

**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 MOTION TO DISMISS OR FOR SUMMARY DETERMINATION  
WITH SUGGESTIONS IN SUPPORT**

**COMES NOW** The Empire District Electric Company (“Empire” or “Company”), by and through counsel and pursuant to Missouri Public Service Commission (“Commission”) Rules 4 CSR 240-2.116 and 2.117, and hereby moves to dismiss this proceeding, or, in the alternative, requests summary determination in its favor.<sup>1</sup> In this regard, Empire respectfully states as follows to the Commission:

**Legal Standard for Dismissal or Summary Determination  
and Statement of Material Facts as to Which There is No Genuine Dispute**

Rule 2.116(4) provides that a case may be dismissed for good cause, and Rule 2.117(1)(E) provides that summary determination may be granted when “there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.”

1. Empire was the subject of a general rate proceeding on June 1, 2018.
2. RSMo. §393.137 (as created by Senate Bill 564) took effect on June 1, 2018.

These are the only facts material to this Motion to Dismiss or for Summary Determination.

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<sup>1</sup> Without waiving its position that this case must be dismissed, Empire, on behalf of all parties to this proceeding, filed a proposed procedural schedule. Proposed dates for the processing of this case were provided in the event the Commission were to overrule the Company’s intended motion to dismiss. The parties’ proposed procedural schedule was approved and adopted by the Commission on June 21, 2018. The schedule provides that any motion to dismiss shall be filed by June 25, 2018. Rule 2.117(1) provides that a motion for summary determination shall not be filed less than 60 days prior to hearing except by leave of the Commission. To the extent required, Empire respectfully requests leave of the Commission to file this Motion to Dismiss or for Summary Determination less than 60 days prior to the scheduled hearing date.

**Senate Bill 564 / RSMo. Section 393.137**

The Office of the Public Counsel (“OPC”) argues that the Commission *shall* exercise its authority under RSMo. §393.137 to reduce Empire’s rates within 90 days of June 1, 2018.<sup>2</sup> As discussed in detail below, however, on June 1, 2018, the effective date of §393.137, Empire had a general rate proceeding pending before the Commission, and the entirety of §393.137 is therefore inapplicable to Empire. Since this proceeding was opened by the Commission specifically to consider the adjustment of Empire’s rates pursuant to §393.137 (Senate Bill 564), the Commission lacks authority or jurisdiction to proceed in this docket. This lack of authority or jurisdiction to proceed provides the necessary “good cause” for dismissal pursuant to Rule 2.116.

SB564 was truly agreed and finally passed by the Missouri House of Representatives on May 16, 2018, and was signed by the Governor on June 1, 2018. Section 393.137 (as created by SB564) became effective the same date it was signed by the Governor as the result of an emergency clause and provides as follows:

This section applies 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.<sup>3</sup>

This new law does not define “general rate proceeding,” but there are three basic ways to initiate a general rate proceeding – or rate case: 1) file and suspend (§393.150); 2) complaint by customer (§393.260); or, 3) by motion of the Commission (§§393.140(5), 393.150, and 393.270).<sup>4</sup> Under Missouri law, the primary rule governing statutory interpretation is to ascertain the intent of the

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<sup>2</sup> OPC’s Motion for Expedited Procedural Schedule, and Motion for Expedited Treatment, filed herein on June 5, 2018.

<sup>3</sup> RSMo. 393.137.1 (emphasis added).

<sup>4</sup> See also, *State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979); and see, generally, *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20 (Mo. banc 1975).

legislature from the language used, to give effect to that intent, and to consider the words used in the statute according to their ordinary meanings.<sup>5</sup>

Even as to any electrical corporation to which §393.137 does apply, the Commission is not mandated to order a one-time adjustment and/or require the utility to defer the financial impact of the Federal Tax Cuts and Jobs Act of 2017 (the “Act”) for the period of January 1, 2018, through the date of any one-time adjustment. 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.

**Case Nos. AW-2018-0174 (Working Docket) and ER-2018-0228 (Rate Case)**

The Commission opened a working docket regarding “the effect on Missouri utilities and ratepayers of a tax reform now being enacted by the Congress of the United States,” File No. AW-2018-0174. Empire filed its Response to Order in File No. AW-2018-0174 on January 31, 2018, stating that the Company believes cost savings from the Act should, and ultimately will, be passed on to utility customers, noting challenges facing all parties and the Commission, and responding to the questions set forth by Staff and the Commission.

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<sup>5</sup> *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406, 413 (Mo. banc 2012).

When the Commission closed the working docket, Staff filed a “Motion to Open Rate Case and to Require Company to Show Cause,” triggering the opening of Case No. ER-2018-0228. Staff stated the following as authority for its Motion to Open Rate Case:

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.

Staff’s Motion to Open Rate Case (emphasis added).

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.” The Rate Case Order also contained five directives to Empire, the first of which was for Empire to show cause, if any, why the Commission should not order it to promptly file tariffs reducing its rates for every class and category of electric service to reflect the percentage reduction in its federal-state effective income tax rate.

On April 24, 2018, the Stipulation was filed in Case Nos. ER-2018-0228 (the Commission-opened rate case for Empire) and EO-2018-0092 (Empire’s Customer Savings Plan) to, among other things, propose a tariff filing by Empire to reduce its rates for every class and category of electric service to reflect the percentage reduction in its federal-state effective income tax rate. On April 26, 2018, OPC objected to the Stipulation.

On May 17, 2018, Staff filed a Voluntary Dismissal in Case No. ER-2018-0228, noting that SB564 was truly agreed and finally passed by the Missouri House of Representatives on May 16, 2018, and, as a result of an emergency clause, RSMo. 393.137 would take effect when the Governor signed SB564. Staff further stated:

It is Staff's belief that the legislature, and all interested stakeholders intended that Section 393.137 would provide the Commission the authority to immediately address the effects of the federal Tax Cut and Jobs Act of 2017 for those electrical corporations that do not have pending rate cases before the Commission.

Despite the fact that the proceeding was a rate case opened by the Commission itself and that the Commission had accepted evidence regarding the Stipulation filed by the Signatories in Case Nos. ER-2018-0228 (the Commission-opened Rate Case) and EO-2018-0092 (Empire's Customer Savings Plan), and without Empire having an opportunity to file a response to Staff's Voluntary Dismissal, the Commission issued a *Notice Acknowledging Dismissal of Application and Closing Case*. This *Notice* was purportedly effective upon issuance.

Also on May 17, 2018, however, Staff filed its Withdrawal of Voluntary Dismissal, noting that it remained "fully committed" to the positions set forth in the Non-Unanimous Stipulation and Agreement. Further, following the filing of Staff's Withdrawal of Voluntary Dismissal, OPC and other parties filed written arguments in Case No. ER-2018-0228.

Oral argument was scheduled to take place in a number of cases regarding the impact of the Act, including Case No. ER-2018-0228 (the Commission-opened Rate Case for Empire), on May 24, 2018. Empire participated in that oral argument. At the beginning of the argument, Judge Woodruff stated as follows:

Staff initially dismissed a case involving Empire Electric, ER-2018-0228, that was reinstated by Staff later that same day. At this point, I'm considering it to be a -- an open case that will be subject to today's proceedings.<sup>6</sup>

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<sup>6</sup> Case No. ER-2018-0228: Tr. Vol. 1 (May 24, 2018), p. 5, lines 14-20.

OPC was represented at the oral argument, did not object to the Judge's statement, and did not object to Empire's participation in the argument. Also, as noted above, OPC filed written comments in Case No. ER-2018-0228 *after* Staff filed its Voluntary Dismissal and Withdrawal of Voluntary Dismissal. Despite all these facts, OPC still asserts that Case No. ER-2018-0228 (the Commission-opened rate case for Empire) was not pending at the time RSMo. §393.137 (as created by SB564) became effective.<sup>7</sup> There is no rational basis for OPC's argument in this regard, and, thus, there is no genuine issue as to any material fact, and summary determination in favor of Empire is warranted.

Case No. ER-2018-0228 is a "general rate proceeding" and was pending before the Commission on June 1, 2018, thus rendering the entirety of RSMo. §393.137 inapplicable to Empire.<sup>8</sup> Empire continues to believe that the cost savings from the Act should be passed on to its customers. It is just that §393.137 (as created by SB564) does not provide the Commission with any additional authority with regard to Empire's rates. Case No. ER-2018-0228, however, remains open and is the appropriate place for the Commission to take up and consider the proper means by which to address the impact of the Act on Empire and its customers.

**WHEREFORE**, Empire respectfully requests an order of the Commission dismissing this proceeding or granting summary determination. Empire requests such further relief as is just and proper under the circumstances.

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<sup>7</sup> OPC's Motion for Expedited Procedural Schedule, and Motion for Expedited Treatment, filed in Case No. ER-2018-0366 on June 5, 2018.

<sup>8</sup> On May 31, 2018, Empire made a filing in its last rate case, Case No. ER-2016-0023, re-opening the case. Thus, Empire actually had two rate cases open before the Commission on June 1, 2018, the effective date of RSMo. §393.137 (as created by SB564). The Commission issued its *Order Closing Case* in Case No. ER-2016-0023 on June 14, 2018 ("Since Empire does not request any action from the Commission, the Commission will close this general rate case.").

Respectfully submitted,

Brydon, Swearngen & England, P.C.

By: */s/ Diana C. Carter*

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**CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing document was filed in EFIS on this 25<sup>th</sup> day of June, 2018, with notice of the same being sent to all counsel of record.

*/s/ Diana C. Carter*