

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

In the matter of The Empire District)
Electric Company of Joplin, Missouri)
for Authority to File Tariffs Increasing)
Rates for Electric Service Provided to)
Customers in the Missouri Service)
Area of the Company.)

File No. ER-2012-0345

STAFF’S RESPONSE TO EMPIRE’S SUPPLEMENTAL BRIEF

COMES NOW the Staff (“Staff”) of the Missouri Public Service Commission (“Commission”), and for its *Response To Empire’s Supplemental Brief* states as follows:

1. Despite the undisputed fact that the Commission has considered and rejected application of the “just and reasonable” standard to interim rate schedules after those schedules have been suspended,¹ Empire has taken another opportunity to argue that the Commission should do so here. This time, Empire has taken an improper occasion to do so.

2. As discussed in the initial and reply briefs of Staff and other parties, while Empire urges the Commission to use a “just and reasonable” standard to evaluate its emergency interim rate increase request, as discussed below, Empire did not present

¹ See the *Concurrence of Commissioner Jeff Davis to the “Order Further Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing,” and Dissent Regarding Procedure and Standard*, filed October 19, 2009 in Case No. ER-2010-0036. While in that concurrence/dissent Commissioner Davis did state his belief that the act of tariff suspension transitioned the applicable standard for interim rates from “financial emergency or near emergency,” to “just and reasonable,” two things are conspicuously absent from that concurrence/dissent. The first, is discussion of what factors Commissioner Davis would have found to be relevant, as application of the “just and reasonable” standard requires consideration of “all relevant factors.” The second is discussion from Commissioner Davis’ of what would constitute justness and reasonableness in light of the extraordinary relief requested. Regardless of whether the concurrence/dissent had included these items, the interpretation advanced by Commissioner Davis, and resurrected here by Empire, failed to sway the majority of the Commission.

evidence supporting its request for an emergency interim rate increase of even a *prima facie* case of **its** positions on other relevant factors, much less provide Staff and other parties with an opportunity to rebut and controvert that *prima facie* case. As detailed in Staff's *Initial Post-Hearing Brief*, absent consideration of all relevant factors, Empire's proffered legal standard is a request for unjustified single issue ratemaking.

3. At this late hour, under the guise of correcting a factual misstatement in Staff's *Reply Brief*, Empire is improperly and ineffectively attempting to buttress the flawed legal arguments it has already presented.

4. Empire brought this misstatement to Staff's attention shortly after the filing of reply briefs. Staff concedes the referenced statement in Paragraph 7 of its *Reply Brief*, regarding rates of return, was misstated. Staff did not immediately prepare and file a corrective filing because Empire had represented that it would make a corrective filing if upon further reflection it concluded it was appropriate and necessary.

5. While failing to add any argument worth Commission consideration, Empire's filing goes far beyond correction of Staff's misstatement.

6. The Commission should disregard the remainder of Empire's filing.² In the event that the Commission does consider Empire's wholly improper attempt to buttress its legal arguments far out of time, the Commission should reject Empire's arguments, as it did recently when the identical argument was considered in Case No. ER-2010-0036.

7. Notably, Empire's argument would have the Commission run afoul of the admonition of the Missouri Supreme Court and over sixty years of case law that a rate

² Only the first paragraph of Empire's filing concerns the legitimate issue of the misstatement.

cannot be determined to be “just and reasonable,” without consideration of “all relevant factors.”³

8. As set out in detail in the briefs of Staff, OPC, MEUA, and MCEG, Empire’s interim rate request fails not the emergency standard for interim rates – as conceded by Empire⁴ -- but also every other recent test utilized by this Commission, and even other standards mentioned as possibilities in prior orders. **In fact, were the Commission to establish rates under the “just and reasonable” method on the factors Empire has put before it, a rate decrease would be in order.**⁵ Staff is, of course, not suggesting that the Commission apply the “just and reasonable” standard to these factors and decrease Empire’s rates, as that would also be unlawful single issue ratemaking.

9. Staff provides below, for the convenience of the Commission, a summation of relevant argument from Staff’s *Initial Post-Hearing Brief*. Although undersigned counsel has edited this material for length, Staff will not reply in kind to Empire’s improper late filing by attempting to insert additional argument at this time.

10. *In State ex rel Missouri Water Company v. Missouri Public Service Commission et al.*, 22 P.U.R.3d 254, 308 S.W.2d 704, the court stated:

| The statute (§393.270, par. 4) says that the commission may consider all facts which in its judgment ‘have any bearing upon a proper determination

³ See *State ex rel Missouri Water Company v. Missouri Public Service Commission et al.*, 22 P.U.R.3d 254, 308 S.W.2d 704.

⁴ Transcript V 2, P 110 L 7 – 13.

⁵ Empire has experienced approximately \$1.6 million more-than-expected revenues since the Joplin tornado, and Empire has experienced an apparent net decline in the dollars of capital investment Empire has dedicated to public service since the last rate case, in spite of its plant additions made for tornado recovery. (See Staff Exhibit 8, P 1 - 2; Staff Exhibit 4, P 5 L 1-10. The \$1.8 million figure in Exhibit 4 was the net amount based on data through June. The updated numbers provided in Exhibit 8 net to \$1.6 million. Staff Exhibit 7, P 17 L 6-23.) This evidence is thoroughly discussed in Staff’s *Initial Post-Hearing Brief* in “Issue 2.”

of the question [of the prices to be charged for water], with due regard, among other things, to a reasonable average return upon capital actually expended, ' etc. '[D]ue regard' to one factor, 'among other things,' simply requires consideration of that factor. It is not preclusive of other relevant factors. Indeed, the phrase 'among other things' clearly denotes that 'proper determination' of such charges is to be based upon *all* relevant factors. See *New York Teleph. Co. v. New York Pub. Service Commission* (1956) 309 NY 569, 12 PUR3d 399, 132 NE2d 847, 850.

Consequently, we must and do hold that in determining the price to be charged for (in this instance) water (§393.270, par. 4) the fair 'value of the property' of the water company which the commission is empowered to ascertain under §393.230, par. 1, is a relevant factor for consideration in the establishment of just and reasonable rate schedules and must be considered in its proper relationship to all other facts that have a material bearing upon the establishment of 'fair and just' rates as contemplated by our statutes and decisions. *Missouri ex rel. City of St. Joseph v. Missouri Pub. Service Commission* (1930) 325 Mo 209, PUR1930E 337, 30 SW2d 8, 10; *Missouri ex rel. City of St. Louis v. Missouri Pub. Service Commission* (1930) 326 Mo 751, PUR1931B 448, 34 SW2d 507; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 US 581, 58 PUR NS 65, 89 L ed 1206, 65 S Ct 829.

11. As articulated in the oft-cited opinion in *State ex rel. Utility Consumers'*

Council of Missouri, Inc. et al v. Public Service Commission of Missouri et al, (UCCM):

Even under the file and suspend method, by which a utility's rates may be increased without Requirement of a public hearing, the commission must of course consider all relevant factors including all operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended. See *State ex rel. Missouri Water Co. v. Public Service Comm'n*, 308 S.W.2d 704, 718-19, 720 (Mo.1957).⁶

12. Staff has shown that Empire's interim rate request fails analysis under even the "just and reasonable" standard.

13. Empire has presented testimony dealing with only two issues:

- Lower-than-expected revenues experienced during the 2011-2012 winter months.

⁶ *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission* 585 S.W.2d 41, 49 (Mo., 1979)

- Capital invested and expenses incurred to restore service following the Joplin tornado.

14. Even as it regards these two issues, Empire's request necessarily requires the Commission to ignore evidence relating to:

- Net higher-than-expected revenues experienced since June 2012 in the amount of \$1.6 million.
- Net reduction of capital invested by Empire.

15. Although Empire requests the Commission consider the lower-than-expected revenues Empire experienced this past winter, Empire expects the Commission to ignore the higher-than-expected revenues Empire enjoyed after the Joplin tornado, and in several months of this summer. In fact, for the period June 2011 – June 2012, Empire experienced \$1.8 million greater revenues than expected in a “normal” year.⁷ Similarly, although Empire did invest in its system to restore service in the aftermath of the Joplin tornado, through its request, Empire necessarily requests the Commission ignore the depreciation expense it has received since its last rate case, as well as the effect of the ADIT reserve.⁸

16. In short, despite its proffered request for “just and reasonable” rates, the rates Empire requests are patently *unreasonable* on the evidence presented. Although the parties have not had the time nor the process to investigate the factors presented in Empire's *general* rate case request, the Commission cannot award just and reasonable rates without consideration of those factors. The Commission should

⁷ Staff Exhibit 4, P 5 L 1-10.

⁸ Staff Exhibit 7, P 17 L 6-23.

not accept Empire's justification to engage in single issue ratemaking by utilizing a "just and reasonable" standard on consideration of less than all relevant factors.

17. As presented in Staff's discussion of "Issue 2," in its *Initial Post-Hearing Brief*, Empire has experienced approximately \$1.6 million more-than-expected revenues since the Joplin tornado,⁹ and Empire has experienced an apparent net decline in the dollars of capital investment Empire has dedicated to public service since the last rate case, in spite of its plant additions made for tornado recovery.¹⁰ Thus, were the Commission to establish rates on the factors Empire has put before it, a **rate decrease** would be in order.

WHEREFORE, Staff provides its *Response To Empire's Supplemental Brief*, and suggests the Commission disregard the remainder of Empire's improper and unimpressive attempts to provide argument at this time.

Respectfully submitted,

/s/ Sarah Kliethermes

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⁹ See Staff Exhibit 8, P 1 - 2; Staff Exhibit 4, P 5 L 1-10. The \$1.8 million figure in Exhibit 4 was the net amount based on data through June. The updated numbers provided in Exhibit 8 net to \$1.6 million.

¹⁰ Staff Exhibit 7, P 17 L 6-23.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 18th day of October, 2012.

/s/ Sarah Kliethermes