

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 30th day of
November, 2011.

In the Matter of the Application of The Empire District Electric)
Company for the Issuance of an Accounting Authority Order) **File No. EU-2011-0387**
Relating to its Electrical Operations and for a Contingent)
Waiver of the Notice Requirement of 4 CSR 240-4.020(2))

**ORDER APPROVING AND INCORPORATING
UNANIMOUS STIPULATION AND AGREEMENT**

Issue Date: November 30, 2011

Effective Date: December 7, 2011

Background

On June 6, 2011, The Empire District Electric Company ("Empire") filed an application for an Accounting Authority Order ("AAO") that would allow Empire to undertake certain accounting procedures in connection with its electrical operations in relation to the damage caused by the May 22, 2011 tornado that struck the City of Joplin, Missouri. The Commission directed notice and established an intervention deadline. Praxair, Inc. and Explorer Pipeline Company intervened. On November 15, 2011, following extensive negotiations, the parties filed a Stipulation and Agreement ("Agreement") purporting to resolve all issues in this matter. All of the parties are signatories to the Agreement and no party has requested a hearing in this matter.

The Agreement

In addition to a contingent waiver of rights in the Agreement, the Signatories request the Commission to enter an order that includes the following:

- a. Authorizes Empire to defer actual incremental Operations & Maintenance expenses associated with repair, restoration, and rebuild activities associated with the May 22, 2011, tornado, and depreciation and carrying charges equal to its ongoing Allowance for Funds Used During Construction rates associated with tornado-related capital expenditures, to Account 182.3, Other Regulatory Assets. This deferral shall not include any difference in charges applicable under Empire's currently effective tariff and any modified tariff that reduces or limits the charges applicable to its customers or developers in connection with restoring or establishing service.
- b. Nothing in the Commission's order shall be considered a finding by the Commission of the reasonableness of the costs and/or expenditures deferred, and the Commission reserves the right to consider the ratemaking treatment to be afforded all deferred costs and/or expenditures, including the recovery of carrying costs, if any.
- c. Any insurance claim proceeds or government payments or credits applicable to incremental operation and maintenance expense or capital expenditures shall be used to offset the total amount of costs to be deferred.
- d. If Empire has not filed an electric general rate case in Missouri by June 1, 2013, then Empire shall write off without rate recovery any deferrals it has already booked.
- e. If Empire files an electric general rate case in Missouri by June 1, 2013, then Empire shall ratably amortize to Account 182.3 over a ten-year (120-month) period any deferrals it has already booked, beginning on the earlier of: 1) the effective date of new rates implemented in its next general rate increase case or rate complaint case; or 2) June 1, 2013.
- f. Empire shall maintain detailed supporting records, work papers, invoices and other documents to support the amount of costs deferred under this AAO, including any related deferred taxes recorded as a result of the cost deferral. Such records shall include controls in place to ensure all expenditures were reasonable and necessary, detailing food and lodging costs, labor and material costs, procedures and verification for expense versus capitalization determinations, and determination of incremental levels of such costs versus normal ongoing levels of costs. Such records shall be made available for review by Staff, Public Counsel, and other intervenors, pursuant to 4 CSR 240-2.085 and Section 386.480.

Empire also agreed to work with parties as the end of the amortization period approaches to develop a mechanism that ensures Empire does not over or under recover the deferred

amounts. And finally, Empire filed a pleading in this docket withdrawing, without prejudice, that portion of its application that seeks authority to defer the lost fixed cost components of Empire's rates.

Analysis and Decision

Missouri courts have recognized the Commission's regulatory authority to grant a form of relief to a utility in the form of an AAO "which allows the utility to defer and capitalize certain expenses until the time it files its next rate case."¹ "The AAO technique protects the utility from earnings shortfalls and softens the blow which results from extraordinary construction programs."² "However, AAOs are not a guarantee of an ultimate recovery of a certain amount by the utility."³ The AAO "simply allows for certain costs to be separately accounted for *possible* future recovery in a future ratemaking proceeding."⁴ "This is not retroactive ratemaking, because the past rates are not being changed so that more money can be collected from services that have already been provided; instead, the past costs are being considered to set rates to be charged in the future."⁵ Although the courts have recognized the Commission's authority to authorize an AAO in extraordinary and unusual

¹ *State ex rel. Aquila, Inc. v. Public Service Comm'n of State*, 326 S.W.3d 20, 27 (Mo. App. 2010). See also Section 393.140, RSMo 2000. Additionally, Commission Rule 4 CSR 240-20.030(1) requires electric utilities to keep all accounts in conformity with the Uniform System of Accounts prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act. However, section (4) of the rule provides that in prescribing this system of accounts the Commission is not committing itself to the approval or acceptance of any item set out in any account for the purpose of fixing rates or in determining any other matter.

² *Id.*

³ *Id.*

⁴ *State ex rel. Office of Public Counsel v. Missouri Public Service Comm'n*, 301 S.W.3d 556, 570 (Mo. App. W.D. 2009).

⁵ *Id.*

circumstances, there is nothing in the Public Service Commission Law or the Commission's regulations that would limit the grant of an AAO to any particular set of circumstances.⁶

The Commission has discretion in prescribing accounting methods and forms of accounts, records and memorandum kept by an electrical corporation without conducting a hearing.⁷ Nevertheless, the Commission issued notice in this matter and allowed interested entities to intervene and request a hearing. No hearing was requested.⁸ Instead, the parties filed the unanimous Agreement. The Agreement waives any procedural requirements that would otherwise be necessary before final decision.⁹ Also, because the settlement disposes of this action, the Commission need not separately state its findings of fact.¹⁰

Based on the Commission's independent and impartial review of the unopposed Agreement, the Commission finds that the Agreement is consistent with the public interest and shall approve it. Therefore, the Commission incorporates the terms of the Agreement into this order.

⁶ Section 393.140, RSMo 2000. Extraordinary has been defined as meaning of a nonrecurring nature, and unusual has been defined as meaning a substantial cost. *Missouri Gas Energy v. Public Service Comm'n*, 978 S.W.2d 434, 437 (Mo. App. 1998); *State ex rel. Office of Public Counsel v. Public Service Comm'n*, 858 S.W.2d 806, 811 (Mo. App. 1993).

⁷ The courts have not decided the issue of whether Section 393.140(4) (which does not require a hearing) or Section 393.140(8) (which does require a hearing) controls the grant of an AAO. *State ex rel. Public Counsel v. Public Service Commission*, 858 S.W. 2d 806, 809-810 (Mo. App. 1993). The Commission's position is that no hearing is required. *Id.*

⁸ The term "hearing" presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... 'Hearing' involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with 'opportunity to be heard'. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Comm'n of State of Mo.*, 776 S.W.2d 494, 495 -496 (Mo. App. 1989). The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence. *Id.*

⁹ Section 536.060, RSMo 2000.

THE COMMISSION ORDERS THAT:

1. The provisions of the Unanimous Stipulation and Agreement filed are approved and incorporated into this order as if fully set forth. The Signatories shall comply with the terms of the Stipulation and Agreement. A copy of the Stipulation and Agreement is attached to this order as Appendix A.
2. This order shall become effective on December 7, 2011.
3. This file shall be closed on December 8, 2011.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Jarrett, and Kenney, CC., concur;
Davis, C., absent.

Stearley, Deputy Chief Regulatory Law Judge,

¹⁰ Section 536.090, RSMo 2000.