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-2012-0345**

OBJECTION TO INTERIM TARIFF
AND REQUEST FOR REJECTION/SUSPENSION
BY MIDWEST ENERGY USERS' ASSOCIATION

A. Introduction and Summary

Pending its intervention, Midwest Energy Users' Association ("MEUA") here presents its summary objections to the interim relief proposed by Empire District Electric Company ("Empire" or "EDE") and requests that the proposed interim tariffs be rejected or suspended by the Commission for a period sufficient to conduct an investigation and a potential hearing regarding their justness and reasonableness. Given that MEUA has not yet been granted intervention, we have not been permitted to review materials designated as Highly Confidential. Therefore this pleading is filed without reference to such materials and any relevant information that might be contained therein.

Summarized, MEUA's objections are that Empire has made no showing of need for this extraordinary relief. In an agreement Empire accepted, it has already received permission from this Commission to accrue and amortize into rates the actual

costs and expenses associated with its storm recovery, but Empire now seeks to do an end run around that accepted relief and, additionally, seek the speculative recovery of "lost margin" or profits on sales that never occurred.

Further, Empire has not shown that its financial abilities have been impaired or are even under significant stress. Nothing close to exigent financial circumstances has or could be shown.

Finally, the proposal for interim relief is based on energy consumption and does not appear to bear any cost relationship to the storm recovery expenditures that Empire claims it has incurred for the reconstruction of its distribution system and customer service lines or drops. Instead, Empire proposes to impose a "rider" primarily in the form of an energy surcharge on customers which conflicts with the rationale of its Fuel Adjustment Charge ("FAC") and makes the refundability of such charges problematic.

At the outset, these intervenors state that they have no difficulty with Empire being permitted, as it already has been (through the AAO that Praxair and Explorer agreed to in EU-2011-0387), to recover its actual expenditures in rebuilding its system and recovering from the damage of the major tornado that struck Joplin. Many of Empire's customers have already sustained significant damage as a result of that tornado. Sadly, many sustained irreparable damage through the loss of beloved family and friends. These loses should not be minimized, nor do we give

minimal consideration to Empire's heavy lifting to restore its system and service and rebuild the Joplin community.[1/] But we do have difficulty with Empire seeking to profit from the exigent circumstances of that storm, for that profit must be exacted from Empire's already strained and captive customer base.

B. Argument

1. Empire's Interim Request Violates Its Agreement For An Accounting Authority Order.

On June 6, 2011 Empire requested an Accounting Authority Order (AAO). In this application Empire requested that many expenses including lost profits be subject to an accrual and recovery. After extensive negotiations, Empire withdrew its request for the lost profits items, and was granted an AAO permitting the deferral of actual incremental Operations and Maintenance expenses associated with repair, restoration, and rebuild activities associated with the May 22, 2011 tornado. The AAO granted also provided for a ten-year amortization of booked deferrals beginning on the earlier of the effective date of new rates in a pre-June 1, 2013 filed rate case or June 2, 2013.

Empire also agreed to maintain detailed records, work papers and invoices to support the amount of costs claimed to have been incurred. These records were to be available to Staff,

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[1/] Although those efforts are commendable, it should be recognized that in doing so Empire was advancing its own interests as well as those of the Joplin community.

OPC and other intervenors (which included Praxair and Explorer Pipeline).

Apparently, however, an AAO is not adequate for Empire.

With this interim request, Empire now appears to be seeking to recover some portion of these same costs, thereby evading the terms of the AAO settlement that it accepted. Empire also seeks what it terms the exercise of "discretion" to allow these rates to go into effect.

These parties are concerned that what was a settled arrangement addressing Empire's ability to recover the costs of a rebuild after a devastating tornado struck portions of its service territory, now appears to have only deferred a request from Empire for "lost profits."

Moreover, as a part of the AAO agreement, Empire withdrew its request for lost profits.

The Commission's Order approving the unanimous stipulation and agreement directed that all the parties comply with its terms. Now Empire sullies an otherwise outstanding response by grasping again at "lost profits" from its customers.

In the Staff's Recommendation filed with respect to the original request for AAO, Staff noted that:

> Empire's request to defer and obtain the opportunity to seek subsequent recovery of lost revenues associated with an extraordinary event is unprecedented in this jurisdiction. Though many prior natural disasters in Missouri (for example floods, wind, and ice storms) resulted in a loss of customer load by the affected utility for a period of time, at no time in the past have these utilities included lost revenues (or "loss of

> fixed cost components of rates") as a financial item for which deferral treatment was requested. [Footnote Omitted].

Staff Recommendation, EU-2011-0387, p. 6.

Empire now presents this Commission with another clear attempt to recover lost profits from business that never occurred. Setting aside the speculative difficulty of attempting to determine "lost profits,"[2/] In the same Recommendation, Staff also opined:

> Application of the standard outlined above for deferral of costs from one period to another period to Empire's lost revenues request indicates that deferral of lost revenues is not appropriate. Notwithstanding Empire's characterization of this aspect of its request as seeking to defer "the fixed cost component of its rates," the information provided to Staff in this proceeding indicates that Empire has billed revenues sufficient to fully recover its fixed costs even after the tornado occurred [footnote omitted]. Consequently, the impact of allowing Empire the relief it seeks by deferring "the fixed cost component of its rates" would be to provide Empire the opportunity to earn an increased level of return on equity (ROE), in subsequent periods to compensate it for the alleged decreased level of ROE it asserts it is currently earning due to the tornado. Staff asserts that the AAO mechanism should not be used simply to prop up a utility's profit levels following an extraordinary event.

Staff Recommendation, EU-2011-0387, p. 6.

And, Staff' Recommendation continued:

[2/] See, e.g., *Clay v. Missouri Highway & Transp. Comm'n.* 951 S.W.2d 617, 620-621 (Mo. Ct. App. 1997) ("We find that the trial court properly refused to admit the evidence of lost profits because it was speculative . . . .").

> Further, there is a clear distinction between allowing deferral treatment of extraordinary expenditures incurred by a utility to make repairs and restore service following a disaster, and allowing deferral treatment of a certain level of revenues that is allegedly foregone due to a disaster. When considering the former category of financial impact associated with a disaster, it is vitally important and in the public interest for a public utility to make expenditures as necessary to repair damages to its system and restore service to customers as quickly as possible in an emergency situation following a natural disaster. Since this type of cost is not normally allowed in a utility's rates as part of ongoing expense, Staff believes, and the Commission has long held, that a utility should be allowed the opportunity to subsequently recover at least a portion of these unanticipated and extraordinary costs in its rates, through a "sharing" of these costs between customers and shareholders. "Lost revenues" are different from these extraordinary repair and restoration costs in that they are an estimation of "specific sales not made" due to the emergency event. It is not appropriate in this circumstance for regulation to offer a utility a financial guarantee of receipt of all or part of assumed "normal" customer usage or sales and, further, Staff asserts that the return on equity allowance included in a utility's rates is intended to compensate a utility for the risk of any fluctuations in sales or revenues from the level previously assumed in setting that utility's rates.

Staff Recommendation, EU-2011-0387, pp. 6-7.

Empire withdrew its request for "lost profits" as a part of the AAO settlement. Empire was directed to comply with the terms of the settlement, but now has chosen not to do son in spirit and, instead, throws itself upon the "discretion" of the Commission to allow it to recover "lost profits" that, based on

Staff's analysis, may have in fact been billed to its customers. This would be a "double-dip" plain and simple.

Empire's testimony is less than clear on what it is seeking to recover. Empire witness Walters asserts that

> Due to the major financial impact the May 22, 2011 tornado has had on Empire over the last year, Empire is requesting an immediate rate increase to begin recovering the ongoing costs associated with the tornado.[3/]

This was exactly what the AAO case was about. If Empire did not want to accept the relief that was offered through the AAO process, why then did it accept that settlement? Indeed, why did it even seek the AAO in the first place?

Then, later, at page 9 of her testimony Witness Walters clarifies that Empire is now seeking

> (1) the revenue requirement associated with Empire's investment in new facilities to replace those facilities destroyed by the storm; (2) and the loss of net margin due to the ongoing loss of customers.
>
> . . . .
>
> Net margin represents the amount of profit a business receives for each dollar of revenue it receives. As the concept relates to Empire's request for interim rate relief, net margin also measures the amount of profit the Company lost as a result of the reduction in rate revenue following the May 2011 tornado.[4/]

Lost margin or profit was explicitly ***not*** part of the AAO settlement. It was withdrawn by Empire as a part of the

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[3/] Walters Direct, p. 6, ll. 14-16.

[4/] Walters Direct, p. 9, ll. 9-12, 16-19

package that was presented to the Commission. It seems, however, that Empire had other ideas.

It also appears from Staff's Recommendation in the EU-2011-0387 matter that Empire's revenues may have actually increased during the period following the tornado. After noting the difficulty of employing a "what-if" scenario to estimate what "lost revenues" would be, Staff witness Oligschlaeger stated:

> Usage information provided to Staff shows that for the May and June 2011 billing months, the usage has been slightly greater than the usage in the May and June 2010 billing months and greater than the annualized, normalized May and June billing months used in the recent rate case, Case No. ER-2011-0004. The revenue of the May 2011 billing month was higher than the revenues in the May 2010 billing month while the June 2011 billing month was approximately the same as the revenues in the June 2010 billing month and higher than the annualized, normalized revenues in the rate case. The revenues from both the May and June 2011 billing months were greater than the May and June revenues used in the rate case.

This increase appears to be confirmed by Empire Witness Walters' testimony at page 9, ll. 2-5:

> In addition, immediately following the tornado, every vacant building, hotel room, and church facility was used for displaced businesses and the influx of volunteers who donated time to assist in the restoration process.

In short, Empire's claims ***certainly*** deserve investigation and such an investigation cannot occur without a suspension and a potential hearing. For that reason alone, the interim tariffs should be rejected or suspended and made the subject of an investigation.

Empire's customers have been through enough devastation already without having to deal with Empire's charges. Certainly Empire should be allowed to recover its out-of-period costs, but this has already been allowed through the AAO mechanism. The proposed interim tariffs could well allow a duplicate recovery.

2. Empire's Interim Request Is Not Justified As Emergency Relief.

In its Motion, Empire cites dicta from the well-worn case of *State ex rel. Laclede Gas Co v. Public Service Commission*.[5/] However, the Court did not mandate use of "discretion" to evade the emergency standard; it confirmed it and refused to overturn the Commission's ***denial*** of Laclede's interim request, holding that it was within the Commission's discretion to deny Laclede's request.

To be clear, MEUA finds it unnecessary here to argue that the Commission lacks authority to grant exigent relief in emergency situations where a utility is palpably threatened with an inability to continue its public service obligation. But that is ***not*** this case. Far from it.

Empire makes no claim that absent interim relief it will be unable to fulfill its service obligations, continue its financing, or any other exigent circumstance that could even remotely justify regulatory intervention. Moreover, as noted above, Empire has already accepted an AAO allowing it to accrue its costs of repair. Empire's financial interests are protected

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[5/] 535 S.W.2d 561 (Mo. App., D.K.C. 1976)

by that AAO, perhaps not how Empire might like, but if that solution was not satisfactory, why did Empire accept the relief offered by the other parties (and the Commission) in the AAO?

The Court confirmed this test, ruling:

> [T]hat the purpose of a special hearing concerning interim rates is to ascertain whether emergency conditions exist which call for especially speedy relief, and the Report and Order expresses the view that an interim increase should be granted only "where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial [*569] integrity." Laclede admits that if this be the proper test to be applied, then the ruling in this case must be against it. As it states in its brief, "Appellant has not and does not now contend that Respondent's order would not be based on competent and substantial evidence if the interim rate tests applied by Respondent and the lower Court are the tests lawfully to be applied to interim rates. . . ."

Laclede, supra, at 568-69.

Empire has not and cannot make these showings. In ER-2011-0004 (Empire's last rate case) a "Global Agreement" was approved which did not address Empire's rate of return. In ER-2010-0130, again a settled case, the Settlement was silent on any rate of return. As stated by the *Laclede* Court:

> [W]hether the rates in effect at any given time are just and reasonable depends upon many facts and can only be determined after rather extended investigation and study. Thus, for example, the Missouri statute provides in § 393.270(4) that "[in] determining the price to be charged for gas * * * the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question * * * with due

> regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies." Because of the necessity to make these investigations, hold hearings and permit arguments with respect thereto, the proceedings before regulatory bodies for rate increases inevitably entail considerable time and have led to delay in the granting of increases which is generally referred to as "regulatory lag." While this delay is regrettable, the courts have recognized that some lag is unavoidable and have generally held that no deprivation of constitutional rights occur because of suspension of the proposed increase pending a hearing thereon, provided the delay for purposes of such hearing is not unreasonably long. Representative cases so holding are [lengthy string citation omitted].

Laclede, supra, at 570.

Here Empire cannot even claim that the rate of return that it is presently earning is "less than the rate previously set" because no rate was previously set. Again, reference to the very case Empire cites undercuts its argument.

> However, the majority and better view rejects the argument that any return less than the rate previously set must be deemed *prima facie* unreasonable.

Laclede, supra, at 570.

In *Laclede*, Laclede claimed that interim relief was justified by reason of a 1973 return that was 0.16% (16 basis points) less than what the Commission had authorized in a proceeding four years earlier. The Commission, wisely, rejected that plea. Here Empire cannot even make that minimal case.

In short, there is no emergency and no showing of emergency. Any "emergency" has already been addressed by this

Commission (and by the signatory parties) though an AAO that protects Empire. But there is no basis for recovery of "lost profits," or "lost revenues" that should be recognized by this Commission as an "emergency," no matter how appealing is the sad occurrence in Joplin. A public utility is not guaranteed any specific rate of return, or, indeed, any return at all. It is only constitutionally entitled to an "opportunity" to earn a return through prudent operations.

3. The Interim Proposal Is Not Related to Empire's Costs of Repair of Storm Damage.

Empire's proposed interim "rider" also fails to demonstrate any relationship to recovery of the costs or (certainly) "lost profits" that Empire claims it was unable to recover because of the storm. Again, Empire's AAO application stands in stark contrast to its claims here.

Empire sought an AAO to be allowed to accrue its "fixed costs" (a somewhat uncertain and confusing term as noted by the Staff Recommendation in Case No. EU-2011-0387 -- perhaps "squishy" might have been better). Further, Empire has been granted the ability to accrue certain expended costs (subject to an amortization mechanism to which Empire agreed) but now seeks to recover an interim charge through a rider on Empire's energy charges.

This is a obvious mismatch.

Certainly energy flows through wires and cannot do so if those wires have been blown down. But the cost of restoring

those wires, and the associated distribution poles, customer drops and other facilities are not energy charges. They are, if anything, customer costs and may either be directly assigned or allocated to customer classes for appropriate recovery. Adding additional energy charges simply shifts costs from one group of customers to another without any causal relationship or, indeed, investigation, of how those costs are incurred.

Our sense is that Empire's system was damaged by the storm and it took money to repair it. But those costs are not variable energy costs and do not vary with the cost of generating energy. Rather Empire's restoration costs vary with the costs of restoring its distribution system and customer service drops.

For example, a high energy user whose service facilities were not damaged by the storm would, under Empire's interim proposal pay an energy "rider" or surcharge. But this customer did not need to have their service restored, rebuilt or reconstructed and the utility incurred no costs "fixed" or otherwise, to "restore" their service. In fact, depending on the circumstance, their service may not have even been interrupted.

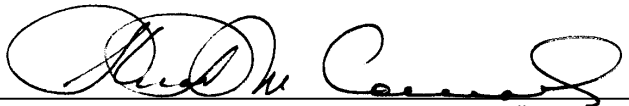
Nor does it solve this difficulty by a claim that the charges are "subject to refund." At this point we have no information what an ultimate rate design decision for Empire in a permanent case might be. But it is clear that shifting costs to the energy component of the rate may well complicate any "refund" mechanism.

C. Conclusion.

Empire has simply fallen far short of even a "stretched" standard for interim relief. Out-of-period recovery of the actual costs of Empire's storm rebuild has already been addressed in Case/File No. EU-2011-0387 through an AAO. An energy-based rider is not a cost-related mechanism to recover actual costs associated with reconstruction of a electric distribution system. In short, Empire's request to implement an "interim" rider on its customers should be rejected. Any exigent need that Empire could show may be addressed in the context of the permanent increase. The matter should move on to a more standard rate case structure in which the previously-agreed and approved AAO may be implemented.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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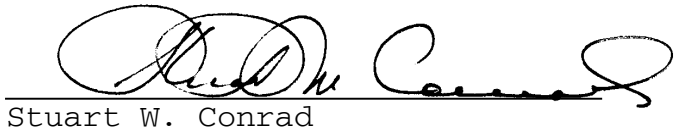
CERTIFICATE OF SERVICE

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: July 20, 2012