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March 2, 1987

Mr. Harvey G. Hubbs  
Secretary  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, Missouri 65102

Re: Case No. AO-87-48

Dear Mr. Hubbs:

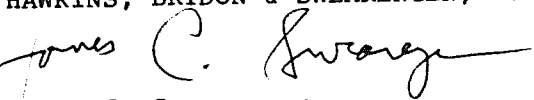
I deliver herewith for filing on behalf of The Empire District Electric Company in the referenced case an original and fourteen (14) copies of Comments in Response to a Missouri Public Service Commission Order Addressing Comments, Granting Interventions and Extending Filing Dates. Copies of this filing have been sent to the parties of record this date.

Thank you for your assistance in this filing.

Very truly yours,

HAWKINS, BRYDON & SWEARENGEN, P.C.

By:

  
James C. Swearengen

JCS:kh

Enc.

cc: All Parties of Record

FILED  
MAR 2 1987  
PUBLIC SERVICE COMMISSION

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BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED  
MAR 2 1987  
PUBLIC SERVICE COMMISSION

In the matter of the investigation )  
of the revenue effects upon ) Case No. AO-87-48  
Missouri utilities of the Tax )  
Reform Act of 1986. )

RESPONSIVE COMMENTS OF  
THE EMPIRE DISTRICT ELECTRIC COMPANY

The Missouri Public Service Commission (the "Commission") has, by its January 30, 1987, "Order Addressing Comments, Granting Interventions and Extending Filing Dates" in Case No. AO-87-48, invited responses from the parties to Staff's interim tariff proposal contained in its Comments filed January 9, 1987. Staff has suggested two alternatives to the Commission for the purpose of expediting the process of decreasing rates charged for utility services in light of the revenue effects of 1986 Tax Reform Act ("TRA"). Staff suggests that (1) the Commission could require all companies subject to its jurisdiction to file tariffs superceding all other filed tariffs and schedules which would indicate that all tariffs, rates and charges in effect as of July 1, 1987, are interim, subject to refund; or (2) all such tariffs could be subject to refund only to the extent that a revenue requirement reduction has been caused by the TRA. As will shown herein, either of Staff's proposals, if implemented, would be in

violation of the United States and Missouri Constitutions and otherwise deficient as a matter of law.

I.

THE IMPOSITION OF INTERIM TARIFFS, SUPERCEDING ALL PRIOR TARIFFS, PROVIDING THAT CHARGES MADE AND REVENUES COLLECTED THEREUNDER ARE SUBJECT TO REFUND IS AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Both the United States and Missouri Constitutions provide that the State may not deprive any person of property without due process of law. U.S. Const. Amend. XIV; Mo. Const. Art. I, § 10. This principal is applicable to the regulation of public utilities by the State. See, State ex rel. Southwestern Bell Telephone Company v. Public Service Commission, 416 S.W.2d 109 (Mo. 1967). Thus, the Commission is without power to order an act performed or thing done by a public utility if it is tantamount to an appropriation of public utility property.

The suggestions made by Staff with respect to interim tariffs do not withstand constitutional scrutiny. Public utilities in this State have a property interest in money collected from their customers under an established schedule of rates. When the established rate of a utility has been followed, the amounts so collected become the property of the utility, of which it cannot be deprived by either legislation<sup>1</sup> or judicial action without violating the due process provisions of the

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1. In fixing just and reasonable rates, the Commission performs a delegated legislative function. Lightfoot v. City of Springfield, 236 S.W.2d 348, 352 (Mo. 1951).

State and federal constitutions. Straube v. Bowling Green Gas Co., 227 S.W.2d 666, 671 (Mo. 1950); State ex rel. Barvick v. Public Service Commission, 606 S.W.2d 474, 476 (Mo. App. 1980). The Commission may not redetermine rates already paid without depriving the utility of its property without due process. State ex rel. Utilities Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41, 58 (Mo. banc 1979), hereinafter referred to as "UCCM."

In Straube, appellants brought an action in equity against respondent, a public utility, to determine the ownership of and recover certain funds received by respondent. One fund represented an amount received by respondent from the Registry of the United States Circuit Court of Appeals of the Eighth Circuit pursuant to its affirmance of a Federal Power Commission rate reduction order. The other fund was an amount representing an alleged excess amount collected by respondent from its customers after the rate reduction order went into effect but prior to the establishment by respondent of an approved revised rate. The Court observed that:

...respondent lawfully came into possession, custody and control of both funds.... Respondent never collected and appellants never paid more than the legally established rate for gas furnished by respondent and appellant's rights were never invaded. (emphasis added).

Id. at 671. The Court held that appellants failed to state a claim upon which relief could be granted. Id. at 672.

The principles articulated in Straube are equally applicable

to the present circumstances. Here, as was the case with Bowling Green Gas Company, utilities are collecting revenues pursuant to lawful rates<sup>2</sup> established by the Commission. Customers are paying no more than the rates that lawfully apply. As such, utilities have a property right in the revenues collected pursuant to those rates. Lightfoot, supra at 353.

Either of Staff's interim tariff proposals would radically alter a utility's right to revenues collected pursuant to a prior Commission order. Were the Commission to adopt Staff's proposal, it would be tantamount to a redetermination of rates already paid; an activity clearly held unconstitutional. The Commission may not order refunds of revenues collected based on an after-the-fact determination of reasonableness. Neither may it employ the fiction of an "interim tariff subject to refund" in order to confiscate indirectly what it could not confiscate directly. Furthermore, Staff's proposal is constitutionally deficient whether or not a rate adjustment is subsequently implemented and a refund ordered. If all or a part of the revenues collected pursuant to tariff are made subject to refund, a utility's property interest has been diminished. In short, it has something substantially less valuable than it had before.<sup>3</sup>

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2. All rates, charges and schedules fixed by the Commission are prima facie lawful and reasonable until found otherwise in a suit brought for that purpose. § 386.270 RSMo 1986.

3. To use an analogy from real property law, a fee simple subject to condition subsequent is a lesser estate than a fee simple absolute.

Despite this undeniable deprivation, Staff suggests that the Commission summarily order an industry wide implementation of interim tariffs superceding all prior tariffs. Staff's suggestion, by its terms, does not contemplate the taking of evidence, the opportunity to be heard or the opportunity to cross examine witnesses prior to the issuance of the Commission's order. It is difficult to imagine a more arbitrary recommendation or one more devoid of the most rudimentary trappings of due process.<sup>4</sup>

For all the foregoing reasons, Staff's interim tariff proposal is constitutionally defective. The Commission should decline to adopt the proposal because it would constitute an act in excess of its jurisdiction.

## II.

THE COMMISSION DOES NOT HAVE THE STATUTORY AUTHORITY TO ORDER PUBLIC UTILITIES TO ADOPT INTERIM TARIFFS SUPERCEDING ALL PRIOR TARIFFS WHICH MAKE CERTAIN REVENUES COLLECTED SUBJECT TO REFUND UPON THE OCCURRENCE OF A SUBSEQUENT EVENT.

It is axiomatic that the Commission is an administrative agency and, as such, it has only those powers conferred by statute either expressly, or by clear implication as necessary to carry out the express grant. UCCM, supra. at 49; State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925,

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4. Due process, by Staff's own admission, is either a standard "file and suspend" rate request or a formal complaint proceeding, either determination being based on all relevant factors. Staff Comments, January 9, 1987, at page 2.

928 (Mo. banc 1958). Although the Public Service Commission law should be liberally construed,

"neither convenience expediency or necessity are proper matters for consideration in the determination of" whether or not an act of the Commission is authorized by statute. (citations omitted). UCCM, at 49.

As acknowledged by the Office of the Public Counsel and Staff, only two procedures are available to the Commission for the purpose of adjusting rates to be charged by public utilities. State ex rel. Jackson County v. Public Service Commission, 532 S.W.2d 20 (Mo. banc 1975). First, a utility may file revised tariffs incorporating proposed increases or decreases in the charge made for a particular service. The Commission may allow the rate to go into effect by declining to take action within thirty (30) days of the filing or it may suspend the effectiveness of the new rates pending a hearing on the lawfulness or reasonableness of the proposed charges. §§393.140(11), 393.150 and 392.230 RSMo 1986. This procedure is commonly known as the "file and suspend" method. Conversely, the Commission may of its own motion initiate a complaint alleging that the rates charged by a utility are unlawful or unreasonable. § 386.390 RSMo 1986. Rates may be revised after a hearing which examines all relevant factors. §§ 392.240 and 393.150 RSMo 1986.

The specificity of the provisions that articulate the procedures to be followed in either a file and suspend rate case or a formal complaint negate the possibility that other procedural alternatives exist. Where the statutes prescribe a

manner in which proceedings before the Commission are to be initiated, that procedure must be followed. State ex rel. Laclede, supra. at 568. The statutory provisions giving the Commission general supervisory power over public utilities (i.e. § 393.130 RSMo 1986) do not give the Commission authority to change the ratemaking scheme created by the legislature. UCCM at 56. The Staff correctly concluded that: "the only procedural alternative available to address the effects of the TRA is to file complaints..." Staff Comments, January 9, 1987 at page 2.

The Court in State ex rel. Laclede, found that the file and suspend statute contained express language of grant empowering the Commission to adopt an abbreviated rate increase procedure, to wit:

The Commission for good cause shown may allow changes [in rates] without requiring the thirty days notice under such conditions as it may prescribe. § 393.140(11) RSMo 1986.

The Court observed that:

The "file and suspend" provisions of the statutory sections quoted above [§ 393.140(11) and § 393.150] lead inexorably to the conclusion that the Commission does have discretionary power to allow rates to go into effect immediately... . 535 S.W.2d at 566.

The Court concluded that the Commission had the authority to order interim rate increases as a necessary incident to its express delegation of power.

We hold that the Commission has the power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirement of utility regulation. (Emphasis added). Id. at 567.

State ex rel. Laclede is to be distinguished from the

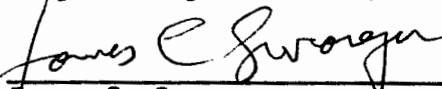


instant circumstances in which the Commission is restricted to formal complaint procedures to effect rate adjustments that it may deem appropriate. As such, the statutory language with respect to file and suspend general rate cases is not applicable, that is, the good cause shown exception to the file and suspend procedure does not apply. No such express grant of authority for the use of an expedited procedure can be found in those statutes specifying the procedure for formal complaints. There being no express grant, there can be no implied power to order the implementation of interim tariffs.

#### CONCLUSION

It is apparent from the foregoing that the Commission is not authorized to order utilities to supercede all prior tariffs with interim tariffs pending the determination of company-specific formal complaints. Neither the instant generic investigatory docket nor anticipated formal complaint cases may serve as the host for interim relief. Thus, as a matter of law, the Commission is not empowered to adopt the Staff's proposals. The Commission should decline to issue an order directing the party utilities to implement interim tariffs.

Respectfully submitted,



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Attorneys for The Empire  
District Electric Company

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing document was served upon all parties of record in the above-captioned proceeding by placing a copy of same in a properly addressed envelope, postage prepaid, and depositing same in the United States mail this 2nd day of March, 1987.

  
James C. Swearingen