

**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) Case No. ER-2018-0366
Rates of The Empire District Electric Company)

EMPIRE’S STATEMENT OF POSITIONS

COMES NOW The Empire District Electric Company (“Empire” or “Company”), by and through counsel, and for its Statement of Positions,¹ respectfully states as follows to the Missouri Public Service Commission (“Commission”):

Issue 1.² 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 (“TCJA”) a. If yes, what should be the amount and the timing of such rate reduction?

EMPIRE’S RESPONSE: Yes, Empire’s rates should be adjusted prospectively, with October 1, 2018, as the effective date of the \$17,837,022 annual rate reduction, as set forth in the Non-Unanimous Stipulation and Agreement executed and filed herein and in Case No. ER-2018-0228 on July 17, 2018 (the “Tax Stipulation”), by Empire, the Staff of the Commission (“Staff”), and the City of Joplin, Missouri (“Joplin”).

Empire’s Motion remains pending before the Commission. Empire’s Motion, as well as the inapplicability of RSMo. §393.137 to Empire, will be discussed in response to Issue No. 4. In the event the Commission grants Empire’s Motion, approval and adoption of the provisions of the Tax Stipulation would be an appropriate, lawful, and reasonable resolution of Case No. ER-2018-0228. In the event the Commission denies Empire’s Motion, good cause exists pursuant to RSMo.

¹ Empire filed a Motion to Dismiss or for Summary Determination (“Empire’s Motion”) in this case and is submitting this Statement of Positions subject to and without waiving its position that this case should be dismissed or that summary determination should be granted in favor of Empire on the basis that the entirety of RSMo. §393.137 is inapplicable to Empire and that the Commission lacks authority or jurisdiction to proceed in this matter.

² Empire’s Statement of Positions uses the List of Issues contained in the “List of Issues, Order of Witnesses, Order of Cross-Examination, and Order of Opening Statements” filed by Staff on behalf of Staff, Empire, the Midwest Energy Consumers Group, and Renew Missouri. A separate List of Issues was also filed by OPC. Empire’s response to Staff Issue No. 1 also addresses OPC Issue No. 3.

§393.137.4, and approval and adoption of the provisions of the Tax Stipulation would be an appropriate, lawful, and reasonable resolution of Case Nos. ER-2018-0366 and ER-2018-0228. The good cause requirements of and Commission discretion afforded by RSMo. §393.137.4 will also be discussed in more detail below.

Empire's Testimony:

Direct Testimony of Charlotte North, pp. 3-4

Staff's Testimony:

Rebuttal Testimony of Mark Oligschlaeger, pp. 4-5

Issue 2.³ 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? a. If yes, what is the correct balance of protected excess ADIT as of 12/31/2017 to be subject to amortization? b. If yes, what is the appropriate amortization period for protected excess ADIT?

EMPIRE'S RESPONSE: Yes, Empire's rates should be adjusted prospectively to reflect a flow-back of excess ADIT to customers due to the TCJA, but it should not be done at this time. Pursuant to the Tax Stipulation, Empire should be directed to 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%.

The calculation of the regulatory liability of excess ADIT, both protected and unprotected, should begin as of January 1, 2018 (technically, December 31, 2017).

At this time, it is believed Empire will be able to use the Average Rate Assumption Method ("ARAM") as a method for computing and normalizing excess ADIT, but there is still uncertainty regarding the determinations of "protected" versus "unprotected." Resolution of excess ADIT quantification issues should be left for resolution in Empire's next general rate case. The deferral

³ Empire's response to Staff Issue No. 2 also addresses OPC Issue No. 4.

provided for in the Tax Stipulation will ensure that Empire's customers receive full reimbursement.

Empire's Testimony:

Direct Testimony of Charlotte North, p. 4

Staff's Testimony:

Rebuttal Testimony of Mark Oligschlaeger, pp. 5-6

Issue 3.⁴ Should Empire District's rates be adjusted prospectively to reflect a flow-back of "unprotected" excess ADIT to customers due to the TCJA? a. If yes, what is the correct balance of unprotected excess ADIT as of 12/31/2017 to be subject to amortization? b. If yes, what is the appropriate amortization period for unprotected excess ADIT?

EMPIRE'S RESPONSE: Yes, but not at this time. Please refer to Empire's response regarding Issue No. 2. The arguments and testimony references are identical for "protected" and "unprotected" ADIT flow-back.

Issue 4.⁵ 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?

EMPIRE'S RESPONSE: No. This issue stems from RSMo. §393.137.3. The entirety of §393.137, however, 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 the effective date of this section."⁶ Empire was the subject of a general rate proceeding on June 1, 2018, and §393.137 took effect on June 1, 2018. There can be no genuine dispute that Case No. ER-2018-0228 is a "general rate proceeding" within the meaning of the statute.

When the Commission closed its general working docket regarding the TCJA, Staff filed a "Motion to Open Rate Case and to Require Company to Show Cause." Staff stated the following as authority for its Motion (emphasis added):

⁴ Empire's response to Staff Issue No. 3 also addresses OPC Issue No. 5.

⁵ Empire's response to Staff Issue No. 4 also addresses OPC Issue Nos. 1, 2, and 6.

⁶ RSMo. 393.137.1 (emphasis added).

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.

On February 21, 2018, the Commission issued its *Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why Its Rates Should Not be Adjusted* (the “Rate Case Order”) in Case No. ER-2018-0228, *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*. The Commission’s Rate Case Order noted that Staff asked the Commission “to open a rate case” because “Empire’s existing rate schedules may no longer be just and reasonable.”

Only the Office of the Public Counsel (“OPC”) filed a response to Empire’s Motion, and OPC’s only argument that Case No. ER-2018-0228 is not a “general rate proceeding” is that the Commission did not intend to consider all relevant factors in that case when establishing new rates for Empire. Essentially, OPC’s argument is that the Commission intended to violate the statutory requirement that the Commission consider all relevant factors in setting rates. It is unreasonable to rely on an anticipated unlawful action on the part of the Commission as a basis for denying that Case No. ER-2018-0228 is a “general rate proceeding” within the meaning of §393.137.

In the event the Commission denies Empire’s Motion and determines that §393.137 is applicable to Empire, the Commission still need not order that the financial impact of the TCJA corporate income tax rate reduction from 35% to 21% be deferred by Empire from January 1, 2018 forward to the date customer rates are adjusted to reflect this impact (§393.137.3). This is because §393.137.4 provides the Commission with discretion.

As noted, the first hurdle to the applicability of the new law is the absence of a rate case pending before the Commission on June 1, 2018. Next, there cannot have already been an adjustment to reflect the effects of the Act. Also, §393.137.4 states, in part, as follows:

Upon good cause shown by the electrical corporation, the commission may, as an alternative to requiring a one-time change and deferral under subsection 2 of this section, allow a deferral, in whole or in part, of such federal act's financial impacts to a regulatory asset starting January 1, 2018, through the effective date of new rates in such electrical corporation's next general rate proceeding. . . .

Section 393.137 did not replace the Commission's discretion to be exercised in the setting of just and reasonable rates.

"Good cause" is not defined in the statute and is not defined in the Commission's rules. The courts and this Commission, however, have defined good cause as "showing a 'legally sufficient ground or reason' under the circumstances. Good cause means a good faith request for reasonable relief. To constitute good cause, the reason 'must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical, and good faith is an essential element.'"⁷

First, the customer benefits of the Tax Stipulation are sufficient "good cause" under §393.137.4. Second, the potential disparity of treatment of the various Missouri utilities constitutes the requisite "good cause." There is no rational basis to take action against Empire under §393.137.3, thereby creating substantial uncertainty regarding Empire's earnings, while allowing the majority of Missouri's regulated utilities to address the impact of the TCJA on only a going-forward basis.

In the event the Commission grants Empire's Motion, approval and adoption of the provisions of the Tax Stipulation would be an appropriate, lawful, and reasonable resolution of Case No. ER-2018-0228. In the event the Commission denies Empire's Motion, good cause exists

⁷ *In the Matter of the Union Electric Company d/b/a Ameren Missouri's Voluntary Green Program*, Order Regarding Motion to Intervene issued March 6, 2013 (internal citations omitted) (emphasis removed).

pursuant to RSMo. §393.137.4, and approval and adoption of the provisions of the Tax Stipulation would be an appropriate, lawful, and reasonable resolution of Case Nos. ER-2018-0366 and ER-2018-0228.

Empire's Testimony:

Direct Testimony of Charlotte North, pp. 2-3

Direct Testimony of Christopher Krygier, pp. 2-6

Staff's Testimony:

Rebuttal Testimony of Mark Oligschlaeger, pp. 2-8

Issue 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?

EMPIRE'S RESPONSE: Yes. Pursuant to the Tax Stipulation, Empire should be directed to 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%. The calculation of the regulatory liability of excess ADIT, both protected and unprotected, should begin as of January 1, 2018 (technically, December 31, 2017).

Empire's Testimony:

Direct Testimony of Charlotte North, p. 4

Staff's Testimony:

Rebuttal Testimony of Mark Oligschlaeger, pp. 5-6

Issue 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?

EMPIRE'S RESPONSE: Yes. Please refer to Empire's response regarding Issue No. 5. The arguments and testimony references are identical for "protected" and "unprotected" ADIT flow-back.

Issue 7.⁸ What modifications should be made to Empire's tariff to implement the revenue requirement reduction?

⁸ Empire's response to Issue No. 7 also addresses OPC Issue No. 7.

EMPIRE’S RESPONSE: Appendix A to the Tax Stipulation displays the appropriate annual rate reduction, along with the revised annual revenue requirement and the allocation of the reduced revenue requirement to the individual rate classes. For the remaining rate design issue and tariff sheet changes, Empire does not object to Staff’s proposal as set forth on page two, line 17 through page three, line 5 of the Rebuttal Testimony of Sarah Lange.

Staff’s Testimony:

Rebuttal Testimony of Sarah Lange, pp. 2-3

WHEREFORE, Empire submits this Statement of Positions, requests an order of the Commission granting Empire’s Motion, and requests an order of the Commission approving the Tax Stipulation. Empire requests such further relief as is just and proper under the circumstances.

Respectfully submitted,

Brydon, Swearngen & England, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was filed in EFIS on this 17th day of July, 2018, with notice of the same being sent to all counsel of record.

/s/ Diana C. Carter