BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri-American Water Company's Request for Authority to Implement a General Rate Increase for Water and Sewer Service Provided In Missouri Service Areas	)))))	File No. WR-2017-0285 File No. SR-2017-0286

THE EMPIRE DISTRICT ELECTRIC COMPANY'S
MOTION FOR RECONSIDERATION

COMES NOW The Empire District Electric Company ("*Empire*"), and for its Motion for Reconsideration states as follows:

1. Empire is a high-volume customer of Missouri-American Water Company ("*MAWC*") pursuant to that certain Interruptible Industrial Water Supply Agreement dated January 18, 2012, as amended (the "*Contract*").

2. On May 10, 2018, Empire filed a Response to MAWC's Motion for Expedited Treatment and Approval of Compliance Tariffs (EFIS No. 458, its "*Response*"). Empire did not object to the tariffs themselves, but Empire did take issue with MAWC's intention to seek a rate increase on Empire as a result of this case. MAWC evidenced this intention to seek a rate increase from Empire in a workpaper provided by MAWC informally in support of its compliance tariffs.

3. On May 15, 2018, the Commission issued an Order Approving Tariffs (EFIS No. 464). Empire's request for reconsideration is limited to finding that the tariffs approved are not applicable to Empire. Empire believes that the Order Approving Tariffs allowed the tariffs to become effective, but did not grant MAWC any authority to increase the commodity charge under the Contract. For this reason, Empire does not take issue with the ordering paragraphs in the Order Approving Tariffs, which conform to the relief requested in Empire's Response, because the ordering paragraphs do not order an increase in the Contract rate.

4. In dictum in the Order Approving Tariffs, the Commission stated that "the workpapers about which Empire complains do not result in a unilateral change in Empire's contract, and that the workpapers merely show the mathematical results of the Commission's decisions in its Report and Order and Order Approving Stipulations and Agreements that set the revenue requirement and rate design for MAWC."

5. Empire respectfully requests that the Commission reconsider its use of this particular dictum in allowing the compliance tariffs to become effective. The Contract rate was not a part of this proceeding because (a) MAWC did not comply with statutory and Commission notice requirements, (b) MAWC did not provide record evidence to support a change to the Contract rate or any conclusions regarding the rate set forth in the workpaper (which is also not part of the record), and (c) the interpretation of the Contract is not properly before the Commission.

6. Empire is not arguing that its rate cannot change as a contractual matter.[1] Rather, Empire is arguing that in this docket MAWC did not properly request, nor did the Commission order, a change to the commodity rate under the Contract. Additionally, the Commission approved a stipulation that provided only one special contract commodity rate (not Empire's) would change as a result of the proceeding. Aside from the specific change allowed by the stipulation, Empire is aware of no other special contract rates that are changing as a result of the proceeding. MAWC does not have the authority to impose a unilateral change in the Contract rate.

The Contract Rate Was Not Properly Raised In This Proceeding

7. Section 393.140(11) provides:

> Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a . . . water corporation . . . in compliance with an order or decision of the commission,

[1] Empire takes issue with many of the contractual interpretations made in MAWC's Reply To The Empire District Company's Response to MAWC's Motion for Expedited Treatment and Approval of Compliance Tariffs (EFIS No. 463, "*MAWC Reply*") and the Staff Reply (EFIS No. 462, "*Staff Reply*"). Because MAWC and Staff appear to agree that contractual interpretation is not appropriate in this proceeding, Empire does not include all of its disagreements with these interpretations, or its argument for different interpretations.

except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect."[2]

8. The Commission has previously ruled that Section 393.140(11) requires a tariff for each special contract be filed with the Commission.[3] In so ruling, the Commission stated that Section 393.140(11) "requires that each special contract entered into by KCPL must be listed on the tariff sheet and a copy of the contract filed with the revised tariff sheet." The Commission went on to state that "[t]he tariff sheet and filing of the contract are for notice purposes" and that "[b]y ordering KCPL to file a tariff which contains the general conditions for taking the service, the Commission concludes the statutory requirements have been satisfied."[4]

9. MAWC has never filed a tariff for the Contract, although MAWC appears to have done so for its other special contracts. Applying the standard from *Kansas City Power & Light*, MAWC has not met the requirements of Section 393.140(11). MAWC did not properly request to raise Empire's rate in this proceeding. Changes to Empire's rate are accordingly not a proper subject of this proceeding.

Lack of Record Evidence

10. Empire is aware of only two instances in the docket where MAWC mentioned Empire's rate. The first mention was buried inside a schedule attached to the direct testimony of MAWC witness Mr. Lagrand.[5] The second mention was similarly buried in a schedule attached to the rate design rebuttal testimony of MAWC witness Ms. Heppenstall.[6] The last amount testified to by

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2 §393.140 RSMo.

3 *See Kansas City Power & Light*, Report and Order, 1995 Mo. PSC Lexis 47 at 23 (Missouri PSC Nov. 22, 1995).

4 *Id.*

5 *See* Direct Testimony of Brian Lagrand, Ex. 16, p. 127, CAS 11 & 12, (EFIS No. 4). The Commission's rules treat direct testimony *separately* from a rate increase request. *See* 4 CSR 240-2.065(1) ("Any public utility which submits a general rate increase shall simultaneously submit its direct testimony with the tariff."). The testimony of these witnesses became effective when sworn to and admitted into the record (at hearing) and were not part of the record until that time. *See* 4 CSR 240.230(3) ("The presiding officer shall rule on the admissibility of all evidence."); Transcript Vol. 15 (EFIS No. 271 at p. 212) (admitting prefiled testimony into the record during hearing).

6 *See* Rebuttal Testimony - Cost of Service Rate Design - of Constance E. Heppenstall, Exhibit 16, page 174, CEH-15 (EFIS No. 295).

MAWC witnesses was one dollar and ninety cents per thousand gallons, which is significantly lower than the amount used in the workpaper.

11. In both cases, the mention of Empire's rate is an unexplained number. Neither witness explained the purpose of including a changed Contract rate or how the rate would change. Neither witness showed how the rate was determined, what inputs were used, or any math that may have been used in calculating the value. Neither witness related the rate to Contract provisions. In his direct testimony, Mr. Lagrand's only statement regarding special contracts generally was that "[s]pecial contract rates will not be affected by this change" to the design of the water tariffs.[7] Ms. Heppenstall did not mention special contracts in her rate design rebuttal testimony. Neither witness mentioned the Contract in their testimony (aside from the schedules).

12. MAWC bears the burden of proof in this case.[8] Because MAWC did not introduce evidence regarding the Contract in this proceeding, there is nothing in the record for the Commission to rely on to determine an accurate or appropriate Contract rate. MAWC likewise did not introduce evidence regarding the manner in which rates are calculated under the Contract, how the parties have addressed changes in the past, or their agreed modification to the Contract.

13. The Commission is unable to consider evidence that is not in the record.[9] The only action by the Commission in this proceeding relating to the Contract was its approval of a stipulation which required that:

> special contracts currently in effect should continue without any material changes, with the exception of the contract with Triumph Foods, LLC, in which the commodity charge will be revised consistent with the confidential Rebuttal Testimony of Staff Witness Mathew J. Barnes.[10]

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[7] *See* Direct Testimony of Brian Legrand, Ex. 16, at p. 18, lines 5-14 (EFIS No. 4).

[8] *See* Mo. Rev. Stat. §393.150.2 ("the burden of proof to show that the increase rate or proposed increased rate is just and reasonable shall be upon the . . . water corporation.").

[9] (*See In the Matter of Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements*, Report and Order, TO-2001-438, 2002 Mo. PSC Lexis 1066, at 209(Missouri PSC Aug 6, 2002) ("The Commission is not able to consider evidence that is not in the record.").

[10] Stipulation and Agreement filed on March 1, 2018 (EFIS No. 261, the "*March 1 Stipulation*"), at ¶ 20.

14. As the March 1 Stipulation indicates, parties introduced evidence regarding the change to the commodity charge of a single special contract, Triumph Foods, LLC. This was the only special contract rate to which the Commission ordered a change. A change in Empire's rate would be a material change to the Contract.

15. Empire acknowledges that the Commission has authority to order a change to the rate under the Contract.[11] However, in this case MAWC did not properly propose such a change, and the record does not include evidence that would support such a determination.

16. The workpaper to which Empire objected is also not record evidence. Accordingly, the workpaper cannot be determined to be a mathematical result of the Commission's decisions as it relates to the Contract. In addition, the workpaper does not include mathematical formulae for the (assumed) MAWC-proposed Contract rate, nor does the record in this case include support for any determinations regarding the calculation of Empire's rate.

Contract Interpretation

17. As noted in Staff's Reply, the Commission cannot 'enforce, construe nor annul' contracts.[12] Staff's reply also states that the Contract does not indicate how and when Empire's commodity rate would change.[13] Therefore, determining how and when Empire's commodity rate would change is a matter for contract interpretation. Staff and MAWC appear to agree with this.[14] Nonetheless, both replies urge particular interpretations of provisions of the Agreement. Empire also agrees that interpretation of the Contract is not properly before the Commission.

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[11] In fact the Commission when approving the Contract reserved the right to order an inquiry into the rate mechanism. Nonunanimous Stipulation and Agreement, Case No. WR-2011-0337 (EFIS Item 283, the "*2011 Stipulation*"), at ¶ 18. It has not done so.

[12] Staff Reply at p. 1, citing *Wilshire Const. Co. v. Union Elec. Co.*, 463 S.W.2d 903, (Mo. 1971)(internal citation omitted).

[13] *See* Staff Reply at p 2. Staff's statement is not entirely correct because Section 9 of the Contract provides that a rate could be renegotiated (with resort to the Commission in an impasse) upon certain events.

[14] *See* Staff Reply at p.1, MAWC's Reply To The Empire District Company's Response to MAWC's Motion for Expedited Treatment and Approval of Compliance Tariffs (EFIS No. 463, "*MAWC Reply*") at p. 1 ("this matter is one of contract").

18. Empire does not believe that the rate under the Contract is immutable. In fact, as noted by Staff, Empire has previously agreed with MAWC to change the commodity rate under the Contract.[15] The parties' course of dealing (changing the rate upon mutual agreement) would be highly relevant to interpreting how and when the rate changes under the contract.[16] Neither MAWC nor Staff relied on the parties' course of dealings in attempting to determine how and when pricing might change under the Contract.

19. MAWC's and Staff's replies rely on stipulations from the 2011 case that approved the Contract to urge particular interpretations of the Contract.[17] Both MAWC and Staff cite a prior stipulation that states that the "commodity charge rate component of the Contract will be subject to modification in subsequent MAWC general rate case..."[18] However, being subject to modification in [a] or [the] subsequent MAWC general rate case, and being required to be modified in [all] MAWC general rate case[s], are two different things.[19]

20. The Contract itself only explicitly provides for a party to petition the Commission to modify the agreement in particular circumstances, including the implementation of amendments for the rate, where the Commission has increased MAWC's fully loaded production costs for the Joplin district in excess of two dollars per CCF of water.[20] Section 9(a) refers to MAWC's *costs* and not the *rate* under the contract. Section 9 can, therefore, be read to indicate that MAWC would only be able to

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[15] Staff asserted without support that a rate change occurred "as a result of a rate case." *See* Staff Reply at n. 9. The rate change did not occur "as the result of a rate case" but rather as a result of negotiation. This resulted in a written agreement of the parties in April 2017 to change the rate effective retroactively to July 2016. The Commission has never ordered a change to the Contract rate in a rate case. This negotiation took place after the rate case, as noted by Staff. *Id.*

[16] *See* Restat 2d of Contracts, § 223(b) (2nd 1981) ("unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement").

[17] Empire notes that using stipulations outside of an agreement to inform contract interpretation would be disfavored under contract law generally, particularly where the signatories to the stipulation explicitly provided that they would not be "prejudiced or bound in any manner by the terms of" the stipulation in any other proceeding. *See* 2011 Stipulation at ¶ 25.

[18] *See* Staff Reply at 3 (citing 2011 Stipulation at ¶ 18.)

[19] There are further ambiguities in this excerpt. For example, the stipulation does not state what entity can propose a change to the rate in [a] or [the] subsequent rate case. Typically modifications to a contract require the consent of both parties. The stipulation does not clearly provide that MAWC or Empire could unilaterally make a request of the Commission to change the rate (as opposed to jointly seeking a modification) outside of the Section 9 process. *See* 2011 Stipulation at ¶ 18.

[20] There is also a question of whether ccf was the correct unit to be used in this paragraph—again a matter of contract interpretation.

require renegotiations of the *rate* if its *costs* increased past the threshold, and not as the result of a case where it did not demonstrate that the threshold was reached. Again, this is a matter of contract interpretation not properly before the Commission in this docket.

Conclusion

21. Empire understands that the Commission could, in an appropriate proceeding, modify the rate to be charged under the Contract. Empire disagrees with any interpretation of the Contract that would require the rate to be changed in every MAWC rate case. In this case in particular, the Contract rate is not subject to change because MAWC did not file the required tariff sheets to initiate a change and did not provide record evidence to support any change; and the Commission did not order any change to the Contract rate (and, in fact, approved a stipulation that provides the special Empire Contract will remain in effect without any material changes).

22. Based upon the matters set forth hereinabove, Empire requests the Commission's statements in dictum in the Order Approving Tariffs that the workpapers "do not result in a unilateral change in Empire's contract with MAWC" and instead "merely show the mathematical results of the Commission's decisions in its Report and Order Approving Stipulations and Agreements that set the revenue requirement and rate design for MAWC" be eliminated or revised to relate solely to the tariffs themselves and not to the Contract rate. Empire further requests that the Commission continue to refrain from ordering any changes in this proceeding to the Contract rate.

WHEREFORE, Empire respectfully requests that the Commission reconsider its Order Approving Tariffs and eliminate or revise its dictum to not apply to the Contract, and to continue to refrain from granting MAWC any authority to increase the rate under the Empire special contract, and granting such other and further relief as the Commission deems necessary or appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing pleading has been served by electronic means on all parties of record as reflected in the records maintained by the Secretary of the Commission through the EFIS system.

Dated: May 25, 2018

/s/ Sharrock Dermott
Sharrock Dermott