BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of The Empire District Electric Company of Joplin, Missouri Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company	))))	**Case No. ER-2012-0345** Tariff File No. YE-2012-0231

PUBLIC COUNSEL'S SUGGESTIONS IN SUPPORT OF MOTION TO REJECT INTERIM TARIFFS

Introduction

Empire would have this Commission believe that the Commission has broad authority to grant interim increases at the Commission's discretion. A more accurate reading of the relevant cases reveals that the Commission has an implied power to deal with utility emergencies, and that granting interim rate relief to deal with emergencies is within the Commission's discretionary exercise of this implied power. In other words, the implied power derives from the existence of an emergency (or a situation very close to an emergency). If there is no emergency, there is no power to exercise. The Commission has no inherent powers; it has only those powers expressly granted to it by statute and those powers necessarily implied by the express grant.

Empire does not argue that it is facing anything other than a routine shortfall in earnings. It does not argue that any specific harm will befall ratepayers if the interim increase is not granted. It does not argue that any specific benefit will accrue to ratepayers if the interim increase is granted. It has not alleged that any specific capital projects have been canceled because of what it considers excessive regulatory lag. It has not alleged that any specific capital

projects will be undertaken if the interim increase is granted. It has not alleged that it has taken significant steps to control costs and achieve efficiencies. In short, the only sure result – if the Commission abandons 60 years of precedent and grants the interim increase – is that Empire's profits will increase. Moreover, every utility that can make a *prima facie* showing that it is missing its authorized return on equity by a few percentage points will argue that it deserves a similar profit boost.

In essence, Empire is seeking an interim increase not because it faces any kind of financial threat going forward, but rather because its past profits in the past in the aftermath of the tornado were lower than it believes they should have been. The remedy for that situation would have been for Empire to seek a rate increase then, not to seek extraordinary ratemaking treatment now.

In these Suggestions, Public Counsel will address three points:

1) the implied power of the Commission to deal with emergencies does not allow it to grant interim increases merely to increase profits;

2) even if the Commission could award an interim increase in the absence of an emergency, Empire has not shown that one is warranted in the current situation; and

3) no Public Service Commission in Missouri's history has granted an interim increase simply to increase a utility's profits.

1. The Commission cannot grant an interim increase absent an emergency or near-emergency.

The general rule is that when a statute expressly authorizes an agency to do something in a certain way, the statute necessarily precludes any implied authority to do it some other way:

> Where the statute (Section 8548) "limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done." Keane v. Strodtman, 323 Mo. 161, 18 S.W. (2d) 896. See, also, Dougherty v. Excelsior Springs, 110 Mo. App. 623, 85 S.W. 112; Taylor v. Dimmitt, 326 Mo. 330, 78 S.W. (2d) 841. **In other words, there can never be an implied power given a county or other public corporation when there is an express power.**[1]

The courts are generally circumspect in finding implied powers, and find such powers only if clearly implied by statute or necessary to carry out the express powers granted:

> "If such power existed at all, it must be looked for among the powers which can be implied only as being **essential** to effectuate the purpose manifested in an express power or duty, conferred, or imposed upon the County Court by Statute." King v. Maries County, 297 Mo. 488, 249 S.W. 418, 420. In this case no implied powers to regulate or control are essential to effectuate the purpose manifested in the express powers granted the County Courts under Sec. 311.220, supra.[2]

And even if an entity is found to possess certain implied powers, those powers are held to be only as broad as necessary and no more. In a unanimous decision of the Missouri Supreme Court in a case examining the extent of the implied authority of a state agency, the Court found it obvious that an agency's implied authority is severely limited:

> The Judicial Finance Commission has specific authority to make factual determinations regarding the reasonableness of the circuit court's budget. That duty includes the discretion to determine the reasonableness of part or all of any particular budget item, as well as the reasonableness of the total amount budgeted. Incidental and necessary to the proper discharge of the Commission's function is a mechanism for avoiding disruption of critical government services while the

[1] Lancaster v. County of Atchison, 352 Mo. 1039, 1046 (Mo. 1944); emphasis added.

[2] State ex rel. Floyd v. Philpot, 364 Mo. 735, 744-745 (Mo. 1954); emphasis added. Indeed, most Missouri cases discussing powers derived by implication as opposed to express statutory authority use such terms as “necessary implication” (*e.g.*, In re Estate of Moore, 354 Mo. 240 (Mo. 1945) or “clearly implied” (*e.g.*, State ex rel. Spink v. Kemp, 365 Mo. 368, 399 (Mo. 1955)).

> reasonableness of the circuit court's budget estimates are being resolved. Thus, the Judicial Finance Commission has implied authority to order the effective date of the appropriation of the new budget delayed until the Commission has had an opportunity to conduct its review of the facts. **Naturally, that implied authority should be exercised with great restraint and only when it clearly appears that failure to grant temporary relief will result in the disruption of vital public services** and the party seeking relief has been diligent in obtaining review.[3]

Thus, when the Laclede[4] court found that the Commission had an implied power to deal (by awarding an interim increase) with an emergency situation that could have lead to a utility financial crisis or the impairment of safe and adequate service, it was because such an implied power was essential to the Commission's *raison d'etre*. The Commission exists to ensure that the public is provided with continuing safe and adequate utility services; if such provision is threatened, the Commission must necessarily have the power to deal with the threat even if such power is not explicitly set out in the statutes. The same cannot be said for a non-emergency situation in which a utility believes it is earning a somewhat inadequate profit. The Commission has express authority to remedy inadequate returns by raising rates after considering all relevant factors in a general rate case, and the Commission cannot claim an implied power when it has an express power.

Cases dating back to the very beginning of utility regulation in the early 1900s recognized that public utility commissions were designed to have limited powers:

> Furthermore, the Public Service Commission, being a creature of the statute, can only exercise such powers as are expressly conferred on it; and the statute conferring such powers, to authorize action thereunder, should clearly define their

[3] State ex rel. Twenty-Second Judicial Circuit v. Jones, 823 S.W.2d 471 (Mo. 1992); emphasis added.

[4] State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561 (Mo. App. 1976)

> limits. Nothing should be left to inference **or seek refuge in implication or the exercise of a discretion.** The language of the New York Court of Appeals in People ex rel. v. Willcox, 200 N.Y. 431, 94 N. E. 215, is apposite in this connection; that: "**The public service commissions were given extensive powers; but they should not be extended by implication beyond what may be necessary** for their just and reasonable execution. They are not without limits, when directed against the management, or the operations, of railroads, and the commissions cannot enforce a provision of law, unless the authority to do so can be found in the statute. . . . Nor should they reach out for dominion over matters not clearly within the statute."[5]

Other cases have reiterated the concept that implied powers only exist to the extent necessary to allow an entity to effectively use its express powers:

> In Love 1979, however, the purchase of the steam plant and loop Bi-State was an intermediate step necessary to achieve the mandate of the statute. Implied powers are powers not expressed but necessary to render effective the power that is expressed. Reilly v. Sugar Creek Township of Harrison County, 139 S.W.2d 525, 526 (Mo. 1940). In the present case, providing an insurance package is a way to provide insurance at less cost to the members and is not an intermediate step in providing insurance. Provision of liability insurance is not dependent on provision of other types of coverage. The uncontradicted evidence shows that liability insurance for the members may be more difficult to obtain and more expensive but that it would not be impossible to obtain or purchase. While inclusion of other forms of insurance coverage would certainly be to the benefit of the municipalities, such coverage is not necessary to achieve the mandate of the statute.[6]

Here, while an interim rate increase, granted without an examination of all relevant factors, would certainly be to the benefit of Empire's shareholders, it is equally certainly not necessary to achieve the mandate of the statute.

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[5] State ex rel. United R. Co. v. Public Service Com., 270 Mo. 429, 442-443 (Mo. 1917); emphasis added.

[6] Crist v. Missouri Intergovernmental Risk Management Asso., 1988 Mo. App. LEXIS 203, 8-9 (Mo. Ct. App. 1988)

The Fischer[7] case, because it follows and cites both Laclede and UCCM, can be viewed as the definitive statement on the derivation and extent of the Commission's power to grant interim rate increases:

> The inquiry is properly begun by reviewing the origins of the Commission's power to grant interim rate increases. While no express statutory provision exists as to such authority, this court held in State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561 (Mo. App. 1976), that the Commission has the authority to grant interim rate increases implied from the "file and suspend" sections, §§ 393.140 and 393.150. This court held that the Commission's authority to grant an interim rate increase is **necessarily implied from the statutory authority granted to enable it to deal with a company in which immediate rate relief is required to maintain the economic life of the company so that it might continue to serve the public.** The court, citing Laclede, recognized the Commission's power to grant interim rate increases in State ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission, 585 S.W.2d 41, 48[4] (Mo. Banc 1979).[8]

2. Empire's current situation does not warrant an interim increase, even if the Commission had the power to grant one.

As discussed above, the Commission has neither express nor implied authority to award an interim increase except to alleviate or avert an emergency. No such emergency exists, so the Commission would be exceeding its statutory authority if it were to grant an interim increase. But even if the Commission disagrees and believes that it has the implied power to grant an interim increase purely to increase profits, the direct testimony submitted in this case does not demonstrate any reason to do so.

[7] State ex rel. Fischer v. Public Service Com., 670 S.W.2d 24 (Mo. Ct. App. 1984).

[8] Ibid., at 26; emphasis added.

The Empire Motion states that its interim increase request is supported by the testimony of witnesses Beecher, Walters, Keith and Sager. The testimony of Empire witness Beecher is merely an overview of the testimony of other witnesses. Mr. Beecher's testimony is notable mostly for what it omits: any mention whatsoever of the Accounting Authority Order (AAO) agreed to by a number of parties and granted by the Commission in Case No. EU-2011-0387. This AAO was intended to mitigate – and has mitigated – the adverse financial impacts of the May 2011 Joplin tornado. Mr. Keith's testimony does not offer substantive support for the request for interim relief; he simply sponsors the tariffs that would implement the interim increase. The point of Mr. Sager's testimony is that he believes that Empire's earnings were unsatisfactory before the tornado and have become marginally worse after the tornado. The testimony of Ms. Walters contains Empire's only real support for the requested interim increase.

In her testimony, Ms. Walters points out that Empire waited a year after the tornado to request rate relief. Ms. Walters defended the year-long delay in seeking rate relief by asserting that it would have been nearly impossible to establish a "normal test year"[9] because of fluctuating customer numbers following the tornado. Despite this assertion, however, Empire has a proposed a test year of March 31, 2011 to March 31, 2012 – a period that encompasses all of the post-tornado fluctuations in customer numbers. Thus the only justification that Empire gives for not filing a rate increase earlier (which would have eliminated the alleged need for interim relief now) is fallacious.

[9] Walters Direct, page 8.

Moreover, Empire's allegation that the tornado caused a significant and persistent drop in its customer count is also fallacious. According to Mr. Beecher's testimony, Empire's Missouri electric customer count was 147,936 as of March 31, 2012.[10] According to Ms. Walters' testimony, as of April 2012, Empire's overall customer count in Missouri was down by approximately 1400 customers.[11] That is a decline of less than one percent.[12] While such a small decline might contribute to the need for a rate increase (because if Empire is unable or unwilling to achieve efficiencies in its operations, the same amount of fixed costs would need to be spread over 1% fewer customers), it certainly does not justify extraordinary rate treatment in the form of an interim rate increase.

The main issue with granting interim rate increases is that the parties are not able to investigate and the Commission is not able to address all relevant factors that may be affecting a utility's financial results. The meager and unconvincing testimony that Empire has proffered in support of its request does not warrant an increase without as complete an investigation as is possible in the full suspension period.

3. No Commission in Missouri's history has granted an interim increase merely to increase profits.

There are only four cases in Missouri – ever – that do not explicitly apply the emergency or near-emergency standard, and only two of these actually granted an interim increase. The first

[10] Beecher Direct, page 3.

[11] Walters Direct, page 10.

of these, in which the Commission declined to award interim relief, is a 1997 Empire case. But in Empire's next interim increase request (in 2001), the Commission noted that it had briefly flirted with applying a "good cause" standard in that 1997 case, and it **clearly rejected** that "good cause" standard in its order in the 2001 case:

> As Empire notes in its pleadings, the Commission did partially develop a "good cause" standard for interim relief in In Re The Empire District Electric Company, 6 MoPSC 3rd 17 (Case No. ER-97-82). However, in that case the Commission based its denial of Empire's request on its conclusion that: "There is no showing by the Company [Empire] that its financial integrity will be threatened or that its ability to render safe and adequate service will be jeopardized if this request is not granted." The differences, if any, between this good cause standard and the historically applied emergency or near emergency standard were not clearly annunciated, and the Commission now returns to its historic emergency or near emergency standard.[13]

The other cases are even less convincing. In the Timber Creek Sewer case,[14] the Commission applied what appears to be a "near emergency" standard even though it did not use that phrase:

> Thus, it is reasonable to conclude that as of the time of the true-up, September 30, 2007, Timber Creek will be earning $115,310 per year less than necessary to meet its revenue requirement. In addition, **$115,310 per year for a small company like Timber Creek is a significant amount that if forgone could quickly threaten the company's financial integrity and even its ability to provide safe and adequate service**. The company originally indicated its need for a revenue increase in March. Suspending the general rate increase while waiting an additional 6-11 months for a decision regarding the connection fee could be detrimental to the company's operations.

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[12] 1400/147,936 = 0.00946.

[13] In the Matter of Tariff Revisions of The Empire District Electric Company Designed to Increase Rates on an Interim Basis for Electric Service to Customers in its Missouri Service Area, Case No. ER-2001-452, Order issued March 8, 2001, Mo. P.S.C. 3D 124, 2001 Mo. PSC LEXIS 578

[14] In the Matter of Timber Creek Sewer Company, Inc.'s Tariff Designed to Increase Rates for Sewer Service, Case No. SR-2008-0080, Order issued October 30, 2007; emphasis added.

The only other case in which the Commission arguably allowed an interim rate increase without a showing of an emergency or near-emergency is a Citizens Electric case.[15] It is perhaps even more easily reconciled with the unbroken line of cases hewing to the emergency or near-emergency standard than the Timber Creek case. The Commission's order stated:

> Citizens stated that without the interim increase, it would suffer the loss of approximately $13,000 per day under the new contracted price for power.
> ...
> Citizens Electric Corporation is a uniquely situated entity. Like most of the utilities that come before the Commission, it is a corporation established under Chapter 351 RSMo. Unlike other corporate entities regulated by the Commission, however, Citizens is structured such that it operates on a business plan similar to a cooperative electric corporation. Citizens' stockholders are also the consumers of the power that Citizens sells. Citizens refers to these consumers as members. Under Citizens' business plan, all revenues in excess of costs are returned to its members in the form of capital credits. Because of its business plan, Citizens has many of the same characteristics of a rural electric cooperative. Citizens does not generate any power. Citizens purchases all of its power under contracts in the wholesale energy market. Citizens recently completed negotiations for a new purchased power agreement which will increase the costs of its wholesale power by 15 percent beginning January 1, 2002. Citizens has not requested a general rate increase since 1982.
> ...
> The Commission finds that the agreement is reasonable in that it provides for just and reasonable rates to be set in the ongoing permanent rate case and it allows Citizens to recover in the interim, subject to refund, the increased costs of its new purchased power agreement. **Therefore, Citizens will be able to provide safe, adequate and reliable service without incurring additional debt or impairing its financial stability.**
> Without the interim increase in rates, Citizens would be placed in the position of losing substantial income each day after January 1, 2002. This potential loss in income would cause Citizens difficulty borrowing money to maintain other operations and proceed with its construction contracts, **negatively impacting Citizens' ability to provide safe, adequate and reliable service to its members.** In addition, because of its unique business plan, the increased interest on

[15] In the Matter of the Application of Citizens Electric Corporation for Approval of Interim Rates, Subject to Refund, and for a Permanent Rate Increase, Case No. ER-2002-217, Order issued December 20, 2007, 11 Mo. P.S.C. 3D 30, 2001 Mo. PSC LEXIS 1817

> borrowed money will ultimately be paid by the consumers themselves, by virtue of their positions as stockholders. **Citizens also indicated that financial problems could result in the elimination of services to the members.**
> ...
> **Because Citizens' organization is very similar to a rural electric cooperative, the Commission finds that it is differently situated than other electrical corporations regulated by the Commission. Therefore, the Commission concludes that it is appropriate to grant interim rate relief on a nonemergency standard in this instance** to permit interim rates....

Empire has not even asserted, much less proffered testimony, that it will incur any financial problems or that it will have any difficulty continuing to provide safe and adequate service if the Commission declines to award an interim increase. Thus the instant case is very different from both the Timber Creek case and the Citizen's Electric case.

What is glaringly obvious, even viewing these two cases in the light most favorable to Empire, is that neither granted interim relief simply to increase the utility's profit. Even though the Commissions deciding those cases did not use the terms “emergency” or “near-emergency,” it is clear that the utilities in both cases were experiences threats to service quality and financial integrity, unlike the circumstances in the instant case.

The most recent case (and only the fourth case ever) in which the Commission arguably applied something other than an emergency or near-emergency standard to an interim rate increase request was Ameren Missouri’s 2010 rate case, ER-2010-0036. While the Commission wisely decided not to allow an interim rate increase in that case, it unwisely opened the door to spurious requests for unneeded interim rate increase requests like the instant one. The Commission, in its Report and Order Regarding Interim Rates, stated:

> A utility does not need to be facing a dire emergency to justify an interim rate increase. The Commission would want to act to remedy the problem long before such a situation would arise. However, the Commission will not act to short

> circuit the rate case review process by granting an interim rate increase unless the utility is facing extraordinary circumstances and there is a compelling reason to implement an interim rate increase.
>
> …
>
> However, an interim rate increase should be used only in situations requiring a quick infusion of cash into a utility. An interim rate increase is not merely another regulatory tool in the Commission's tool box. It is an extraordinary tool that should only be used in extraordinary circumstances.[16]

Thus, while the Commission in that case expressly disavowed the requirement for a "dire emergency" without a very clearly annunciated new replacement standard, it appears that the new standard looks a lot like the old standard. According to the Commission's discussion in ER-2010-0036, interim rate relief is an extraordinary tool that should only be used when:

1) a utility is facing extraordinary circumstances;

2) there is a compelling reason to award an interim increase; and

3) the extraordinary circumstances can be remedied or avoided by a quick infusion of cash.

It is difficult to think of a situation in which this standard would apply, except for a situation in which a utility is desperate for cash to avoid or remedy financial problems that might threaten the utility's ability to provide safe and adequate service. Regardless of whether this new standard applies or the old standard applies, Empire has not – even taking all of its allegations at face value – demonstrated a need for interim relief.

Conclusion

The Commission should reject Empire's request for an interim rate increase for the reasons stated herein and in Public Counsel's Motion to Reject Interim Tariff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 20th day of July 2012.

/s/ Lewis R. Mills, Jr.

[16] Case No. ER-2010-0036, Report and Order Regarding Interim Rates, issued January 13, 2010, page 12.