BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

INITIAL POSTHEARING BRIEF

OF

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TABLE OF CONTENTS

I. INTRODUCTION

As an initial matter, MECG does not seek to minimize the significance of the tornado that struck Joplin in May of 2011. Under any definition, this tornado was a monumental disaster for the people of Joplin. Additionally, MECG is not attempting to minimize the efforts made by Empire in restoring service following that tornado.

On a visceral level, one would automatically believe that Empire must have experienced some financial hardship as a result of this tornado. On that same level, one would naturally be tempted to reach for all available regulatory tools in order to compensate Empire for this financial hardship. As this evidence points out and this brief will demonstrate, however, such initial impressions are misplaced. Any financial hardship has been completely addressed by the Commission's issuance of an Accounting Authority Order ("AAO"). This AAO allows Empire to defer certain costs for later recovery. As a result, Empire did not have to immediately book these costs against earnings and Empire's earnings were protected. Therefore, any further reaction, such as the immediate interim rate relief, would solely be done to inflate profits to Empire shareholders.

Furthermore, the evidence supports the notion that, while it may have lost customer accounts, Empire did not lose usage or revenues. In reality, these lost customer accounts were simply displaced. Customers that lost their homes were suddenly relocated to relatives' homes, hotels, apartments, or temporary FEMA housing. Therefore, while they were displaced, these customers continued to still use electricity and Empire continued to still collect these revenues.

The notion that revenues were displaced and not lost is supported by the fact that, despite the tornado, Empire realized record earnings in 2011. Furthermore, despite the tornado and its claim of lost revenues, Empire actually saw revenues grow by 13% over the same period in 2010.

In the final analysis, the tornado was a tremendous disaster for all of Joplin, not just Empire District Electric. Empire's neighbors and fellow victims of this disaster, however, paid their bills. In fact, Empire's neighbors paid bills that resulted in increased revenues and record profits. Now using its misplaced notion of lost revenues, Empire is asking these same neighbors to pay even more. It is unfair for Empire to expect its neighbors to pay higher rates to account for revenues that were not lost, but simply displaced. As such, the Commission should deny Empire's request for interim relief.

Furthermore, MECG asserts, given Empire's improved financial condition, that it was inappropriate for Empire to request this relief. Nevertheless, MECG recognizes that until the Commission begins to place limits on the utilities' rate case expense, utilities like Empire will continue to incur large amounts of costs for outside counsel and consultants to process these cases, no matter how unlikely the outcome. It is inequitable for ratepayers to have to pay increased rate case expense for matters like the immediate case. These ratepayers have already paid rates that resulted in record profits for Empire in 2011. Additionally, these ratepayers will pay the entire cost of the tornado through the already granted Accounting AAO. This case was filed solely as an attempt to enhance profits for Empire shareholders. Nothing about this case has been beneficial for ratepayers. Therefore, MECG asks that the Commission disallow all rate case expense associated with Empire's request for interim rate relief.

II. THE COMMISSION SHOULD MAINTAIN ITS RELIANCE UPON THE EMERGENCY STANDARD IN ASSESSING THE PROPRIETY OF INTERIM RATES.

A. MISSOURI COMMISSION PRECEDENT

In the first case regarding interim relief, Southwestern Bell Telephone Company filed, on May 24, 1949, an application for a temporary rate increase. As its basis for interim relief, Southwestern Bell noted that it was granted increased rates of $3.4 million under authority of the Commission in Case No. 11,191. On appeal, the Circuit Court reversed, for lack of jurisdiction, the Commission's decision in Case No. 11,191. The practical effect of the Court's decision was to relegate Southwestern Bell to the rates in effect prior to Case No. 11,191, rates previously found by the Commission to produce an unreasonably low rate of return. This unreasonably low rate of return was further exacerbated by the incurrence of a $2.3 million wage increase since the time Case No. 11,191 was submitted to the Commission. As a result, Southwestern Bell asked the Commission, in an effort to achieve the objectives previously expressed by the Commission in Case No. 11,191, to authorize interim rate relief in the amount of $5.7 million.[1]

In its Report and Order, the Commission, noticing the lack of suspension period, found that "parties who desire to oppose or at least look closely into the situation probably will be denied sufficient time to prepare thoroughly their side of the case" effectively resulting in a situation in which "[t]he Commission, in its haste to render immediately needed relief, is more likely to err than where the case is tried in the normal

[1] *Southwestern Bell Telephone Company*, 2 Mo.P.S.C.(N.S.) 131 (1949).

way."[2] As such, while noting that "it has the power to prescribe the conditions under which temporary and emergency operations are to be carried on," the Commission effectively limited interim relief to those situations in which the utility could make a showing of confiscation.[3]

The interim standard as set forth in the *Southwestern Bell* case remained in place until 1975, when the Commission clarified the standard. In a Missouri Public Service Company decision,[4] the Commission discussed the rationale underlying interim relief.

> Under the present circumstances, the mechanism of interim rate relief exists to fill a void in the regulatory process. It is recognized that the machinery of permanent rate relief does at times grind exceedingly slow and that the companies under the jurisdiction of the Commission may, from time to time, find themselves facing emergencies which require timely action by the Commission. However, the fact that time is of the essence in an interim case creates certain constraints which would otherwise not be present in a normal proceeding. The Commission must accept at face value the evidence presented to it by the Company, because time does not permit extensive verification of this evidence by the Commission and its Staff.[5]

As such, the Commission deemed it appropriate to provide clarification to the previously expressed *Southwestern Bell* standard. "Therefore, it is incumbent upon the Company to demonstrate conclusively that an emergency does exist. The Company must show that (1) it needs additional funds immediately, (2) that the need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief."[6] Finding that the utility had failed to meet the requirements necessary for interim relief, the Commission denied the request for emergency rates.

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[2] *Id.* at 134.
[3] *Id.*
[4] *Missouri Public Service Company*, 20 Mo.P.S.C. (N.S.) 244 (1975).
[5] *Id.*
[6] *Id.*

Since the *Missouri Public Service Company* case, the Commission has frequently accepted the emergency or near emergency standard.[7] The Commission has routinely applied the emergency standard in cases involving electric, gas, telephone, water and sewer companies under its jurisdiction.[8]

In recent years, the Commission introduced an aspect of "good cause" to its consideration of interim rate requests. While the name of the standard may have modified slightly, the Commission's application of the standard still looked for an emergency prior to granting an interim rate relief.

In 1997, the Commission considered a request from Empire District Electric for interim rate relief. While rejecting Empire's request, the Commission appeared to introduce some consideration of "good cause" to its decision.[9] Immediately, Empire seized upon this perceived shift in the Commission's standard and again requested interim relief in conjunction with its next general rate case. In that decision, the Commission noted that while discussing "good cause", its previous decision was in essence an application of the emergency standard.

> 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 Mo.PSC 3rd 17 (Case No. ER-97-82). However, in that case the Commission based its denial of Empire's request on the conclusion that: "There is no showing by the Company 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

[7] The standard set forth in the *Missouri Public Service Company* case has also been referred to as a "test of immediate need". See, *Missouri Public Service Company*, 22 Mo.P.S.C. (N.S.) 427, 429 (1978).
[8] See, *Missouri Public Service Company*, 22 Mo.P.S.C. (N.S.) 427 (1978); *Kansas City Power & Light Company*, 23 Mo.P.S.C. (N.S.) 413 (1980); *Missouri Public Service Company*, 24 Mo.P.S.C. (N.S.) 245 (1981); *Martigney Creek Sewer Company*, 25 Mo.P.S.C. (N.S.) 641 (1983); *Arkansas Power & Light Company*, 28 Mo.P.S.C. (N.S.) 143 (1986); and *Raytown Water Company*, 1 Mo.P.S.C. 3d 184 (1991).
[9] *Empire District Electric Company*, 6 Mo.P.S.C. 3rd (1997).

> the Commission now returns to its historic emergency or near emergency standard.[10]

Most recently, the Commission considered Ameren Missouri's request for interim rate relief. Again, while discussing some notion of good cause, it because apparent in the Commission's application, that it was continuing to utilize the emergency / near emergency standard.

> 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.[11]

Clearly then, while it may have been inconsistent in its naming of the standard, at times introducing notions of good cause and extraordinary circumstances, the Commission has been consistent in its application of the standard. As the Commission has recognized, "[a]lthough the Commission has claimed authority to grant interim rate increases on something less than an emergency basis, in practice, the 'good cause shown standard looks a lot like the 'emergency' standard."[12] As the following section indicates, the Commission's standard is also consistent with the standard applied by other state utility commissions in assessing interim rate relief.

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[10] *Empire District Electric Company*, Case No. ER-2001-452 (issued March 8, 2001).
[11] *Union Electric Company*, Case No. ER-2010-0036 (issued January 13, 2010).
[12] MEUA-1, page 2 (citing to *Ameren Missouri*, Case No. ER-2010-0036, Report and Order, issued January 13, 2010.

B. APPROACH OF OTHER STATES TOWARDS INTERIM RELIEF

The authority to grant interim rate relief has been almost universally recognized to exist in the regulatory commissions of this nation. As the Missouri Court of Appeals recognized:

> The very real necessity of recognizing such a power in the regulatory agency has long been recognized by courts throughout the country. Not a single case has been cited by Jackson County nor found by independent research which has ever denied such a power to a regulatory agency such as the Missouri Public Service Commission. On the other hand, numerous cases from diverse jurisdictions have recognized and given effect to such an implied power even in the absence of specific statutory authority.[13]

Generally, the decision to grant interim relief is deemed to be within the sound discretion of the commission.[14] Similar to the approach taken by the Missouri Commission, the vast majority of jurisdictions have limited interim relief to those situations in which a utility can meet some form of an "emergency" standard. (See Attachment 1).[15]

In the case of *Jersey Central Power & Light Company*, the New Jersey Board of Public Utility Commissioners addressed the type of situation which would justify interim relief.

> Indeed, since Hope and pursuant to the legal standards we have enunciated, this board is duty bound to provide necessary funds to a utility on an emergency basis, subject to refund in the event of a financial and

[13] *State ex rel. Laclede Gas Company v. Public Service Commission*, 535 S.W.2d 561, 566 (Mo.App. 1976) (citations omitted).
[14] *Id.* at 568.
[15] Attachment 1 only presents those cases which are easily accessible through Public Utility Reports (PUR). Therefore, the absence of a particular jurisdiction from Attachment 1 should not be construed as an indication that the jurisdiction does not utilize the emergency standard. A review of the headnotes contained in the index to PUR indicates that many of these jurisdictions utilize some form of the emergency standard. However, since not all cases are reported, many of these cases are not easily accessible. For instance, **Colorado:** *Public Service Company of Colorado*, Docket No. 1420, Decision No. C80-1039 (May 27, 1980); **Georgia:** *Georgia Power Company*, Docket No. 2532-U (August 7, 1973); **Maryland:** *Maryland Marine Utilities, Inc.*, 76 Md.P.S.C. 332, Case No. 7892, Order No. 67055 (June 17, 1985); **Oklahoma:** *Oklahoma Gas & Electric Company*, Cause No. 28123, Order No. 238068 (May 9, 1983); *Oklahoma Natural Gas Company*, Cause No. 28069, Order No. 236244 (April 5, 1983); **Utah:** *US West Communications*, Docket No. 85-049-02 (1985); **Wisconsin:** *Monroe County Telephone Company*, 2-U-6221 (July 27, 1965).

> service crisis. We have defined emergency in rather stringent terms to protect the consumer. ***There has to be a showing that but for an immediate infusion of ratepayer funds petitioner would not be able to continue to provide safe, adequate, and proper service or reasonably access the market for needed construction or expense***. This may take the form of a coverage crisis, an inability to access the financial markets for needed construction, and/or a cash-flow crisis. Mere attrition in earnings is not sufficient unless it impacts financing, construction, or service.[16]

Similarly, in the case of *Commonwealth Edison Company*, the Illinois Commerce Commission discussed its standards relevant to interim rate relief.

> In deciding this question, the commission believes that there must exist an obvious revenue deficiency coupled with one or more of the following: a sudden decline in revenues caused by factors outside the control of the utility; an inability to arrange debt financing or attract capital at reasonable costs without increased operating revenues; an evidentiary showing that deferral of partial rate relief until a final order can be issued would result in an unreasonable and harmful loss of revenue to the petitioning utility; and that reasonable grounds exist for the commission to believe that the utility would be entitled to rate relief at the time a final order is issued. . . . The commission must act in such a manner as to maintain the financial integrity of the utility and maintain its responsibility to the utility's ratepayers.[17]

In still another case, the Indiana Public Service Commission applied an emergency standard in its assessment of the need for interim relief. "Although petitioner is facing an impending cash shortage, there was little or no evidence presented concerning possible curtailments of service, efforts to reduce operating costs or efforts to obtain alternative financing. Based upon the limited evidence presented, the commission could not grant petitioner emergency rate relief."[18]

In 1983, the Massachusetts Department of Public Utilities, after previously adopting a lesser standard for the consideration of interim rate relief, returned to the logic of the emergency standard. While the passage does appear long, it is extremely

[16] *Jersey Central Power & Light Company*, 38 PUR4th 115, 117 (N.J. 1980) (emphasis added).
[17] *Commonwealth Edison Company*, 40 PUR4th 62, 64 (Illinois 1982) (emphasis added).
[18] *Hoosier Energy Rural Electric Cooperative, Inc.*, 62 PUR4th 419, 422 (Ind. 1984).

informative in that it presents the consequences, as experienced in Massachusetts, of adopting a lesser standard for interim relief.

> We find it appropriate in this case to take the opportunity to reassess and clarify the department's requirement and guidelines for petitions for interim relief. In Re Western Massachusetts Electric Co. (1975) D.P.U. 18252, we stated:
>
> "While there is no specific statutory authority to act on an interim basis, the department has recognized that there may be circumstances of great urgency requiring that relief be given to a utility more quickly than would be the case if a full and careful investigation were undertaken. Thus, the department has from time to time entertained petitions for interim rate increases. However, the granting of an interim rate increase necessarily means that the department must act without a full hearing and without subjecting the proposed rate filing to close scrutiny. It is for this reason that we approach requests for interim increases cautiously and have adopted the position that a genuine emergency must exist before such increases will be granted."
>
> Further in Re Boston Edison Co. (1978) D.P.U. 19300-A, we stated:
>
> "The standard applicable to requests for emergency interim relief is well settled. . . Specifically, we believe that interim rate relief is and should remain extraordinary relief, and that it should be granted only where the company can demonstrate clearly and convincingly that it is the only practical way to avoid probable, immediate, and irreparable harm either to its business or to the interests of its customers."
>
> Thus, historically, the interim relief procedure existed as a device to provide relief to companies which demonstrated by "clear and convincing" evidence that such relief was necessary "to avoid probable, immediate, and irreparable harm either to its business or to the interest of its customers." Re Western Massachusetts Electric Co., *supra*. This standard for interim relief, the so-called "emergency" standard, was modified by the department in Re New England Teleph. & Teleg. Co. (1980) 41 PUR4th 121, to a less restrictive standard because of the department's expressed concern about the effects of regulatory lag in an inflationary period. The department's modified standard was explained in detail in Re Western Massachusetts Electric Co. (1981) D.P.U. 557. In that decision we explained that the "D.P.U. 380 standard is intended to directly address the negative impact of regulatory lag upon a company in an inflationary economy." Therefore, in order to meet the modified standard, a company had to show that regulatory lag existed and that such

> regulatory lag had a negative effect on the company as a result of the impact of an inflationary economy.
>
> Since the adoption of the modified standard in D.P.U. 380 companies have, with increasing frequency, sought interim relief and have sought to expand upon the reasons for interim relief. This experience indicates that the broadening of our previous standard has served mainly to impose administrative burdens upon an already tightly constrained six-month suspension period. The filing and reviewing of such interim proposals have presented serious problems in the expeditious and proper treatment of general rate filings.
>
> In light of these factors, the department hereby returns to the strict emergency standard as described in the Western Massachusetts Electric and Boston Edison cases.[19]

As one can easily see, the emergency standard has been accepted by virtually all jurisdictions of this nation. When other standards have been implemented, common sense has mandated a return to the logic of the emergency standard.

III. EMPIRE'S FINANCIAL CONDITION DOES NOT WARRANT INTERIM RATE RELIEF.

A. APPLICATION OF THE COMMISSION'S "EMERGENCY" STANDARD

A cursory review of Empire's testimony and its financial statements provides a ready indication that Empire is not facing an emergency situation that justifies the use of the "extraordinary tool"[20] of interim rate relief. Of utmost importance, Empire readily admits that it is not having difficulty providing safe and adequate service.[21] Furthermore, Empire fails to meet any of the three criteria set forth in the emergency standard.[22]

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[19] *Fitchburg Gas & Electric Light Company*, 52 PUR4th 197, 201-202 (Mass. 1983) (emphasis added).
[20] *Union Electric Company*, Case No. ER-2010-0036 (issued January 13, 2010).
[21] Tr. 88-89 and 106-107.
[22] "Therefore, it is incumbent upon the Company to demonstrate conclusively that an emergency does exist. The Company must show that (1) it needs additional funds immediately, (2) that the need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief." *Missouri Public Service Company*, 20 Mo.P.S.C. (N.S.) 244 (1975).

First, Empire does not need additional funds immediately. Despite the tornado striking in May of 2011, Empire waited 16 months, until filing this rate case.[23] During that intervening period, Empire saw revenues increase by 13% in the quarter of the tornado[24] and realized record earnings in 2011.[25] As a result of these record earnings, Empire has seen its retained earnings balance go from $4.1 million immediately before the tornado[26] to almost $34 million by the end of 2011.[27] Given the rapid increase in its retained earnings balance, it is apparent that Empire is able to meet its current expenses, capital requirements and dividends out of internally generated funds. As such, Empire does not need additional funds immediately through an interim rate increase.

Second, any need for additional funds can easily wait until any rate increase is approved. Despite the fact that the tornado occurred in May of 2011, Empire chose to wait until July of 2012 to file its permanent rate increase. As such, Empire has already demonstrated that it can postpone any additional funds. As scheduled, rates resulting from the permanent rate increase will go into effect in late May / early June. In the meantime, Empire can meet current financing needs through internally generated funds or its increasingly large retained earnings balance.

Third, in the event that Empire does not receive additional funds, they have other alternatives. Evidence indicates that in addition to internally generated funds, Empire also has approximately $34 million in retained earnings that it can access in the short run before the rate increase becomes effective.[28] Furthermore, Empire has a $150 million

[23] Empire Exhibits 1 through 5 all filed with initiating tariffs on July 6, 2012.
[24] Tr. 116-117 (2Q10 revenues = $106,249,000; 2Q11 revenues = $119,903,000). Increase of 12.85%.
[25] Ex. MECG-1 (Data Request No. 6) (2011 earnings were a record $54,971,000, an increase of 15.98% over 2010 earnings).
[26] Ex. Empire-1 at page 10.
[27] Ex. MECG-1, at page 2 (Data Request No. 5).
[28] *Id.*

unsecured revolving credit facility.[29] Finally, Empire has recently evidenced its ability to access capital markets through a private placement of $88 million of 3.58% First Mortgage Bonds.[30]

Clearly, despite the extraordinary nature of the tornado, the impact on Empire's financial situation has not been of the nature that would justify the use of the "extraordinary tool" of interim rate relief. In fact, despite insinuations to the contrary, Empire's financial situation has improved since the tornado. Revenues actually increased following the tornado, earnings were at a record level in 2011, and Empire's retained earnings balance is at its highest level since 2003. All of these facts dictate that the Commission deny Empire's request for interim rate relief.

B. APPLICATION OF EMPIRE'S "EXTRAORDINARY CIRCUMSTANCE" STANDARD

Given its inability to meet the time-tested emergency standard, Empire instead seeks to latch on to language in the Ameren case indicating that interim relief may be justified to meet "extraordinary circumstances."[31] Under Empire's theory then, given that the Joplin tornado was extraordinary, Empire's financial condition following the tornado must also be an "extraordinary." As justification for its "extraordinary" financial condition following the tornado, Empire points to two financial factors: (1) Empire's alleged lost revenues resulting from the tornado and (2) the need to suspend its quarterly dividend following the tornado. As this brief reveals, however, Empire's basis for

[29] Staff – 2, page 9.
[3030] *Id.*
[31] Empire Reply to Motion to Reject and Other Requests in Opposition to Interim Rate Relief, filed July 30, 2012, at page 3 (citing to *Union Electric Company*, Case No. ER-2010-0036 (issued January 13, 2010).

interim rate relief is either: (1) misplaced or (2) actually resulted from historical Empire management practices and not the tornado.

1. Empire Did Not Have Lost Revenues

As alleged in the testimony of Empire's CEO:

> The loss of revenues resulting from the tornado caused a direct reduction in revenue. . . . The reduction in revenue and increase in costs due to the tornado have reduced Empire's earnings levels and cannot be reflected in rates until the Commission authorizes new rates for Empire.[32]

Thus, Empire asserts that it realized a reduction in revenues and earnings as a result of the tornado. Empire theorizes then that it needs interim rate relief and that the need for such relief is a direct result of an "extraordinary circumstance" – the May 2011 tornado.

Contrary to Empire's claims, however, it is apparent that Empire has not suffered a reduction in earnings or revenues. While 2010 earnings were $47.4 million, 2011 earnings increased by 15.98% to a record $55.0 million.[33] Such earnings were realized despite the May 2011 tornado. Similarly, while revenues in the second quarter of 2010 were $106,249,000, revenues for the comparable period in 2011 were $119,903,000.[34] Therefore, despite the incurrence of the tornado, Empire's revenues actually increased by 13%. Certainly, Empire's claim that "the tornado caused a direct reduction in revenues and earnings" is not accurate.

The increase in revenues and earnings is not surprising when one recognizes that customers and revenues were not lost. In reality, those customers were simply displaced. Customers that once had individual accounts were now displaced to live with relatives or in apartments, hotels or temporary FEMA housing. Therefore, while these customers no

[32] Empire 1, page 9.
[33] Ex. MECG-1 (Data Request No. 6)
[34] Tr. 116-117.

longer had individual accounts, they were still using electricity and generating revenues, albeit on a different account. In addition, Empire was realizing the new, unexpected revenues associated with emergency cleanup efforts and workers.

Recently, Missouri Gas Energy (MGE), the local gas distribution company in Joplin, sought an AAO associated with costs resulting from the same May 2011 tornado.[35] Like Empire now, MGE asked that the Commission grant it recovery of revenues lost as a result of the tornado.[36] Similar to the situation experienced by Empire, the Commission noted that MGE revenues actually grew following the tornado.[37]

Ultimately, the Commission rejected MGE's position seeking recovery of lost (ungenerated) revenues.

> In support of recording ungenerated revenue on a deferred basis, the Company urges the Commission to look only at whether the tornado was extraordinary. Staff and OPC argue that the AAO sought would not only allow the recording of an item, it would create the item recorded. Staff and OPC are correct.
>
> Actual expenditures exist in the past, present, or future and represent an exchange of value that the Company must record. Ordinarily, the Company records them currently and, if they are extraordinary, the Company must record them in Account 182.3.
>
> The Company's claim is different. ***Ungenerated revenue never has existed, never does exist, and never will exist. Revenue not generated, from service not provided, represents no exchange of value. There is neither revenue nor cost to record, in the current period nor in any other.***[38]

[35] See, Case No. GU-2011-0392.

[36] The Commission objected to the phrase "lost revenues" as misleading. ("Lost revenue," is the term that the Company and Staff use, but that term is misleading because it suggests that the Company had the money and then lost it, which is untrue. OPC's term "expected revenue," is more accurate. "Ungenerated" fully expresses the characteristic determinative of the claim."). *Southern Union Company*, Case No. GU-2011-0392, Report and Order, issued January 25, 2012, at page 2.

[37] *Id.* at page 22. ("The Company hypothecates a loss by isolating a drop in revenue in the tornado area. No authority makes that area relevant to exclusion of the rest of the Company's service territory. On the contrary, Staff and OPC showed that Company revenue is up.").

[38] *Id.* at pages 23-25 (emphasis added).

2. Empire's Retained Earnings Balance Was Not Affected by the Tornado

As the second rationale for its request for interim rate relief, Empire asserts that its annual dividend was suspended as a result of the tornado.[39] Specifically Empire alleges, "[g]iven the low level of retained earnings, the expected lost revenue from lost and displaced customers due to the tornado . . . the Empire board met three days after the storm and suspended the Company's dividend for an estimated duration of two quarters."[40] While Empire would like to portray its suspension of dividends as being a result of the tornado, the evidence indicates that the suspension of the Empire dividend was driven solely by Empire's historic practice of paying dividends in excess of earnings.

As Empire notes, certain provisions of the Federal Power Act and covenants in Empire mortgage bonds essentially ties Empire's ability to pay dividends, in some degree, to the amount of its retained earnings balance.[41] To the extent that earnings exceed dividends, this retained earnings balance increases. Similarly, to the extent that earnings are less than dividends, the retained earnings balance decreases.

Empire would have the Commission believe that its decision to suspend its quarterly dividend was driven by the tornado. In reality, however, the need to suspend the dividend was tied directly to a retained earnings balance that had been deflated by years of Empire paying dividends in excess of earnings. As the following table indicates, the Empire annual dividend / share has routinely exceeded its annual earnings / share.

[39] Empire 1, pages 9 -11.
[40] *Id.* at 10.
[41] *Id.*

Year	Dividend / Share[42]	Earnings / Share[43]
2000	$1.28	$1.36
2001	$1.28	$0.59
2002	$1.28	$1.29
2003	$1.28	$1.30
2004	$1.28	$0.86
2005	$1.28	$0.92
2006	$1.28	$1.50
2007	$1.28	$1.10
2008	$1.28	$1.18
2009	$1.28	$1.21
2010	$1.28	$1.24

The frequency with which dividends exceeded earnings is best demonstrated in Figure 1:

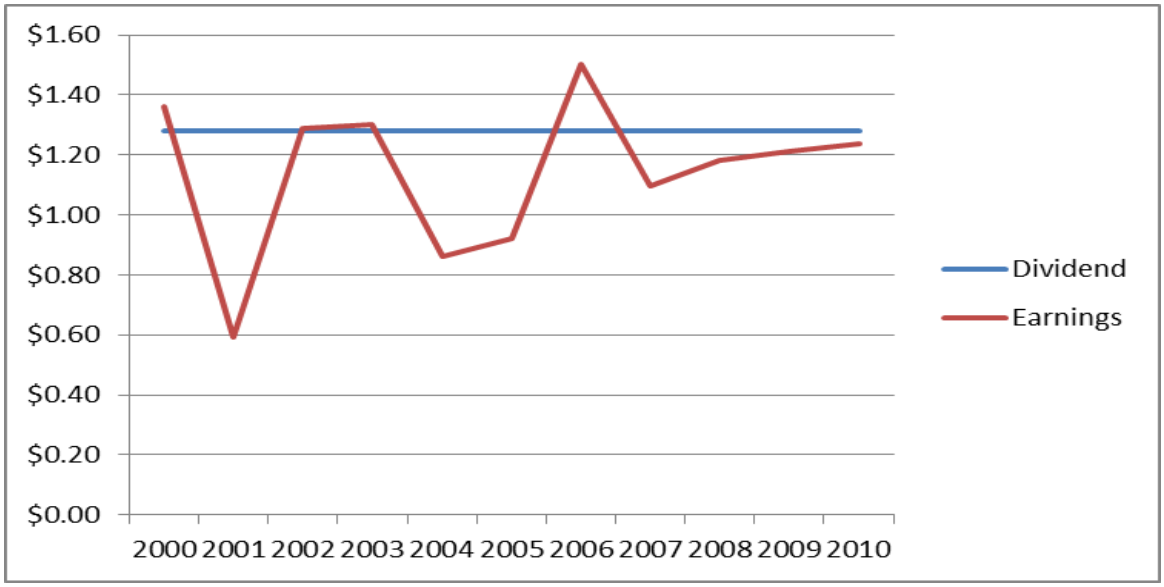


Figure 1

The practical effect of Empire's historic decision to pay dividends in excess of earnings was to reduce its retained earnings balance. Over the course of the past decade,

[42] MECG-1 (Data Request 3). All Empire dividends were paid to common shareholders. Empire redeemed the last of its preferred stock in 1999. (MECG-1, Data Request 4).
[43] MECG-1 (Earnings from Data Request 6; Number of Shares from Data Request 8). Earnings per share calculated by simply dividing earnings by number of shares.

Empire's retained earnings balance had been reduced from $54.1 million to $5.5 million by Empire's historic practice of paying inflated dividends.[44]

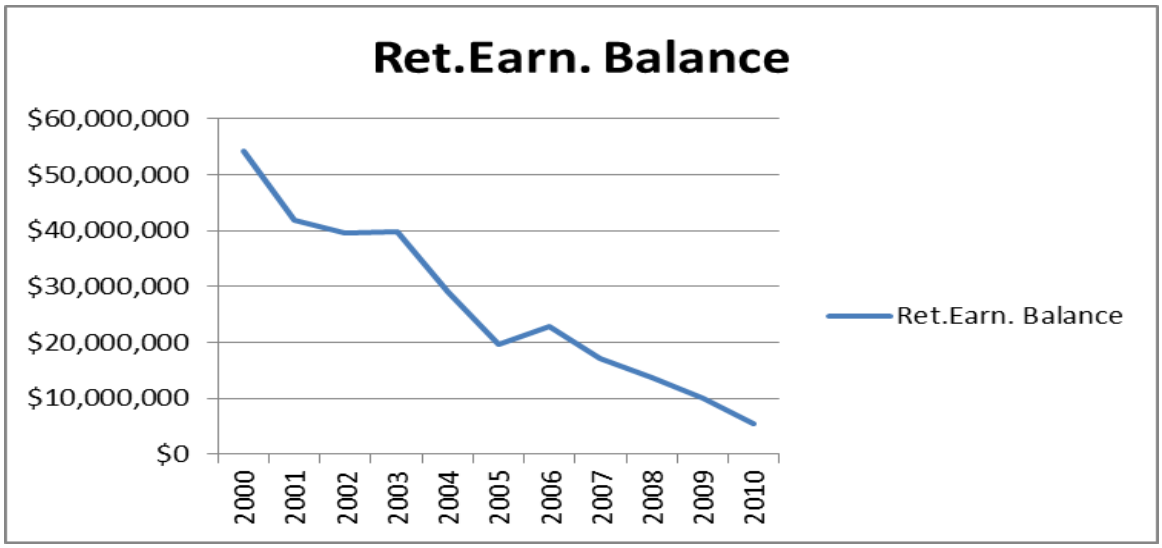


Figure 2

In fact, on March 31, 2011, Empire's retained earnings balance was down to $4.1 million.[45] Nevertheless, Empire continued with its regularly scheduled quarterly dividend in April of 2011.[46] When the tornado struck in May of 2011 then, Empire's retained earnings balance had already gone negative.[47]

3. Empire Does Not Meet Its Own Extraordinary Circumstances Standard

Recognizing its clear failure to meet the emergency standard, Empire urges the Commission to apply a standard based upon "extraordinary circumstances." Like MGE before it, Empire simply appears to claim that since the tornado was extraordinary, it must necessarily have had extraordinary consequences for Empire that justify interim rate

[44] MECG-1 (Data Request 5).
[45] Empire-1, page 10.
[46] *Id.*
[47] *Id.* at page 11.

relief. Bound to explain its case, Empire alleges that it experienced: (1) lost revenues and (2) a suspended dividend as a result of the tornado.

The evidence, however, demonstrates that Empire did not experience lost revenues. In fact, despite the tornado, Empire saw revenues grow by approximately 13%. Furthermore, despite the tornado, Empire realized record earnings in 2011. This financial evidence supports the notion that Empire did not lose revenues. Instead, while Empire may have lost customers, the revenues were simply displaced. In reality, customers were still using Empire electricity and generating revenues, they were now located with relatives or in apartments, hotels or temporary FEMA housing.

Furthermore, Empire's claim that its quarterly dividend was affected by the tornado is disingenuous. As a result of Empire's historic practice of paying dividends in excess of earnings, Empire had reduced its retained earnings balance to essentially zero. Given the covenants in its mortgage indentures, Empire would likely have had to suspend its dividend even if the tornado had not occurred. Empire's claim that its dividend was suspended in response to the tornado is simply convenience.

Ultimately, the Commission should realize that Empire has not met either the emergency standard or the extraordinary circumstances standard. As a result, the Commission should reach the same conclusion that it reached with regard to MGE's accounting authority order request and deny Empire's request.

IV. EMPIRE'S EARNINGS HAVE BEEN PROTECTED THROUGH AN ACCOUNTING AUTHORITY ORDER.

In its testimony and pleadings, Empire has misled the Commission into believing that it has incurred costs in response to the tornado that has negatively affected Empire's

earnings. For instance, "[t]he reduction in revenue and increase in costs due to the tornado together have reduced Empire's earnings levels."[48] By making such allegations, Empire fails to inform the Commission of the existence of an Accounting Authority Order which effectively shields Empire's earnings from the incremental operation and maintenance costs resulting from Empire's response to the tornado. Instead, such costs are deferred for recovery in rates resulting from the permanent part of this rate case.

As Staff Witness Oligschlaeger points out, Empire's AAO mitigates the financial impact of the tornado on Empire's earnings.

> Empire was not required to charge to current expense any O&M expense or depreciation expense directly associated with the storm, and the AAO authorized Empire to accrue a carrying charge equal to its Allowance for Funds Used During Construction (AFUDC) rate on its tornado capital additions to offset the lack of current return on its tornado related capital additions.[49]

Therefore, despite Empire's claims that this increase in cost has reduced its earnings, it is clear that Empire's earnings have been protected from any impact from the tornado.

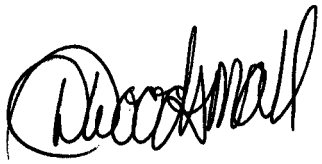
V. CONCLUSION

MECG respectfully request that the Commission deny Empire's request for interim rate relief. As this brief has demonstrated, Empire continues to provide safe and adequate service and fails to meet any of the required criteria under the Commission's emergency standard. Furthermore, the rationale provided by Empire in its attempts to meet an extraordinary circumstance standard has been proven to be misplaced. For these reasons, the Commission should deny Empire's request for interim rate relief.

[48] Empire-1, page 9
[49] Staff-7, pages 12-13. See also, MEUA-1, page 3.

Furthermore, MECG asserts that the Commission should deny Empire recovery of any rate case expense associated with this case. It has been shown that Empire set record earnings in 2011. Nevertheless, Empire believes that the customers that provided these record earnings should be required to pay for interim rate relief. Until the Commission begins to place limits on the utilities' incurrence of rate case expense, they will continue to view rate case expense as an open wallet to fund any case no matter how unlikely the outcome. Given that this case was brought solely in an effort to enhance shareholder profits and that ratepayers have received no benefit from this matter, MECG asks that the Commission deny Empire recovery of any rate case expense associated with this interim rate request.

Respectfully submitted,



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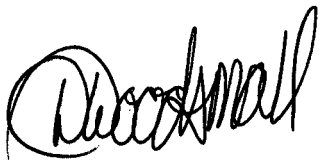
ATTORNEY FOR THE MIDWEST ENERGY CONSUMERS GROUP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: September 20, 2012

JURISDICTIONS WHICH UTILIZE THE EMERGENCY STANDARD

ALASKA	Re: Municipality of Anchorage d/b/a Anchorage Sewer Utility	37 PUR4th 97 (1980)
ARIZONA	RUCO v. Arizona Corp. Comm'n	20 P.3d 1169 (2001)
ARKANSAS	Re: Arkansas Power and Light Company	10 PUR4th 474 (1975)
	Re: Arkansas Louisiana Gas Company	93 PUR3d 201 (1972)
	Re: Fordyca Water Company	88 PUR (N.S.) 98 (1951)
CALIFORNIA	Re: San Diego Gas and Electric Company	213 PUR4th 1 (2001)
	Re: Southern California Edison Company	207 PUR4th 261 (2001)
	Re: Southern California Edison Company	205 PUR4th 296 (2001)
	Re: Citizen's Utility Company of California	89 PUR3d 334 (1971)
	Re: Citizen's Utility Company of California	19 PUR3d 177 (1957)
	Re: Southern Counties Gas Company	18 PUR3d 338 (1957)
	Pacific Telephone & Telegraph Company	44 Cal.3d 878 (1949)
DISTRICT OF COLUMBIA	Re: Chesapeake & Potomac Telephone Company	56 PUR4th 53 (1983)
	Re: Chesapeake & Potomac Telephone Company	95 PUR3d 339 (1972)
	Re: Potomac Electric Power Company	95 PUR3d 99 (1972)
FLORIDA	Re: People's Gas Systems, Inc.	98 PUR3d 205 (1972)
HAWAII	Re: Lanai Water Company, Inc.	163 PUR4th 623 (1995)
	Re: East Honolulu Community Services, Inc.	118 PUR4th 259 (1990)
IDAHO	Re: Idaho Power Company	233 PUR4th 107 (2004)-
	Re: Washington Water Power Company	37 PUR4th 576 (1980)
	Re: Washington Water Power Company	22 PUR4th 485 (1977)
ILLINOIS	Re: Temporary Rate Increases	77 PUR4th 747 (1986)
	Re: Commonwealth Edison Company	49 PUR4th 62 (1982)

INDIANA	Re: Indiana-America Water Company	88 PUR4th 43 (1987)
	Re: Public Service Company of Indiana	72 PUR4th 660 (1986)
	Re: Hoosier Energy Rural Electric Cooperative Inc.	62 PUR4th 419 (1984)
	Re: Wayne County Rural Electric Membership Corp.	98 PUR3d 525 (1973)
	Re: Indianapolis Power & Light Company	88 PUR3d 401 (1971)
	Boone County Rural Electric Membership Corp. v. Indiana Public Service Commission	159 N.E.2d 121 (Ind. 1959) 29 PUR3d 409 (1959)
KENTUCKY	Re: Big Rivers Electric Cooperative	274 PUR4th 170 (2009)
LOUISIANA	Ex parte Louisiana Power and Light Company	70 PUR4th 460 (1985)
	Ex parte Gulf States Utilities Company	80 PUR4th 370 (1986)
MAINE	Re: Central Maine Power Company	45 PUR4th 191 (1982)
MASSACHUSETTS	Re: Western Massachusetts Electric Company	52 PUR4th 32 (1983)
	Re: Fitchburg Gas & Electric Co.	52 PUR4th 197 (1983)
MICHIGAN	Re: Consumers Power Company	66 PUR4th 1 (1985)
MONTANA	Re: Montana-Dakota Utilities Company	14 PUR4th 115 (1976)
NEW HAMPSHIRE	Public Service Company of New Hampshire v. State of New Hampshire	2 PUR4th 59 (1973)
	Re: Public Service Company of New Hampshire	95 PUR3d 401 (1972)
NEW JERSEY	Re: Jersey Central Power and Light Company	38 PUR4th 115 (1980)
	Re: Public Service Electric and Gas Company	6 PUR4th 302 (1974)
NEW MEXICO	Re: El Paso Electric Company	38 PUR4th 289 (1980)
	Re: Gas Company of New Mexico	28 PUR4th 20 (1978)
NEW YORK	Re: Long Island Lighting Company	100 PUR4th 237 (1989)
NORTH CAROLINA	Re: Carolina Power and Light Company	4 PUR4th 387 (1974)
OHIO	Re: Dayton Power & Light Co.	41 PUR4th 136 (1980)
OREGON	Re: Portland General Electric Company	86 PUR4th 463 (1987)

PENNSYLVANIA	Pennsylvania Public Utility Commission v. Pennsylvania Electric Co.	26 PUR4th 337 (1978)
TEXAS	Re: Lo-Vaca Gathering Company	4 PUR4th 349 (1973)
UTAH	Re: Questar Gas Company	198 PUR4th 551 (2000)
VERMONT	Re: Franklin Electric Light Company	118 PUR4th 267 (1990)
	Re: Green Mountain Power Corporation	98 PUR3d 291 (1973)
WASHINGTON	Re: Verizon Northwest Inc.	236 PUR4th 259 (2004)
	Re: Avista Corporation	213 PUR4th 177 (2001)
	Washington Utilities and Transportation Commission v. Pacific Northwest Bell Telephone Co.	11 PUR4th 166 (1975)