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	)))))))	**ER-2011-0004**

OPPOSITION TO MOTION OF EMPIRE DISTRICT ELECTRIC COMPANY TO ESTABLISH ADMISSIBILITY OF TESTIMONY

COMES NOW the MIDWEST ENERGY USERS' ASSOCIATION ("MEUA")[1/] and its participating members, Praxair, Inc., Explorer Pipeline Company, and Enbridge Pipeline Company, and opposes the March 21, 2011 Motion by Empire District Electric Company ("Empire") To Establish Admissibility of Testimony and Exhibits ("Motion") as follows:

[1/] In its November 3, 2010 *Order Regarding the Missouri Energy Users' Association's Application to Intervene* the Commission stated: "Indeed, granting intervention to an unincorporated association is a grant of intervention to the association's individual members – its current members." The Commission included the following footnote (as footnote 7): "An unincorporated association has no legal entity distinct from its membership. *State ex rel. Auto. Club Inter-Insurance Exchange v. Gaertner*, 636 S.W.2d 68, 70 (Mo. banc 1982)." In the same Order the Commission granted intervenor status to Praxair, Explorer and Enbridge as individual parties.

A. Summary of Position.

1. MEUA's opposition references several areas in which Empire's Motion is insufficient and has no merit. These are the lack of party identity, failure to show relevance to issues that are specific to Empire's rate case, failure to comply with provisions of the Administrative Procedure Act and Empire's attempt to bootstrap itself around its burden of proof.

B. Empire's Motion Fails Because of a Lack of Identity of Parties Across the Two Proceedings.

1. Empire's Motion seeks to admit into the record of Case No. ER-2011-0004 selected portions of the already-developed record in Case No. ER-2010-0355. The Motion is apparently premised on a perception that the parties in this proceeding should be estopped from other arguments or contentions because of the ER-2010-0355 record. Alternatively, Empire may be arguing that it cannot meet its burden of proof without having this evidence. Neither argument has merit.

2. The record in a case before the Missouri Public Service Commission is important. Judicial review is constrained to that record and, indeed, the Commission, in the first instance, is duty bound to ground its findings upon competent[2/]

[2/] Competent evidence is that which would be admissible in a court of law. Statements in violation of evidentiary rules do not qualify as competent and substantial evidence. *Concord Publ'g House, Inc. v. Dir. of Revenue*, 916 S.W.2d 186, 195 (Mo. *banc* 1996).

and substantial evidence on the whole record.[3] That record should be protected from contamination by incompetent material.

3. Collateral estoppel operates to limit relitigation of the same issues in a later proceeding. The Missouri Supreme Court has held:

> The doctrine of issue preclusion, traditionally known as "collateral estoppel," ought to preclude plaintiffs from a damages judgment that exceeds those amounts. Hudson v. Carr, 668 S.W.2d 68 (Mo. banc 1984), and Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713 (Mo. banc 1979), set forth the factors that govern whether it is appropriate for a court to apply the doctrine to preclude re-litigation of an issue decided in a former proceeding:
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> > "(1) whether the issue decided in the prior adjudication was ***identical*** with the issue presented in the present action;
> >
> > "(2) whether the prior adjudication resulted in a judgment on the merits;
> >
> > "(3) whether the party against whom collateral estoppel is asserted ***was a party or in privity*** . . . with a party to the prior adjudication ." Oates, 583 S.W.2d at 719.[4]

4. The parties to this case, ER-2011-0004, are not the same as those in ER-2010-0355. Neither Explorer Pipeline nor Enbridge Pipeline were parties in ER-2010-0355. Admission of

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[3] Mo. Const., Art. V, Section 18.

[4] *Newton v. Ford Motor Co.*, 282 S.W.3d 825, 833 (Mo. 2009) (emphasis added).

purported evidence over their objection -- which is here made -- is impermissible.

5. There is also no privity between the parties. Moreover, even the attorneys representing Kansas City Power & Light Company ("KCPL") and are not the attorneys representing Empire.

C. The Motion Should be Denied Because It Seeks Admission Into the Record of Evidence That Has Not Been Shown To Be Relevant.

1. As noted in *Newton, supra,* there must be an identity of issue. There is not. Empire had a different level of responsibility to its ratepayers with respect to the Iatan construction project. As a partner in that project, Empire was entitled to receive, or could have requested, reports that other parties, even the Staff of this Commission are still not permitted to access. Reference need only be made to the numerous objections and motions to produce that have distinguished the KCPL Iatan proceeding.

2. Questions regarding that responsibility, whether Empire in fact sought to avail itself of those opportunities, what was or should have been disclosed as a result, and what Empire chose to do with such information as was or should have

been obtained are not questions litigated in the KCPL matter. Staff's Response indicates that the two cases are different.[5/]

D. The Motion Should Be Denied Because It Seeks Admission of Material That Does Not Comply With the Requirements of Missouri's Administrative Procedure Act.

1. Section 536.070(6) of Missouri's Administrative Procedure Act is specific regarding official notice. Only those matters that could be taken as judicial notice by a court of record may be subject to official notice.[6/] The material sought to be admitted by Empire's Motion fails this test.

2. Judicial notice is limited to matters of ***fact*** about which there could be no reasonable dispute. A court may take judicial notice of the law of gravity. The ***content*** of

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[5/] Staff "advises the Commission and parties that the ***Empire Audit Report*** is not simply a trued-up version of Staff's ***Iatan Construction Audit and Prudence Review Report . . .***filed on November 3, 2010, in Case No. ER-2010-0355 and the ***Iatan Record.***" *Staff's Response*, March 24, 2011, pp. 1-2. Staff appears to consent to Empire's Motion. We do not.

[6/] Section 536.070(6) provides:

> Agencies shall take official notice of ***all matters of which the courts take judicial notice.*** They may also take official notice of technical or scientific facts, not judicially cognizable, within their competence, if they notify the parties, either during a hearing or in writing before a hearing, or before findings are made after hearing, of the ***facts*** of which they propose to take such notice and give the parties reasonable opportunity to contest such ***facts*** or otherwise show that it would not be proper for the agency to take such notice of them. (Emphasis added)

testimony, cross-examination or Commissioner questions and responses are ***not factual*** matters. Rather, they are matters of opinion. They are out of court statements that are offered to prove the truth of what they say -- the very definition of hearsay. Hearsay is not competent evidence.[7/] It cannot be used to support a Commission decision.

3. Were there dispute regarding whether there was a hearing in the KCPL matter and whether issues concerning Iatan were included in that hearing, it might be proper to take official notice of the record in the earlier proceeding to establish the ***fact*** that there was a hearing. It goes beyond permissible official notice to import from an earlier record, testimony, cross-examination, transcript and bench questions when these materials are proffered for the truth of their content. That is plainly improper. There is no authorization in any statute or

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[7/] "Cases are legion that . . . hearsay evidence does not rise to the level of "competent and substantial evidence" within the ambit of Mo. Const. Art. V, § 18. State ex rel. DeWeese v. Morris, 359 Mo. 194, 221 S.W.2d 206, 209 (1949); Dickinson v. Lueckenhoff, 598 S.W.2d 560, 561-62 (Mo. App. 1980); Wilson v. Labor and Indus. Relations Comm'n, 573 S.W.2d 118, 120-21 (Mo. App. 1978); Bartholomew v. Bd. of Zoning Adjustment, 307 S.W.2d 730, 733 (Mo. App. 1957); State ex rel. Horn v. Randall, 275 S.W.2d 758, 763 (Mo. App. [**13] 1955); and Dittmeier v. Missouri Real Estate Comm'n, 237 S.W.2d 201, 206 (Mo. App. 1951)."

State ex rel. Marco Sales, Inc., et. al. v. Public Service Commission of the State of Missouri, 685 S.W.2d 216, 220 (Mo. App. 1984).

Commission rule for such action. Empire cites none. These parties object to incorporation of incompetent evidence.

E. The Motion Should Be Denied Because It Is a Bootstrap Effort to Evade Empire's Burden of Proof.

1. Empire has the burden of proof in this proceeding. Section 393.150.2.[8/] Empire must prove that the amounts that it seeks to place into its rate base were prudently incurred. Neither convenience nor expediency can excuse Empire's burden of proof.

2. Empire's September 28, 2010 direct case contains no evidence that Iatan expenses were prudently incurred. Staff has challenged certain Iatan expenditures as being imprudently incurred in its revenue requirement case. Empire has the opportunity to rebut that evidence. However, that rebuttal must be limited to those matters -- and only those matters -- that were raised by Staff. To the extent that Empire seeks to proffer evidence directed to other issues, that evidence is not competent and should be rejected.

3. Without witnesses from KCPL, Empire may be unable to meet its burden that its investment in Iatan was prudent. Empire may be unable to force attendance by these witnesses or

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[8/] 2. . . . At any hearing involving a rate sought to be increased, ***the burden of proof*** to show that the increased rate or proposed increased rate is just and reasonable ***shall be upon the . . . electrical corporation*** . . . . (Emphasis added)

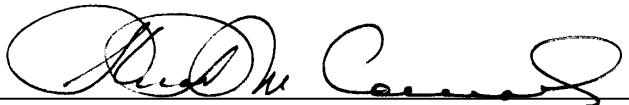
require them to submit rebuttal testimony to support Empire's burden of proof. Empire may have failed to include such a right in its agreement with KCPL. That may be a separate item of imprudence. Although Empire now may argue that it cannot make its case and expedience justifies needless duplication, it has been well said that

> . . . however difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, neither impulse nor expediency can be substituted for the requirement that such rates be "authorized by law" and "supported by competent and substantial evidence upon the whole record." Article V. § 22 [now section 18], Constitution of Missouri, V.A.M.S.[9/]

WHEREFORE for the foregoing reasons Empire's Motion must be denied.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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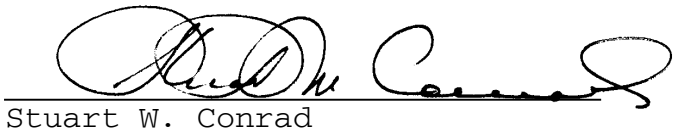
ATTORNEYS FOR MIDWEST ENERGY USERS' ASSOCIATION

[9/] *Missouri Water Company, ex rel. State of Missouri vs. Public Service Commission of the State of Missouri*, 308 S.W.2d 704, 720 (Mo. 1957); *State ex rel. Martigney Creek Sewer Co. v. Public Service Com.*, 537 S.W.2d 388, 394 (Mo. 1976).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by electronic means, by United States Mail, First Class postage prepaid, or by hand delivery to all known parties in interest upon their respective representatives or attorneys of record as reflected in the records maintained by the Secretary of the Commission.



Stuart W. Conrad

Dated: March 25, 2011