

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

In the Matter of the Empire District)	
Electric Company for Authority to)	
File Tariffs Increasing Rates for Electric)	<u>File No. ER-2014-0351</u>
Service Provided to Customers in the)	
Company's Missouri Service Areas)	

CONCURRING OPINION OF COMMISSIONER DANIEL Y. HALL

On June 24, 2015, the Commission issued a Report and Order in this case approving a rate increase for Empire District Electric Company. The Report and Order included approval of a unanimous stipulation that resolved, among other things, the parties' dispute regarding the amount of rate case expense Empire will recover in rates for pursuing and prosecuting its rate increase request.¹ Specifically, the signatories to the stipulation agreed that Empire should be authorized to file tariffs designed to increase its revenues by \$17,125,000 and also that rate case expense was no longer a contested issue.²

The parties do not specify in their agreement what amount of rate case expense will be recovered through the agreed upon revenue requirement.³ However, Empire witness W. Scott Keith testified that the company supports including the entirety of rate

¹ "The *Revised Stipulation and Agreement and List of Issues*, filed on April 8, 2015, is approved and incorporated into this order as if fully set forth herein." *Report and Order*, p. 30. All parties to this case either signed the stipulation or did not oppose it.

² *Revised Stipulation and Agreement and List of Issues*, EFIS No. 181, p. 2 sets the revenue requirement. The document also includes reference as to the remaining contested issues, which do not include rate case expense, and dismisses all witnesses related to rate case expense.

³ Because the parties reached a "blackbox" settlement of the revenue requirement issue, it is not possible to determine the amount of rate case expense to be included in rates and, correspondingly, whether ratepayers are being asked to cover all or just a portion of Empire's rate case expense. As of February 28, 2015, Empire had incurred approximately \$128,536.00 in rate case expense. Sarver Surrebuttal, Ex. 224, p. 3. In its *Statements of Position*, filed March 31, 2015, Staff indicated a two-year normalization of rate case expense, or an annual amount of \$64,251, was an appropriate amount to include in rates, and Staff stated that this number was "consistent with the settled position." EFIS No. 164 p. 4.

case expense in the calculation of Empire's revenue requirement,⁴ and estimated its total rate case expense at the time it filed this rate case to be \$357,000.⁵ It is Empire's position that the company's ratepayers, through the rates they pay for electric service, should be required to pay 100 percent of Empire's prudently incurred rate case expenses. I am not convinced it constitutes good public policy in general, or in this case in specific, to require customers to pay 100 percent of the utility's rate case expense. For that reason, I write separately to express my disagreement with the Commission's Report and Order approving the stipulation to the extent the stipulation is consistent with Empire's position on this issue and relegates all rate case expense to customers.

I acknowledge that, in one sense, rate case expense is like other common operational expenses, such as employee salaries, information technology upgrades, and fuel costs. These are all expenses the utility must incur in order to provide utility service to customers. In order to prosecute a rate case, the utility must incur expenses for lawyers and consultants, and a rate case is the established process under Missouri law by which new just and reasonable rates are set. Accordingly, and because it is indisputable that customers benefit from having just and reasonable rates, it is appropriate for customers to bear some portion of the utility's cost of prosecuting a rate case.

However, rate case expense is also different from most other types of utility operational expenses. First, the rate case process is adversarial in nature, with the utility on one side and its customers on the other. Some utilities have taken issue with that observation, contending that utilities do not view their customers as adversaries. I

⁴ Keith Rebuttal, Ex. 108, pp. 2 – 9.

⁵ Roth Rebuttal, Ex. 308, p. 19.

appreciate that sentiment; I want that to be true. But that is not how it appears from where I sit. During evidentiary hearings, the Office of Public Counsel and other customer organizations often oppose the utilities on virtually every issue presented – the former taking positions that would lower rates, and the latter taking the positions that would result in increased rates. In this case, Public Counsel specifically advocated for rate case expense sharing while the company opposed the idea. In addition, at local public hearings, customers regularly articulate the harmful effect of rising utility rates on their financial affairs and plead with the Commission to take whatever action necessary to mitigate any future rate increase.

Second, unlike other operating expenses, rate case expense produces some direct benefits to the utility, more specifically, to its shareholders, that are not shared with customers. In a typical rate case, as in this one, the utility seeks a higher rate of return than customers are willing to support. While I agree it is absolutely necessary, both legally and from a public policy perspective, to ensure that the utility has the opportunity to recover a reasonable return on its investment, any amount sought over a reasonable rate of return is solely sought for the benefit of shareholders. This stands in contrast to typical operating expenses where there is a direct benefit to ratepayers – safe, adequate and reliable service.

Third, requiring 100 percent of rate case expense to be paid by ratepayers provides the utility with what appears to be an inequitable financial advantage over other participants in the rate case process. Staff and the Office of Public Counsel both operate within tight annual budgets, and the intervener consumer groups must pay their own legal expenses. In contrast, under the current system, the utility prosecutes its rate

case with an unconstrained budget, receiving reimbursement from ratepayers for all of its expenses related thereto. This allows the utility, in some circumstances, to “out-gun” its opponents, investing resources other parties cannot match to engage numerous counsel and consultants, and conduct multiple rounds of depositions and written discovery.

Finally, full reimbursement of all rate case expense does nothing to encourage reasonable levels of cost containment. While utilities insist they carefully scrutinize and manage their costs, and that the prudence review these costs receive is designed to ensure that unnecessary and exorbitant rate case expenses are disallowed, it is indisputable that the Commission has only rarely disallowed even a portion of a utility’s rate case expense as imprudently incurred. This is because, in the context of rate case expense, a true prudence review would be cumbersome, time-consuming, resource intensive, and even impractical.⁶ Simply put, it does not work as well as providing a direct financial incentive to the utility to minimize litigation costs.

Accordingly, I believe rate case expense should be shared by ratepayers and shareholders. Some have noted in past cases that there is no express authority in statute or rule to implement such a sharing mechanism, however, the Commission has the current legal authority to take such action. Under Missouri law, the Commission

⁶ Any after-the-fact review of rate case expense necessarily depends on the utility’s ability to make available detailed, transparent records about costs related to experts and attorneys, which are often considered confidential to some degree. Furthermore, even if records are made available, by the nature of the subject matter, any review of those records is inherently so deferential it can sometimes become a perfunctory exercise. Despite these challenges reviewing rate case expense for prudence, the Commission has disallowed, on rare occasions, portions of rate case expense when certain costs were deemed excessive. See, *In the Matter of Missouri Gas Energy*, Report and Order Case No. GR-2004-0209, 12 Mo. P.S.C. 3d 581, 623 (2004) and *In the Matter of Missouri-American Water Company*, Report and Order, Case No. WR-93-212, 2 Mo. P.S.C. 3d 446, 449 (1993).

must set just and reasonable rates,⁷ and rates that include 100 percent of the utility's rate case expense, for the reasons set forth above, may not be just or reasonable.⁸ Moreover, this Commission has already found rate case expense sharing to be just and reasonable in at least one prior case. In a 1986 decision, *In the Matter of Arkansas Power and Light Company*,⁹ the Commission "adopted Public Counsel's proposed disallowance of one-half of rate case expense." It is also important to note that there are a number of other cases where the Commission acknowledged it had this authority.¹⁰

Some parties in other cases have suggested a workshop would be in order to examine and develop this concept. However, the Commission has already opened a working case precisely on this issue, File No. AW-2011-0330. This case was opened April 7, 2011, over four years ago, and is currently still open. In that case, Staff issued a comprehensive Staff Report, which concludes,

Staff recommends that the Commission consider employing structural incentive measures in rate cases to provide utilities with stronger incentives to reasonably limit their rate case expenses to appropriate and necessary levels. . . . These measures may include . . . sharing of rate case expense."¹¹

⁷ ". . . All charges made or demanded by any . . . electrical corporation . . . shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge . . . is prohibited." Section 393.130.1, RSMo 2000 as currently supplemented.

⁸ Of course, there are rate cases where the utility does not have the means to absorb a portion of rate case expense, and requiring it to do so would ultimately harm customers. In such circumstances, it would appear just and reasonable that rates include the entire amount of rate case expense.

⁹ Report and Order, Case No. ER-85-265, 28 Mo. P.S.C. (N.S.) 435, 447 (1986).

¹⁰ See, *In the Matter of Kansas City Power & Light Company*, Report and Order, Case Nos. EO-85-185 and EO-85-224, 28 Mo. P.S.C. (N.S.) 229, 263 (1986), and *In the Matter of Missouri Gas Energy*, Report and Order, File No. GR-2009-0355, 19 Mo. P.S.C. 3d 245. 303, (2010). Interestingly, and as Public Counsel points out, Missouri is not the only jurisdiction that has considered and even implemented rate case expense sharing. Roth Rebuttal, Ex. 308, pp. 17-18.

¹¹ *Staff's Investigative Report on Rate Case Expense*, Sept. 4, 2013, p. 15. Any party interested in this issue had an opportunity to provide comments in AO-2011-0330, as the Commission order establishing the file provided, "[u]sing this file, any person with an interest in this matter may . . . submit any pertinent responsive comments or documents." *Order Directing Staff to Investigate and Opening a Repository File*,

As noted above, I believe the stipulation is reasonable and should be approved. I appreciate the parties' efforts to reach this agreement that includes a number of other complex issues beyond the rate case expense issue. Going forward, I am heartened by Public Council's pursuit of rate case expense sharing in this case and by both Public Counsel and Staff advocating for rate case expense sharing in the Kansas City Power & Light rate case that is currently pending before this Commission. I am also encouraged by the support some of my fellow Commissioners have expressed for considering a rate case expense sharing mechanism in future cases.


For the forgoing reasons, I concur.

Respectfully submitted,



Daniel Y. Hall
Commissioner

Commissioner Rupp joins this concurring opinion in its entirety.



Scott T. Rupp
Commissioner

Dated this 17th day of July, 2015
at Jefferson City, Missouri