat, water, or sewer corporation. Section 386.390.1, RSMo.; ***State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission***, 585 S.W.2d 41, 48 (Mo. banc 1979) (“***UCCM***”). Within a rate case, the Commission may investigate any matter necessary to enable it to ascertain facts requisite to the exercise of its powers. Section 393.270.1, RSMo., ***UCCM***, at 48.”

above and it continues to be a general rate case. But was it pending on June 1, 2018?

**Case No. ER-2018-0228 was pending on June 1, 2018:**

Case No. ER-2018-0228 was created on February 16, 2018, by Staff's *Motion to Open Rate Case and Require Company to Show Cause*.<sup>67</sup> The creation of the case did not require the Commission's *Order Opening Rate Case*, which was not issued until February 21, 2018.<sup>68</sup> Instead, case creation is an automatic function of the Commission's *Electronic Filing and Information System ("EFIS")* and nothing that OPC or MCEG has said can alter that fact. The Commission's *Order Opening Rate Case* is the third item on the docket sheet of Case No. ER-2018-0228 as any observer can see for himself or herself. Indeed, *EFIS* permits the improvident opening of cases, which the Commission must then affirmatively act to close, as it did in the instance of Case No. ER-2018-0365, which *EFIS* automatically opened upon OPC's filing of its *Motion to Open an Electric Rate Case Proceeding* on June 4, 2018.<sup>69</sup> The Commission promptly closed that case on June 6, 2018, stating:

The Office of the Public Counsel filed a motion on June 5, 2018, asking the Commission to open an electric rate case proceeding under authority of Section 393.137, RSMo, which became effective with the signature of the Governor on June 1, 2018. The Commission has opened such a proceeding on its own motion within File No. ER-2018-0366. As a

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<sup>67</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*Motion to Open Rate Case and Require Company to Show Cause*, filed Feb. 16, 2018) pp. 6-7.

<sup>68</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why Its Rates Should Not be Adjusted*, issued Feb. 21, 2018).

<sup>69</sup> *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0365 (*Motion to Open an Electric Rate Case Proceeding*, filed June 4, 2018).



result, Public Counsel's motion is now moot and this file shall be closed.<sup>70</sup>

Staff filed its *Voluntary Dismissal* of Case No. ER-2018-0228 on May 17, 2018,<sup>71</sup> and the Commission acknowledged that dismissal and closed the case on the same day.<sup>72</sup> Later on the same day, Staff filed its *Withdrawal of Voluntary Dismissal*, and *EFIS* obligingly re-opened the case.<sup>73</sup> It has remained open every day since and is still open today, July 26, 2018. It will remain open until the Commission takes the affirmative step of issuing a notice to close it.

OPC and MEGC are simply wrong, incorrect, and off base when they insist that Case No. ER-2018-0228 was not pending on June 1, 2018, because the Commission had not, and still has not, acknowledged Staff's resurrection of the case by its *Withdrawal of Voluntary Dismissal* on May 17 by the issue of any notice or order. That's simply not how the Commission or its *EFIS* system works. Since *EFIS* is the official record of the Commission's proceedings, its designation of a case as "open" or "closed" at any given moment is authoritative.<sup>74</sup>

And, in fact, the Commission did acknowledge the re-opening of Case No. ER-2018-0228 on May 24, 2018, at the opening of the oral argument:

JUDGE WOODRUFF: There was also -- Staff initially dismissed a case involving Empire Electric, ER-2018-0228, that was reinstated by

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<sup>70</sup> *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0365 (*Notice Closing File*, issued June 6, 2018) p. 1.

<sup>71</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*Voluntary Dismissal*, filed May 17, 2018).

<sup>72</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*Notice Acknowledging Dismissal of Application and Closing Case*, issued May 17, 2018).

<sup>73</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*Withdrawal of Voluntary Dismissal*, filed May 17, 2018).

<sup>74</sup> As Empire asserted, Case No. ER-2016-0023 was also open on that date.

Staff later that same day. At this point, I'm considering it to be a -- an open case that will be subject to today's proceedings.<sup>75</sup>

***Empire is not subject to § 393.137:***

Section 393.137 is a special ratemaking authority, created by the enactment of SB 564. By its plain terms, at § 393.137.1, it applies only “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.” As Staff has demonstrated in the foregoing discussion, Case No. ER-2018-0228 is a general rate case that was pending on June 1, 2018. It follows that the Commission does not have authority to adjust Empire’s rates under § 393.137.

**C. Since Empire is not subject to § 393.137, what should the Commission do?**

As Staff explained during the oral argument held on May 24, 2018,<sup>76</sup> the Commission should dismiss Case No. ER-2018-0366 and do the following in Case No. ER-2018-0228:

- Order Empire to file tariffs, to be effective October 1, 2018, setting new rates reflecting the reduction in Empire’s federal income tax liability pursuant to the *TCJA* going forward. The record shows that the amount of this reduction should be \$17,837,022.<sup>77</sup> Although Staff and Empire agree

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<sup>75</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*, Case No. ER-2018-0228 (*Transcript, Vol. 1*, filed June 12, 2018) p. 5, ll. 14-20.

<sup>76</sup> *Id.*, pp. 10-11.

<sup>77</sup> Tr. vol. 2, p. 128, line 23, through p. 129, line 19.

as to the amount of the appropriate reduction, other parties do not, so the tariffs should be interim, subject to refund.<sup>78</sup>

- Order Empire to establish a deferral, as of January 1, 2018, of excess ADIT, both protected and unprotected, to be returned to ratepayers over appropriate amortization periods in Empire's next rate case.<sup>79</sup> The record shows that the amount of excess ADIT, so far as it can presently be known, is \$120,170,706.<sup>80</sup>
- Offer parties an opportunity to file testimony and have an evidentiary hearing to the extent that they believe that Empire's rates should be reduced by some other amount, or that the amount of excess ADIT deferred for future return to the ratepayers should be different, or that the amortization periods should be a particular length.
- At the conclusion of the hearing referred to above, order Empire to file compliance tariffs setting out permanent rates.

Staff has agreed with Empire that the excess rates collected during what has been called the "stub period," from January 1, 2018, to the effective date of Empire's rate reduction, should be retained by Empire. The recovery of this money from an unwilling utility company is barred by the Due Process Clauses of the Constitution of the

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<sup>78</sup> Why interim subject to refund? Because parties disagree as to the appropriate process for recognizing the *TCJA*, therefore, the Commission would be setting rates at the *beginning* of the rate case process rather than at the end, see ***State ex rel. Midwest Gas Users' Association v. Public Service Commission***, 976 S.W.2d 470 (Mo. App., W.D. 1998). Such an order is necessarily an interim rate order and must be made subject to refund so that the rate can be trued-up in the final rate setting order at the end of the rate case process.

<sup>79</sup> Empire agreed to this in both the *First Stipulation and Agreement* and the *Second Stipulation and Agreement*, and is thus willing to return the excess ADIT from January 1, 2018, onward.

<sup>80</sup> Tr. vol. 2, p. 129, lines 11-22. This is an interim value and will change. Tr. vol. 2, p. 204, lines 9-24.

United States and the Constitution of Missouri.<sup>81</sup> As the Missouri Supreme Court stated, “The commission has the authority to determine the rate to be charged, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery. It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.”<sup>82</sup> The legislature is free to authorize single-issue ratemaking and has done so via a number of special grants of ratemaking authority. However, the Constitution bars retroactive ratemaking and so the legislature’s attempt to authorize it in § 393.137 is necessarily ineffective.

**D. What if the Commission concludes that Empire is subject to § 393.137?**

If the Commission concludes that Empire is subject to § 393.137, the Commission should dismiss Case No. ER-2018-0228 and do the following in Case No. ER-2018-0366 (this case):

- Order Empire to file tariffs, to be effective October 1, 2018, setting new rates reflecting the reduction in Empire’s federal income tax liability pursuant to the *TCJA* going forward. The record shows that the amount of this reduction should be \$17,837,022.<sup>83</sup>

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<sup>81</sup> U.S. Const., amend. XIV, § 1; Mo. Const., art. I, § 10.

<sup>82</sup> *UCCM*, *supra*, 585 S.W.2d at 58.

<sup>83</sup> Tr. vol. 2, p. 128, line 23, through p. 129, line 19.

- For good cause shown, order Empire to establish a deferral, as of January 1, 2018,<sup>84</sup> of excess ADIT, both protected and unprotected, with the deferral to be returned to ratepayers over appropriate amortization periods in Empire's next rate case. The record shows that this amount, so far as it can presently be known, is \$120,170,706.<sup>85</sup>

Section 393.137 grants the Commission a one-time rate adjustment authority which must be exercised within 90 days of June 1, 2018, that is, by August 30, 2018. The Commission's *Report and Order* in this case, then, must be effective no later than August 30, 2018. The statute does *not* by its plain terms require that the rate reduction must occur not later than August 30, but rather that the Commission exercise its authority by August 30, so the Commission would be within the statute if, by August 30, it orders a rate reduction to take place on October 1.

The statute also allows deferral, in whole or in part, of the impact of the *TCJA* for good cause shown.<sup>86</sup> At the hearing, Empire's witness testified both that the ARAM method for determining excess ADIT was mandatory for Empire<sup>87</sup> and that Empire would not be capable of completing the necessary calculations prior to the fourth quarter of 2018.<sup>88</sup> The evidence further shows that an improper calculation and flow back of excess ADIT might be considered by the IRS to constitute a "normalization" violation, the effects of which would mean otherwise unnecessary increased costs for

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<sup>84</sup> Empire agreed to this date in both the *First Stipulation and Agreement* and the *Second Stipulation and Agreement*.

<sup>85</sup> Tr. vol. 2, p. 129, lines 11-22. This is an interim value and will change. Tr. vol. 2, p. 204, lines 9-24.

<sup>86</sup> Section 393.137.4.

<sup>87</sup> Tr. vol. 2, p. 184, line 17, through p. 185, line 10; p. 188, lines 7-18.

<sup>88</sup> Ex. 10, p. 2; Tr. vol. 2, p. 188, line 19, through p. 189, line 6; p. 189, lines 19-23; p. 189, line 24, through p. 190, line 24; p. 190, line 25, through p. 191, line 11.

Empire's ratepayers going forward.<sup>89</sup> These facts, in Staff's opinion, constitute good cause such that the Commission would be authorized to defer a portion of the financial impact of the *TCJA* pursuant to § 393.137.4.<sup>90</sup> What part should be deferred? The excess ADIT, both protected and unprotected. By Empire's next rate case, those amounts should be known with certainty and the necessary amortization period for the protected excess ADIT should also be known.<sup>91</sup>

As for the "stub period" excess revenues, Staff repeats its view that Due Process prohibits the recapture of those funds from an unwilling utility.<sup>92</sup> Likewise, the Supreme Court's decision in *UCCM*, quoted above, also prohibits its deferral and subtraction from the revenue requirement when calculating future rates.<sup>93</sup>

Section 1 of SB 564 (at p. 25 of the bill) provides, "Notwithstanding the provisions of section 1.140 to the contrary, the provisions of this act shall be nonseverable, and if any provision is for any reason held to be invalid, such decision shall invalidate all of the remaining provisions of this act." Given the constitutional infirmity of the provisions of § 393.137 purporting to permit return to ratepayers of both the "stub period" over-earnings and the "stub period" excess ADIT, it is possible that the entire act is invalid.

**E. Chairman Hall's question:**

At the close of the hearing, Chairman Hall posed this question: "If the Commission were to determine that . . . Senate Bill 564 was not applicable to Empire,

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<sup>89</sup> Ex. 10, p. 2; Tr. vol. 2, p. 192, line 5, through p. 193, line 13.

<sup>90</sup> Tr. vol. 2, p. 204, line 14, through p. 205, line 21.

<sup>91</sup> Tr. vol. 2, p. 189, lines 7-23; p. 190, line 25, through p. 191, line 11.

<sup>92</sup> See pp. 27-28, above.

<sup>93</sup> *UCCM*, *supra*, 585 S.W.2d at 58.

I'd like to know the parties' positions both on the law and the facts as to whether an AAO would be appropriate for the excess ADIT [from] January 1 going forward and for the reduction in revenues during the stub period."<sup>94</sup>

Staff responds that, while the Commission has authority pursuant to § 393.140(8) to defer those amounts, it does not have the power to require an unwilling utility to return those amounts to ratepayers.<sup>95</sup> This question will undoubtedly be litigated and a definitive answer obtained from the courts; for that reason, it would be prudent to defer those amounts until that definitive answer is obtained. As explained throughout this brief, Staff, Empire and the City of Joplin have put forth a *Stipulation and Agreement*, with terms by which the Commission could effectuate the intent of the TCJA.

### **CONCLUSION**

By reason of all the foregoing, Staff prays that the Commission will dismiss Case No. ER-2018-0366 and proceed to adjust Empire's electric rates in Case No. ER-2018-0228 as herein recommended by Staff; or, in the alternative, if the Commission concludes that Empire is subject to § 394.138, then the Commission should dismiss Case No. ER-2018-0228 and proceed to adjust Empire's electric rates in Case No. ER-2018-0366 as herein recommended by Staff.

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<sup>94</sup> Tr. vol. 3, p. 333, lines 18-23.

<sup>95</sup> See pp. 27-28, above.

Respectfully submitted,

**/s/ Kevin A. Thompson**

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### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was served upon all parties or their representatives as listed on the Service List maintained by the Commission's Data Center, electronically, on this 30<sup>th</sup> day of July, 2018.

**/s/ Kevin A. Thompson**