MISSOURI PUBLIC SERVICE COMMISSION

STAFF INVESTIGATION REPORT

INVESTIGATION INTO THE EMPIRE DISTRICT ELECTRIC COMPANY'S CUSTOM COMMERCIAL AND INDUSTRIAL REBATE PROGRAM

FILE NO. EW-2019-0351

MAY 24, 2019

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I. Executive Summary

On May 10, 2019, a Notice of New Proceeding and Order Directing Filing ("Notice") was issued in File No. EW-2019-0351. The Notice states that on April 2, 2019, Commissioner Rupp was informed that The Empire District Electric Company ("Empire") had denied a customer's application under Empire's Custom Commercial and Industrial Rebate Program ("C&I Custom Rebate Program") on the basis that the customer had purchased and/or installed LED light fixtures prior to applying for the C&I Custom Rebate Program rebate. The Notice directs the Staff of the Missouri Public Service Commission ("Staff") to conduct an investigation of the C&I Custom Rebate Program and file a report of its investigation by May 24, 2019.

On April 8, 2019, Staff became aware of a situation similar to that referenced in the Notice. Staff conducted an informal investigation related to the concerns raised by the customer and also spoke with the customer in question. It appears from that conversation that at least part of the concern with the C&I Custom Rebate Program preapproval process is related to the costs a customer could incur prior to application, only to have the application rejected. Staff informed the customer that we would be reviewing the preapproval process as part of the next rate case, a Missouri Energy Efficiency Investment Act ("MEEIA") application, or another applicable case.

In response to the Notice, Staff completed an investigation of Empire's C&I Custom Rebate Program and provides this Report summarizing its investigation and responding to the specific questions outlined in the Notice.

II. Creation and Administration of Empire's C&I Custom Rebate Program

Program History

Based on Staff's research, Empire implemented and administered the Missouri Commercial and Industrial Facility Rebate Program ("C&I Facility Rebate Program") effective May 7, 2007, which was the first time Empire offered custom rebates to customers. While there was no specific preapproval language in the tariff, it appears to Staff that preapproval was implied by the language, "The [C&I Facility Rebate Program] rebates will be individually determined and analyzed to ensure that the **proposed measure** passes the Societal Benefit/Cost Test at a test result of 1.05 or higher." (Emphasis added.)

This program remained in place with the same program name and pre-approval language until June 1, 2017, when the program name changed to the Custom Commercial and Industrial Rebate Program and more detail was added to the tariff including specific preapproval language. One section of the tariff states that, "Prior to the purchase or installation of equipment, each potential rebate will be individually determined and analyzed to ensure it passes the cost-benefit analysis." In another section of the tariff it states, "Projects must be preapproved prior to purchase and/or installation of equipment. Applications made after equipment has been purchased or installed will not be eligible." Empire was, and is still, the administrator of this program.

Application process, timeline for preapproval, post-approval activities & rebate payments

Based on email correspondence received from Empire in response to informal Staff discovery, the following is a step-by-step process timeline from the point the customer submits an application to the point where Empire processes the rebate.

1. Applications are submitted to either Applied Energy Group ("AEG") – Empire's consultant for processing C&I Custom Rebate Program applications – or to Empire directly, to be submitted to AEG.
2. If the application is for lighting, and does not include a lighting inventory template (attached as Exhibit A), AEG requests the customer complete one.
3. AEG requests lighting specs to verify wattages included on the lighting inventory template.
4. AEG conducts a desk review to estimate first-year kWh savings, and calculates the rebate based on the lesser of the following:
    - $0.10 per first year kWh savings
    - Fifty (50) percent of the incremental cost; and
    - $50,000 per project or $100,000 per customer per year
5. AEG e-mails a commitment letter to the contractor and/or customer, letting them know that the customer is free to go forward with purchase and installation of the equipment. Customers have 6 months to complete the project or request an extension.
6. Upon completion of the project, the customer/contractor sends the final invoices to Empire and AEG to verify purchase or installation.
7. AEG verifies that the equipment installed and estimated costs are in line with those on the scope of work on the application.
8. When the purchase and installation has been verified by AEG, AEG notifies Empire to process the payment.
9. Empire processes the payment, and mails the check with a letter saying thank you for participating.

Program Budget

For the C&I Custom Rebate Program that became effective June 1, 2017, Program Year 1 ("PY 1")[1] had a budget of $768, 000 and Program Year 2 ("PY 2")[2] has a budget of $800,000.

The C&I Custom Rebate Program has been a popular program for Empire and the annual budgets have been fully committed by December 2017 and September 2018, respectively. Once a budget is fully committed, Empire places the letter found in Exhibit B on its website.

III. Comparison to other electric utility C&I Program Requirements

Preapproval for a C&I custom rebate program is a common practice among the Missouri investor-owned electric utilities. Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") has had a C&I Custom Rebate Program[3] in all three of its MEEIA cycles.[4] The pre-approval language in Ameren Missouri's tariff for its C&I custom rebate program for all three MEEIA cycles reads, "Prior to purchasing and installing Measures(s), Applicant must submit a Custom Incentive Application form that provides data about the applicable facility and potential Measures(s)." Ameren Missouri's tariff goes on to state that, "The Company or Program Administrator will perform a desk review of the Custom Incentive Application to determine eligibility, Measure Benefit Cost Test results, estimated energy savings and Custom Incentive amount for each Measure."[5]

[1] June 1, 2017 – May 31, 2018
[2] June 1, 2018 – May 31, 2019
[3] In MEEIA Cycles 1 and 2 this program was called the Custom Incentive Program and in MEEIA Cycle 3 it is called the Business Custom Incentive Program.
[4] MEEIA Cycle 1 was 2013-2015, MEEIA Cycle 2 was 2016-2018, and MEEIA Cycle 3 is for 2019-2021 with the exception of the low income programs which is for 2019-2024.
[5] This is the tariff language for MEEIA Cycles 1 and 2, with the only differences in the MEEIA Cycle 3 tariff language being the removal of the words "Company or" and changing Benefit Cost to Benefit/Cost.

Kansas City Power & Light Company ("KCPL") has had a C&I custom rebate program[6] in both of its MEEIA cycles.[7] The pre-approval language in KCPL's tariff for its C&I custom rebate program reads, "A "Custom Incentive" is a direct payment or bill credit to a participant for installation of Measures that are part of projects that have been pre-approved by the Program Administrator." It further states, "Projects must be pre-approved by the Program Administrator before the project start date to be eligible for a rebate."

KCP&L Greater Missouri Operations Company ("GMO") has had a C&I custom rebate program[8] in both of its MEEIA cycles.[9] GMO's MEEIA Cycle 1 tariff was not clear on the need for pre-approval for its C&I custom rebate program. However, it is Staff's understanding that preapproval was a requirement for GMO's C&I custom rebate program in MEEIA Cycle 1. In GMO's MEEIA Cycle 2 tariff, the same preapproval language as KCPL's MEEIA Cycle 1 and 2 tariffs was included.

IV. The rationale for Empire's C&I Program provision requiring that "[p]rojects must be pre-approved prior to purchase and/or installation of equipment. Applications made after equipment has been purchased or installed will not be eligible."

Staff discussed with Empire its rationale for the preapproval provision in the C&I Custom Rebate Program. Part of Empire's rationale for the provision requiring preapproval of C&I Custom Rebate Program projects is so Applied Energy Group can perform a desk review prior to the customer purchase and installation of equipment. This is crucial for AEG to determine: 1) if the equipment qualifies for a rebate; 2) the projected annual energy and demand savings based on

[6] KCPL's C&I custom rebate program is called the Business Energy Efficiency Rebates – Custom.
[7] MEEIA Cycle 1 was 2014-2015 and MEEIA Cycle 2 is for 2016-2019.
[8] In MEEIA Cycle 1 this program was called the Commercial and Industrial Custom Rebate Program and in MEEIA Cycle 2 this program is called the Business Energy Efficiency Rebates – Custom.
[9] MEEIA Cycle 1 was 2013-2015 and MEEIA Cycle 2 is for 2016-2019.

the equipment being replaced compared to the equipment being installed; 3) the customer's payback period; 4) cost-effectiveness of the project; and 5) the amount of the rebate.

Another reason for Empire requiring preapproval of C&I Custom Rebate Program projects is to reduce the potential for free-ridership. Free-ridership occurs when a customer receives a rebate through an energy efficiency program for installing an energy efficient measure even though the customer would have installed the energy efficient measure absent the program. Preapproval does not eliminate free-ridership, but does add another level to better ensure the customer would not have installed the equipment absent the program, thus allowing the rebates to incent energy efficiency in areas where it would not otherwise happen and to ensure all customers are not funding rebates for customers that would have installed the equipment without the rebate. The customer has most likely not committed any cost to the project at this point, giving at least an indication that the rebate is influencing the customer's decision to install the energy efficient equipment. If a customer applies for a rebate after the purchase or installation of energy efficient equipment, they have already committed the cost to this project giving much less of an indication that the rebate was an influencing factor in the purchase or installation.

The most important rationale Empire expressed for preapproval of a C&I Custom Rebate Program project is so the customer knows what they are getting up-front in the beginning of the process. It allows Empire and the customer to be in alignment as to what is expected from both parties before committing to the project. The customer is committing to Empire that it will purchase and install energy efficient equipment to achieve a certain level of savings. Empire is committing to the customer a specific rebate amount. This part is important. For example, a customer can find out from Empire through the preapproval process that they will receive a

$15,000 rebate to help offset a $30,000 upfront cost as opposed to spending $30,000 only to find out after-the-fact that the rebate will only be $5,000.

V. The number of C&I Program applications rejected by Empire because a customer did not receive preapproval prior to purchasing and/or installing of otherwise eligible equipment since rates went into effect in Empire's last rate case.

Staff corresponded with Empire via email in regards to the request in the notice for the number of C&I Custom Rebate Program applications rejected by Empire, since the rates went into effect in Empire's last rate case, because a customer did not receive preapproval prior to purchasing and/or installing otherwise eligible equipment. Empire stated in its response, ""Rejections' before an application is filed, like happened here,[10] are not tracked or counted. In situations like this, there's often just a phone call involved. It's my [Empire Legal Counsel] understanding that we can provide the number of cancelled applications, but without the break down between voluntary withdrawals, disqualified customers, and those where the six-month window expired.[11]"

VI. The number of approved C&I Program applications and the average rebate amount received per customer per program year since rates went into effect in Empire's last rate case.

Based on information provided by Empire, there were approximately 106 C&I Custom Rebate Program applications approved in PY 1 and approximately 85 C&I Custom Rebate Program applications approved in PY 2. The average rebate in PY 1 was almost $5,300 and the average rebate in PY 2 was a little more than $8,900.

[10] On Tuesday, April 2, 2019, when Commissioner Rupp was informed that Empire had denied a customer's application under its C&I Custom Rebate Program on the basis that the customer had purchased and/or installed LED light fixtures prior to applying for the Custom C&I Rebate Program.
[11] When a customer is pre-approved for a C&I Custom Rebate Program project, the customer has six months to complete the project and provide complete documentation of the project's completion.

VII. The legal basis, if any, for the Commission to grant a waiver of the C&I Program preapproval provision or amend Empire's tariff requiring pre-approval as a term of the C&I Program.

State ex rel. St. Louis County Gas Co. v. Public Service Commission, 315 Mo. 312 (Mo. Sup. Ct., Division 1, 1926) was an appeal by the Commission from a circuit court judgment reversing the Commission's order, in which the "sole question presented for decision on the facts of this case is whether the commission may *in specific instances* compel a gas corporation to make extensions and furnish service in violation of the rules [*i.e.,* tariffs] relating to rates and charges which are on file with it and have its approval, express or implied, and which are applicable to the public as a whole."[12] (Emphasis added) The court stated the applicable law was in subdivision 12 of section 10478 of the Revised Statutes of 1919, which is now (in large part) subdivision (11) of section 393.140, RSMo. 393.140(11), RSMo., currently provides as follows:

> The commission shall:
>
> (11) Have power to *require every* gas corporation, *electrical corporation*, water corporation, and sewer corporation *to file with the commission and to print and keep open to public inspection schedules showing all rates and charges* made, established or enforced or to be charged or enforced, all forms of contract or agreement *and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed* by such gas corporation, electrical corporation, water corporation, or sewer corporation; but this subdivision shall not apply to state, municipal or federal contracts. *Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission,* which shall plainly state the changes proposed to be made in the schedule then in force and the time when the

[12] *State ex rel. St. Louis County Gas Co. v. Public Service Commission,* 315 Mo. 312, 316 (Mo. Sup. Ct., Division 1, 1926)

> change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; *nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances.* The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time. (Emphasis added)

Applying what it deemed to be the applicable law, the court stated that "[a] schedule of rates and charges filed and published in accordance with the foregoing provisions acquires the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the commission. . . . *If such a schedule is to be accorded the force and effect of law, it is binding, not only upon the utility and the public, but upon the Public Service Commission as well.*"[13] (Emphasis added)

The court further stated that the general purpose of the statute quoted above is to compel the utility to furnish service to all inhabitants of the area it professes to serve at reasonable rates

[13] *State ex rel. St. Louis County Gas Co. v. Public Service Commission*, 315 Mo. 312, 317 (Mo. Sup. Ct., Division 1, 1926). A tariff has the force and effect of law and is binding on the utility, the public and the PSC. This is the "Filed Rate Doctrine" or "Filed Tariff Doctrine." "As developed for purposes of the Federal Power Act, the 'filed rate' doctrine has its genesis in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-252, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951). There, this Court examined the reach of ratemakings by FERC's predecessor, the Federal Power Commission (FPC). * * * [M]any state courts have applied the filed rate doctrine of *Montana-Dakota* to decisions of state utility commissions and state courts that concern matters addressed in FERC ratemakings." *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 962, 964, 106 S.Ct. 2349, 2354-55, 2356, 90 L.Ed.2d 943, ___ (1986). Missouri courts have uniformly applied the Filed Rate Doctrine to decisions of the PSC, *see, e.g., State ex rel. AG Processing, Inc. v. Public Service Commission*, 311 S.W.3d 361 (Mo. App., W.D. 2010); *Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568 (Mo. App., E.D. 1997).

and without discrimination, and quoted what is now subdivision (5) of section 393.140, RSMo., as prescribing the "methods by which these results are to be obtained."[14] 393.140(5), RSMo., provides that

> The commission shall:
>
> (5) Examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. *Whenever the commission shall be of the opinion,* ***after a hearing had upon its own motion*** *or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe* the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and *the just and reasonable acts and regulations to be done and observed*; and whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaints, that the property, equipment or appliances of any such person or corporation are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters. (Emphasis added)

The court concluded that the utility's rules and regulations in question were integral parts of its schedule of rates and charges; "[i]f they are unjust and unreasonable, the commission, after a hearing, as just referred to, may order the schedule modified in respect to them. *But it cannot set them aside as to certain individuals and maintain them in force as to the public generally*."[15] (Emphasis added)

Just a few years later the court was presented with another case involving a utility's extension tariff, but this tariff contained what the court referred to as an "exception clause" which

[14] *State ex rel. St. Louis County Gas Co. v. Public Service Commission*, 315 Mo. 312, 317 (Mo. Sup. Ct., Division 1, 1926).
[15] *Id.* at 318.

provided that "[i]n exceptional cases, where extensions are requested under conditions which may appear to warrant departure from the above rules, the cost of such extensions, if requested and desired by the company, shall be borne as may be approved by the Public Service Commission of Missouri." *State ex rel. Kennedy v. Public Service Commission*, 42 S.W.2d 349, 350 (Mo. Sup. Ct., Division 2, 1931). The court stated "that provision was designed only to afford the possibility of granting relief where, because of exceptional conditions, there may be urgent need for such relief and it may justly be granted. *Without some such provision in the rule the commission could not authorize the company to make an exception in the application of its approved rule* [citing the *St. Louis County Gas* discussed above]." *State ex rel. Kennedy v. Public Service Commission*, 42 S.W.2d 349, 353 (Mo. Sup. Ct., Division 2, 1931) (Emphasis added).

In the present situation involving Empire, Empire's Custom C&I Rebate Program tariff does not contain language permitting "waivers" or "exceptions." Therefore, based on the foregoing Missouri Supreme Court analysis of the applicable statutes (*i.e.*, the Filed Tariff Doctrine analysis), the approved tariff providing for preapproval as a term of the program (which tariff has the force and effect of law) is binding and cannot be waived by the Commission. However, as set forth in section 393.140(5), RSMo., and recognized by the court in *St. Louis County Gas*, if tariffs are unjust and unreasonable the Commission may order them to be modified *after a hearing* had upon the Commission's own motion. Such a proceeding would obviously necessitate the procedural formalities normally afforded a hearing.

VIII. Any policy considerations the Commission should consider in deciding whether to grant a waiver of the C&I Program preapproval provision or amend Empire's tariff requiring pre-approval as a term of the C&I Program.

Should the Commission determine it has the legal authority to grant a waiver of or amend the C&I Custom Rebate Program preapproval provision, Staff cautions against such an approach for policy reasons. First, Staff is concerned with the Commission unilaterally waiving or modifying a provision of a tariff absent a specific request from Empire, Staff or another interested stakeholder or party. Further, any waiver should only be considered after opportunity for intervention and hearing so the Commission has the opportunity to consider relevant factors related to the request. Second, Staff is concerned with the Commission waiving or modifying a provision such as the C&I Custom Rebate Program preapproval process for Empire when Ameren Missouri, KCPL and GMO all have similar requirements. Finally, as explained above, the preapproval process is designed, in part, to help the companies manage the incentive or rebate budgets. As customers receive preapproval for their C&I projects, funds are committed. If a customer completes a project without obtaining preapproval, then reaches out to the utility for an incentive or a rebate, funds that were previously committed may no longer be available for entities that obtained preapproval for projects. Similarly, if no projects are subject to preapproval, customers will likely complete projects, only to be told after the fact that funding is expended.

More specific to the current situation, making changes to a C&I Custom Rebate Program would require a consideration of the approved budget and incentive structures. In Staff's opinion, such financial considerations should only be modified in the context of a general rate proceeding or a MEEIA or similar filing before the Commission. Staff commits to reviewing the preapproval process in a future appropriate Empire proceeding before the Commission.