

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

In the Matter of The Empire)
District Electric Company’s Request)
For Authority to Implement a General)
Rate Increase for Electric Service)

Case No. ER-2016-0023
Tracking No.: YE-2016-0104

**Public Counsel’s Response to Empire’s
Motion to Strike CAM Testimony**

COMES NOW the Office of the Public Counsel (“OPC”), by and through undersigned counsel, and for its *Response* to the Empire District Electric Company’s (“Empire”) *Motion to Strike CAM Testimony and Motion for Expedited Treatment* filed on April 26, 2016, states as follows:

Empire’s Request for Expedited Treatment

1. On April 26, 2016, Empire filed a *Motion to Strike CAM Testimony and Motion for Expedited Treatment* on behalf of itself “and other parties,¹” requesting the Commission strike certain portions of OPC’s witness, Mr. Charles Hyneman’s testimony relating to the adoption by the Commission of a Cost Allocation Manual (“CAM”) in the pending rate case.
2. OPC’s testimony was filed on April 1, 2016. After waiting twenty-four (24) days, Empire now seeks expedited consideration of its motion two days before the original deadline for filing Rebuttal testimony. Empire offers no explanation for its delay in filing the motion other than a reference to extended filing deadlines. The same day that Empire filed its motion, the Commission extended the deadline for filing Rebuttal testimony to May 2, 2016. Whether or not the filing deadline was extended did not prohibit Empire from filing its motion earlier. As such,

¹ No other party, except for Empire itself, is a signatory to this *Motion to Strike* and it is unclear to OPC which other parties, if any, would be directed to take resources away from other rate case matters to rebut Mr. Hyneman’s testimony. Other parties are able to respond and participate, at their discretion, to issues in a case and are not forced to respond to every issue raised.

there was no reason for Empire's delay or any basis for expedited treatment.

Empire's Motion to Strike

3. Empire's motion to strike cites no statute, Commission Rule, or any other source of legal authority under which it may be entitled to its request. Instead, Empire merely offers it "makes this request at this time, so that Empire and the other parties to this rate case are not required to direct time and resources away from rate case matters[.]" (Doc. No. 80, p. 1). This motion is without merit and should be denied.

4. Empire's purported rationale for both its motion to strike and its motion for expedited treatment is the same – it does not want to "direct time and resources away from rate case matters" and it wants to "focus on proper rate case issues." (Doc. No. 80, pp. 1, 8). Empire contends testimony on a CAM is not a rate case issue and should be addressed in a different case.

5. First, Empire's desire to ignore a portion of the testimony and issues raised by OPC in this case and to address the issue in a different case is irrelevant. As stated earlier, Empire cites to no legal authority entitling it to relief. Nor has it sufficiently explained the basis and criteria it applies for determining which testimony is worthy of its time.²

6. Second, this rate case is the best opportunity to examine the CAM. During a general rate case, the Commission *must* consider all relevant factors. *See State ex rel. Util. Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979). The Commission's rules, specifically related to affiliate transactions, require the utility to have a "commission-approved CAM." (*See* 4 CSR 240-20.010(2)(E) and (3)(D)). OPC, charged with representing the ratepayers, has raised this as an issue in this case. The Commission's Staff, if only to a limited

² Empire laments the rate case process is too compressed for this issue to be considered, stating "OPC seeks to force its CAM on Empire, in this rate case proceeding which must be processed within 11 months[.]" (Doc. No. 80, p. 6).

level the company deems acceptable, has also raised cost allocation issues (*See* Doc. No. 80, p. 2).

7. Empire's request to consider the CAM in another case is unreasonable. As described in detail in the company's motion to strike, its CAM has languished without final agreement or Commission-approval since 2011 (Doc. No. 80, pp. 2-7). The allocation of costs, to be described in a CAM, impacts the rates the Commission will ultimately set in this case. Thus, the CAM testimony is relevant in this case and the Commission must give it all due consideration.

Motions to Strike before the Commission

8. The facts and circumstances in this case fail to justify exclusion of the CAM testimony. The Commission has addressed when it will consider motions to strike pre-filed testimony. In rejecting a motion to strike in Ameren Missouri's recent rate case, this Commission cautioned against striking pre-filed testimony explaining:

Generally, the proper time to object to the admissibility of evidence is after it has been offered. But in some circumstances prefiled testimony may be so inappropriate and prejudicial to make it unjust to require the other parties respond to that testimony. In such circumstances, the Commission might appropriately grant a motion to strike.

(In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariff to Increase Its Revenues For Electric Service, File No. ER-2014-0258, *Order Denying Motion in Limine or to Strike Testimony*, p. 2, *Iss'd* Jan. 14, 2015). OPC's CAM testimony is neither inappropriate nor prejudicial. Empire has not, and OPC suggests it cannot, show that responding to the CAM testimony is prejudicial and should be stricken.

9. Though Empire failed to cite any rule, the Missouri Supreme Court's Rules of Civil

Procedure address motions to strike. Rule 55.27(e), explains “the court may order stricken from any pleading any ... redundant, immaterial, impertinent, or scandalous matter.” Empire does not allege the CAM testimony should be stricken for any of the listed reasons. To the contrary, Empire’s opposition to the CAM testimony appears to be because it is different testimony than what the company expected, and so, not redundant. Because the company is required to have a commission-approved CAM as it helps allocate costs appropriately the testimony is material and pertinent. The only thing of controversy about the CAM is that after nearly five years, Empire does not have a commission-approved CAM. It is clear, then, Rule 55.27(e) provides no support for Empire’s motion.

10. As explained herein, Empire’s motion lacks any legal basis to support its request and should be rejected. Empire, through its motion, invites the Commission to limit consideration of the company’s CAM to a different case.³ The Commission should decline to do so, and instead, consider and decide the CAM issue along with all other relevant factors in this rate case.

WHEREFORE, the Office of the Public Counsel submits this Response and requests the Commission deny Empire’s *Motion to Strike CAM Testimony*.

³ This Commission has occasionally described cases open for extended periods of time without resolution as being in “la la land.” The CAM case has been unresolved since 2011.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Tim Opitz

Tim Opitz
Senior Counsel
Missouri Bar No. 65082

Cydney D. Mayfield
Deputy Counsel
Missouri Bar Number 57569
Office of the Public Counsel
Post Office Box 2230
Jefferson City, MO 65102
(573) 522-6189 (Voice)
(573) 751-5562 (FAX)
cydney.mayfield@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 28th day of April 2016:

/s/ Tim Opitz