

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

**STATE EX REL. PUBLIC COUNSEL; STATE EX REL. JEREMIAH NIXON, STATE
EX REL. UNION ELECTRIC COMPANY, APPELLANTS,**
v.
PUBLIC SERVICE COMMISSION, RESPONDENT.

DOCKET NUMBER WD69259, WD 69270, WD69297

DATE: January 13, 2009

Appeal From:

Cole County Circuit Court
The Honorable Richard G. Callahan, Judge

Appellate Judges:

Division One: Harold L. Lowenstein, Presiding Judge, Paul M. Spinden and Victor C. Howard,
Judges

Attorneys:

Lewis R. Mills, Jr., Robert E. Carlson, Jefferson City, MO., and James B. Lowery, Columbia,
MO., for appellant.
Steven R. Dottheim, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS, WESTERN DISTRICT

**STATE EX REL. PUBLIC COUNSEL; STATE EX REL. JEREMIAH NIXON, STATE
EX REL. UNION ELECTRIC COMPANY, APPELLANTS,**

v.

PUBLIC SERVICE COMMISSION, RESPONDENT.

No. WD 69259, WD69270, WD69297

Cole County

Before Division One Judges: Harold L. Lowenstein, Presiding Judge, Paul M. Spinden and Victor C. Howard, Judges

The appellants, Union Electric Company (UE), the State of Missouri, and the Office of Public Counsel, appealed separately the Public Service Commission's order authorizing UE, an electric utility, to increase its electricity rates. Because the three appeals raised common issues, we consolidated them. On appeal, UE presents two points, the State presents four points, and Public Counsel presents eight. When possible, we address the points together.

AFFIRMED.

Division One holds:

In their first point, UE complains that the commission's authorized rate of \$43 million was erroneous because it was based on an improper 10.2 percent rate of return on UE's equity. The State and Public Counsel, on the other hand, assert that the evidence did not justify a rate of return above 9.8 percent. The commission's decision is supported by substantial evidence. The commission accepted the testimony of Michal Gorman, an energy consultant, whose three studies put UE's rate of return between 9.8 percent and 10.3 percent. The commission was not obligated to believe all of Gorman's testimony, and it was free to reject his constant growth discounted cash flow analysis as inconsistent with the other two tests and, accordingly, to modify his recommended 9.8 percent rate of return. Averaging Gorman's other studies results in a rate of return on equity of approximately 10.25 percent, which is consistent with the commission's rate of 10.2 percent.

UE next complains that the commission erred by not making findings of fact concerning the rate of return on equity that satisfied the requirements of §§ 386.420 and 536.090, RSMo 2000. UE complains that the commission did not explain how it determined a rate of 10.2 percent. Public Counsel makes a similar argument. We, however, had no difficulty understanding the basis for the commission's setting UE's rate of return at 10.2 percent. The commission provided much detail in explaining how it reached its conclusion. The appellants' contentions are without merit.

The State and Public Counsel next challenge the manner in which the commission factored UE's combustion turbine generators (CTGs) in Illinois into UE's revenue requirement. The commission valued the CTGs at the price that UE had paid for them during 2005. Public Counsel contends that he carried his burden of raising "serious doubts" about UE's expenditure by presenting undisputed evidence that UE had purchased similar CTGs for an average price of \$193.80 per kilowatt. The commission stated that it did not value the CTGs at this price because there major factors distinguished UE's purchase of CTGs in Illinois from its earlier CTG purchases. These differences provided a reasonable basis for concluding that the earlier purchases were not a good indicator of the value of the Illinois CTGs. The commission concluded correctly that Public Counsel did not carry his burden of raising serious doubts regarding UE's expenditures.

The State, however, claims that it carried its burden of raising serious doubts about UE's expenditure because its expert, Michael Brosch, a utility consultant, provided undisputed evidence that the average market price for comparable transactions was \$288 per kilowatt. Brosch's testimony was undisputed, but the commission declared that it did not believe his testimony. The commission was free to disbelieve Brosch's testimony.

Next, Public Counsel joins the State asserting next that the commission erred in not reducing UE's revenue requirement by approximately \$70 million. The State contends that the commission should have made this adjustment to account for its loss of low cost electricity from Electric Energy's Joppa plant. They contend that the commission should have treated the Joppa plant as UE's regulatory asset. The State argues that, if the Joppa plant were UE's regulatory asset, its income should be imputed to UE because UE's ratepayers financed its construction and maintenance. The commission rejected the State's contention because the evidence established that the Joppa plant was not UE's regulatory asset. There was evidence in the record to support the commission's conclusion.

Public Counsel, on the other hand, argues that the commission erred in not imputing this lost revenue because the record established that UE acted imprudently when it failed to renew purchase contracts with Electric Energy. Public Counsel claims that UE acted imprudently in not combining its 40 percent share of Electric Energy's stock with Ameren's or Kentucky Utility's stock to force the Electric Energy board to continue selling electricity to UE at cost. The commission denied Public Counsel's request because forcing Electric Energy's board to lose out on profits by selling its electricity to UE at cost instead of selling it on the open market likely would have resulted in the board's violating its fiduciary duty under Illinois law to manage the corporate business solely in accord with the corporation's interest. Public Counsel cites no cases holding that a utility acts imprudently when it fails to require its affiliate to violate its fiduciary duty so the utility's ratepayers can pay a lower rate, and considering UE imprudent for failing to take an action that could open up its affiliate to liability makes little sense. The commission did not err in failing to impute this income into UE's revenue requirement.

The State finally asserts that the commission erred in not reducing UE's revenue requirement to account for UE's losses resulting from destruction of its Taum Sauk Plant. The State claims that UE's revenue requirement is high because UE is no longer able to make any

money off capacity sales from the plant. The State contends that, because undisputed evidence established that UE's negligence caused the plant's destruction, the commission should have adjusted UE's revenue requirement so ratepayers are not paying higher rates caused by UE's negligence. Public Counsel makes a similar argument. The commission never ruled on the merits of the issue because neither party raised the issue during the hearing. The commission was correct that neither party raised the issue.

Public Counsel next asserts that the commission erred in denying his motion to dismiss UE's rate case on the ground that UE had failed to appear at three public hearings. Regulation 4 CSR 240-2.116(3) grants the commission the discretion to decide when a party should be dismissed for violating its order. The commission chose not to exercise its discretion.

Public Counsel next asserts that the commission erred in adjusting UE's revenue requirement downward by only \$230 million to account for the profits it receives from off-system sales. He contends that the record establishes that the commission relied on an incorrect methodology in calculating the reduction. He avers that the commission erred in relying on its staff's computer model, which determined the amount of UE's off-system sales. He argues that the commission should have relied on his expert's model, which established that UE's off-system sales were substantially higher. Even if Public Counsel presented a valid method for calculating off-systems sales, the commission was free to choose its staff's method over Public Counsel's method. We do not discern that the commission abused its discretion.

In his next point, Public Counsel contends that the commission erred in entering UE's Peno Creek plant into its rate base at a value of \$550 per kilowatt. He complains that the record established that UE paid more than fair market value to construct the plant because UE unduly delayed its construction. In setting the value of the Peno Creek, the commission decided to accept the testimony of its staff member who stated that UE paid a fair price for Peno Creek. The staff member's testimony provided the commission with an adequate basis for believing that all of Peno Creek's cost should be included in UE's rate base.

Public Counsel finally asserts that the commission erred in lowering UE's revenue requirement by \$5 million to account for the profits that UE makes on the sale of its extra sulfur dioxide (SO₂) allowances because the record does not support that figure. The commission's baseline of \$5 million was well within the figures adduced at the hearing—a range from zero to \$24 million. We, therefore, will not substitute our discretion for the commission's discretion.

Opinion by: Paul M. Spinden, Judge

Date: January 13, 2009

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