BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company	)))	Case No. ER-2018-0366

EMPIRE'S POST-HEARING BRIEF

COMES NOW The Empire District Electric Company ("Empire" or "Company"), by and through counsel, and for its Post-Hearing Brief, respectfully states as follows to the Missouri Public Service Commission ("Commission"):

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A. Empire's Motion to Dismiss or for Summary Determination

Commission Rule 2.116(4) provides that a case may be dismissed for good cause, and Rule 2.117(1)(E) provides that summary determination may be granted when "there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest." Since this proceeding was opened by the Commission specifically to consider the adjustment of Empire's rates pursuant to RSMo. §393.137 (as created by Senate Bill 564), and the entirety of §393.137 is inapplicable to Empire, the Commission lacks authority or jurisdiction to proceed in this docket.

This lack of authority or jurisdiction to proceed provides the necessary "good cause" for dismissal pursuant to Rule 2.116 and satisfies the "entitled to relief as a matter of law" and "good cause" elements required for a grant of summary determination pursuant to Rule 2.117. Also, there is no *genuine* dispute as to any material fact. Empire was the subject of a "general rate proceeding" – or rate case – on June 1, 2018, and §393.137 took effect on June 1, 2018. These are the only material facts.

1. Case No. ER-2018-0228 is a "general rate proceeding" within the meaning of §393.137 (as created by SB564).[1]

Section 393.137 applies only "to electrical corporations ***that do not have a general rate proceeding*** pending before the commission as of the later of February 1, 2018, or the effective date of this section."[2] This new law does not define "general rate proceeding." Under Missouri law, the primary rule governing statutory interpretation is to ascertain the intent of the legislature

[1] On May 31, 2018, Empire made a filing in its last rate case, Case No. ER-2016-0023, re-opening the case. Thus, Empire actually had two rate cases open before the Commission on June 1, 2018, the effective date of RSMo. §393.137 (as created by SB564). The Commission issued its *Order Closing Case* in Case No. ER-2016-0023 on June 14, 2018 ("Since Empire does not request any action from the Commission, the Commission will close this general rate case.").

[2] RSMo. 393.137.1 (emphasis added).

from the language used, to give effect to that intent, and to consider the words used in the statute according to their ordinary meanings.[3] The Commission took administrative notice of Exhibits 11-13, information from the Commission's website. All three of these documents discuss how a "rate case" typically takes 11 months to process and involves the two-step ratemaking process of determining a utility's revenue requirement and then establishing the proper rate design. The Commission consistently uses the term "rate case" as a synonym for "general rate proceeding."

When the Commission closed its general working docket regarding the federal Tax Cut and Jobs Act of 2017 (the "Act"), the Staff of the Commission ("Staff") filed a "Motion to Open Rate Case and to Require Company to Show Cause." Staff stated the following as authority for its Motion (emphasis added):

> The Commission may, on its own motion, open a *rate proceeding* to determine the reasonableness of the rates and charges of any electrical, gas, heat, water, or sewer corporation. Section 386.390.1, RSMo.; *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission,* 585 S.W.2d 41, 48 (Mo. banc 1979) (*"UCCM"*). Within a *rate case*, the Commission may investigate any matter necessary to enable it to ascertain facts requisite to the exercise of its powers. Section 393.270.1, RSMo., *UCCM,* at 48.

On February 21, 2018, the Commission issued its *Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why Its Rates Should Not be Adjusted* (the "Rate Case Order") in Case No. ER-2018-0228, *In the Matter of the Propriety of the Rate Schedules for Electric Service of The Empire District Electric Company*. The Commission's Rate Case Order noted that Staff asked the Commission "to open a rate case" because "Empire's existing rate schedules may no longer be just and reasonable."

The Commission issued a press release when it opened Case No. ER-2018-0228 (Ex. 14). With the press release, the Commission noted that Staff "asked the Commission to open rate cases" for seven specific investor-owned utilities in light of the Act. The Commission noted that

[3] *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406, 413 (Mo. banc 2012).

new rate cases were not needed for KCPL, GMO, Liberty Utilities, and MAWC, because, at the time, those utilities already "have ***rate cases*** before the Commission." (Ex. 14 (emphasis added))

Only the Office of the Public Counsel ("OPC") and the Midwest Energy Consumers Group ("MECG") expressed opposition to Empire's Motion to Dismiss or for Summary Determination in Case No. ER-2018-0366. Counsel for MECG, however, previously had this to say about the nature of Case No. ER-2018-0228:

> (T)his case as applies to Empire District is a general rate case. . . . If you reject that settlement, we have a general rate case here, so the provisions of SB-564 don't apply. You reject the settlement, you don't have the one-time authority anymore under SB-564. How do you get that money back to customers? So – so that's my concern. . . . So I believe Staff had it right initially by dismissing this case. Dismiss this case, get rid of the general rate case. That way, if you reflect the settlement in the Empire wind case, you can still make the one-time change under SB-564. But right now, you've really boxed yourself. There's a predicament as it applies to Empire Electric.[4]

Although counsel for MECG stated opposition to Empire's Motion to Dismiss or for Summary Determination at the evidentiary hearing in Case No. ER-2018-0366, arguing in direct contradiction to his statements made in Case No. ER-2018-0228, only OPC filed a response to Empire's Motion. And OPC's only argument that Case No. ER-2018-0228 is not a "general rate proceeding" is that the Commission did not intend to consider all relevant factors in that case when establishing new rates for Empire. As noted in the press release (Ex. 14), with the Commission's Rate Case Order in ER-2018-0228, the Commission did direct Empire to show cause why it should not be ordered to "file tariffs reducing their rates for every class and category" and also directed Empire "to state their position on whether the Commission can order a reduction in utility rates without considering all relevant factors in an ***extended*** general rate case." (Ex. 14 (emphasis added))

[4] Case No. ER-2018-0228: Tr. Vol. 1 (May 24, 2018), pp. 76-77.

Again, the Commission demonstrated that "rate case," "general rate case," and "general rate proceeding" are used interchangeably in the industry. With its Rate Case Order, the Commission, essentially, directed Empire to tell the Commission if there are other relevant factors in the instant cause that must be addressed and show cause, if any, why the Commission should not direct Empire to file revised tariffs as a result of the Act in the Commission-initiated rate case proceeding.

OPC's argument, on the other hand, is that the Commission intended to violate the statutory requirement that the Commission consider all relevant factors in setting rates. It is unreasonable to rely on an anticipated unlawful action on the part of the Commission as a basis for denying that Case No. ER-2018-0228 is a "general rate proceeding" within the meaning of §393.137.

2. Case No. ER-2018-0228 was pending before the Commission on June 1, 2018, the effective date of §393.137.

On May 17, 2018, Staff filed a Voluntary Dismissal in Case No. ER-2018-0228, noting that SB564 was truly agreed and finally passed by the Missouri House of Representatives on May 16, 2018, and, as a result of an emergency clause, RSMo. 393.137 would take effect when the Governor signed SB564. Staff further stated:

> It is Staff's belief that the legislature, and all interested stakeholders intended that Section 393.137 would provide the Commission the authority to immediately address the effects of the federal Tax Cut and Jobs Act of 2017 for those electrical corporations that do not have pending rate cases before the Commission.

Without Empire having an opportunity to file a response to Staff's Voluntary Dismissal, the Commission issued a *Notice Acknowledging Dismissal of Application and Closing Case*. This *Notice* was purportedly effective upon issuance, thereby preventing Empire and any other

interested party from seeking rehearing pursuant to RSMo. §386.500 and thus preventing a subsequent appeal.

Also on May 17, 2018, however, Staff filed its Withdrawal of Voluntary Dismissal. Further, following the filing of Staff's Withdrawal of Voluntary Dismissal, OPC and other parties filed written arguments in Case No. ER-2018-0228. OPC now argues, however, that Staff could not withdraw its dismissal. More importantly, the case is not Staff's to dismiss. There are three basic ways to initiate a general rate proceeding – or rate case: 1) file and suspend (§393.150); 2) complaint by customer (§393.260); or, 3) by motion of the Commission (§§393.140(5), 393.150, and 393.270).[5] Case No. ER-2018-0228 is a general rate proceeding opened by the Commission – there is no applicant pursuant to §393.150, and there is no complainant pursuant to §393.260. As noted, when the Commission closed its working docket regarding the Act, Staff filed a "Motion to Open Rate Case and to Require Company to Show Cause," stating that "(t)he Commission may, on its own motion, open a rate proceeding . . ." On February 21, 2018, the Commission then issued its *"Order Opening Rate Case . . ."* in Case No. ER-2018-0228. The *Notice Acknowledging Dismissal of Application and Closing Case* issued by the Commission on May 17, 2018, was essentially a nullity – either because it acknowledged Staff's dismissal of a case that was not Staff's to dismiss or because the *Order* was issued and purportedly effective on the same day.[6]

[5] S*ee also*, *State ex rel. Utility Consumers' Council of Missouri*, *Inc. v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979); and *see*, generally, *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20 (Mo. banc 1975).

[6] *State ex rel. Office of the Pub. Counsel v. PSC*, 236 S.W.3d 632 (Mo. 2007) ("law specifies 30 days for applying for rehearing but allows the PSC the discretion to set a shorter time as long as the time is reasonable. By issuing the December 29 order with an effective date of January 1, 2007, the PSC abused its discretion to provide public counsel with a reasonable period of time in which to appeal the order."); *State ex rel. Office of Pub. Counsel v. PSC*, 266 S.W.3d 842 (Mo. 2008) ("general rule is that when an order or judgment is vacated, the previously existing status is restored and the situation is the same as though the order or judgment had never been made").

Oral argument also took place in Case No. ER-2018-0228 (the Commission-opened rate case for Empire), as well as in a number of other cases regarding the impact of the Act, on May 24, 2018 – following Staff's dismissal, issuance of the *Notice*, and Staff's withdrawal of its dismissal. At the beginning of the argument, Judge Woodruff stated as follows:

> Staff initially dismissed a case involving Empire Electric, ER-2018-0228, that was reinstituted by Staff later that same day. At this point, I'm considering it to be a -- an open case that will be subject to today's proceedings.[7]

OPC was represented at the oral argument, did not object to the Judge's statement, and did not object to Empire's participation in the argument. Also, as noted above, OPC filed written comments in Case No. ER-2018-0228 *after* Staff filed its Voluntary Dismissal and Withdrawal of Voluntary Dismissal. Despite all of these facts, OPC argues that Case No. ER-2018-0228 was not pending before the Commission on June 1, 2018, and is not now pending before the Commission. There is simply no rational basis for OPC's argument.

As discussed in detail above and in Empire's Motion to Dismiss or for Summary Determination with Suggestions in Support, on June 1, 2018, the effective date of §393.137 (as enacted by SB564), Empire had a general rate proceeding pending before the Commission, and the entirety of §393.137 is therefore inapplicable to Empire.

B. <u>The Tax Stipulation – a Fair and Reasonable Ratemaking Alternative</u>

Empire continues to believe that the cost savings from the Act should be passed on to its customers. It is just that §393.137 does not provide the Commission with any additional authority with regard to Empire's rates. As a result of the Non-Unanimous Stipulation and Agreement executed by Empire, Staff, and the City of Joplin ("Joplin") and filed herein and in Case No. ER-2018-0228 on July 17, 2018 (the "Tax Stipulation"), however, the Commission need not make this determination. Or, if the Commission does determine that the statute does not apply to

[7] Case No. ER-2018-0228: Tr. Vol. 1 (May 24, 2018), p. 5, lines 14-20.

Empire, the Tax Stipulation will still allow Empire's customers to see immediate benefits of the Act.

Even as to any electrical corporation to which §393.137 does apply, the Commission is not mandated to order a one-time adjustment and require the utility to defer the entire financial impact of Act for the period of January 1, 2018, through the date of any one-time adjustment. As noted, the first hurdle to the applicability of the new law is the absence of a rate case pending before the Commission on June 1, 2018. Next, there cannot have already been an adjustment to reflect the effects of the Act. Then, 393.137.4 states, in part, as follows:

> Upon good cause shown by the electrical corporation, the commission may, as an alternative to requiring a one-time change and deferral under subsection 3 of this section, allow a deferral, in whole or in part, of such federal act's financial impacts to a regulatory asset starting January 1, 2018, through the effective date of new rates in such electrical corporation's next general rate proceeding. . . .

Again, the primary rule governing statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent, and to consider the words used in the statute according to their ordinary meanings.[8] Subsection 4 of 393.137 allows for "a deferral, in whole or in part" as an "alternative" to "requiring a one-time change and deferral" pursuant to subsection 3. As discussed in detail in the Contested Issues section below, the Commission, based on the competent and substantial evidence in the record in this proceeding, cannot proceed under subsection 3. This means, even if 393.137 is deemed to apply to Empire, only subsection 4 is available to the Commission in this proceeding. The discretionary deferral of 393.137.4 is an alternative – or a substitute for – the one-time adjustment and complete deferral of subsection 3.

It should also be noted that the deferral provisions of both §393.137.3 and §393.137.4 speak only of the creation of a "regulatory asset" – and not a regulatory liability. As such, ascertaining the intent of the legislature from the language used and proceeding under either

[8] *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406, 413 (Mo. banc 2012).

subsection 3 or subsection 4 of this new law may provide no benefit to Empire's customers. As noted above, however, the Tax Stipulation presents a just and reasonable ratemaking alternative to the Commission so that the Commission need not make the determination that §393.137 does not apply to Empire and/or need not grapple with the Legislature's word selection.

Section 393.137 does not mandate that the Commission adopt OPC's unreasonable and unsupported recommendations in this case, and the new statute did not replace the Commission's discretion to be exercised in the setting of just and reasonable rates. This is because subsection 4, for good cause shown, authorizes the Commission to defer the impacts of the Act, in whole or in part, to the effective date of rates in Empire's next general rate proceeding. The good cause necessary to support approval of the Tax Stipulation as the proper action under 393.137.4 is discussed below in the Contested Issues section.

Section 393.137.4 authorizes only a deferral, in whole or in part, of the impacts of the Act – it does not also authorize an immediate going-forward adjustment in rates. The Tax Stipulation, however, does provide for this going-forward adjustment, with Empire's customers to see an annual reduction of $17,837,022 effective October 1, 2018. The Tax Stipulation provides for a known date for rate reductions for every class and category of electric service to reflect the percentage reduction in Empire's federal-state effective income tax rate. Approval of the Tax Stipulation would eliminate any questions about legislation, process, or legal issues surrounding implementation of the Act's tax rate reductions and would provide nearly $18 million of immediate benefits to Empire's customers. Approval of the Tax Stipulation would also eliminate the need to answer the question of whether the Commission should issue an accounting authority order ("AAO") for Empire related to the Act but outside the scope of 393.137.

Empire submits that a Commission order directing the following would result in just and reasonable rates and a fair and equitable outcome for Empire and its customers:

1. Empire shall file revised retail tariff sheets in an appropriate timeframe that would allow such tariffs to take effect October 1, 2018. The tariffs shall reflect a reduction in base rate revenue as the result of the implementation of the Act. The reduction in the annual revenue requirement shall represent the calculated revenue requirement utilized in current base rates utilizing a federal corporate income tax rate of 35%, compared to a recalculated revenue requirement using the reduced federal corporate income tax rate of 21%. Empire's revised retail tariff sheets shall be prepared in accordance with Tax Stipulation Appendix A, which displays the annual reduction, along with the revised annual revenue requirement and the allocation of the reduced revenue requirement to the individual rate classes. (Tax Stipulation)

2. For the design of rates to flow back to customers the annual revenue requirement reduction provided for above in ordered paragraph 1, the revenue requirement reduction applicable to each rate class will be divided by the total kilowatt-hour ("kWh") billing units stated for that class. The result of this calculation will be a cents-per kWh rate for each service classification that will be applied to all billed usage of customers taking service under those classifications (stated as a separate line item on the customers' bills) to yield separate line item bill credits. (Ex. 4, Rebuttal Testimony of Sarah Lange, p. 2)

3. Empire shall establish a regulatory liability to account for the tax savings associated with excess Accumulated Deferred Income Taxes ("ADIT"). Empire shall record a regulatory liability for the difference between the excess ADIT balances included in current rates, which was calculated using the 35% federal corporate income

taxes, versus the now lower federal corporate income tax rate of 21%. The calculation of the Regulatory Liability of excess ADIT shall begin as of January 1, 2018. (Tax Stipulation)

C. <u>Chairman Hall's Requested Briefing</u>

At the conclusion of the evidentiary hearing, Chairman Hall asked for a particular issue to be briefed:

> (I)f the Commission were to determine that the statute – Senate Bill 564 – was not applicable to Empire, I'd like to know the parties' positions both on the law and the facts as to whether an AAO would be appropriate for the excess ADIT January 1 going forward and for the reduction in revenues during the stub period.[9]

In response to this request from Chairman Hall, Empire notes that the Commission previously found as follows regarding AAOs:

> An AAO allows the "deferral" in the booking of a current expense to a utility's balance sheet as an asset. The cost is booked by a utility based upon the possibility that a regulatory authority will agree to allow recovery of the cost in a future rate case. This allows costs to be recorded in a period other than that in which they were actually incurred. An AAO gives a utility the opportunity to obtain future rate recovery of extraordinary costs, even if those costs were not actually incurred within an ordered test year for a general rate proceeding.[10]

Whether the Commission is considering an AAO for a regulatory asset or a regulatory liability, the standard for granting an AAO is the same. An AAO, which is authorized by the Uniform System of Accounts ("USOA"), is to deal with the financial effects of extraordinary items or events. The USOA defines an "extraordinary item" as one:

> related to the effects of events and transactions which have occurred during the current period and which are of unusual nature and infrequent occurrence . . . they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company and which would not reasonably be expected to recur in the future.

[9] Case No. ER-2018-0366: Tr. Vol. 3, p. 333.
[10] 2014 Mo. PSC Lexis 665, pp. 4-5.

Pursuant to the USOA, the Commission has applied the following criteria for granting an AAO: (1) the costs are associated with an event that is extraordinary, unusual, and unique, and (2) the costs are material in terms of financial impact on the utility. The materiality question is a fact-specific inquiry. Company-specific evidence may also be required on the issue of whether the tax rate reduction would qualify as extraordinary, unusual, and unique. Given the evidence in the record in this proceeding (which was opened for the express purpose of taking action under 393.137), it is likely that evidence could be presented to support findings of materiality and extraordinariness regarding the impact of the Act on Empire. Recently, however, the Commission determined in a Missouri-American Water Co. case that "[t]here is nothing unusual or extraordinary about paying property taxes to warrant an AAO. It is a recurring expense." Report and Order issued December 20, 2017, in File No. WU-2017-0351.

It is important to note that "AAOs are not the same as ratemaking decisions, and that AAOs create no expectation that deferral terms within them will be incorporated or followed in rate application proceedings." *Missouri Gas Energy v. PSC*, 978 S.W.2d 434, 438 (Mo. App. W.D. 1998). Even if the criteria of materiality and exceptionality are satisfied and an AAO is issued, a rate change may only operate prospectively, and rates may not be confiscatory. If 393.137 is properly deemed inapplicable to Empire and an AAO is ordered for the excess ADIT and the reduction in revenues during the stub period, nothing will be finally determined at this time – all issues of recovery and ratemaking will remain for Empire's next rate case, and Empire's customers will not receive an immediate benefit from the Act.

In the event the Commission grants Empire's Motion to Dismiss or for Summary Determination, approval and adoption of the provisions of the Tax Stipulation would be an appropriate, lawful, and reasonable resolution of Case No. ER-2018-0228 (in conjunction with

approval of Staff witness Lange's rate design proposal). In the event the Commission denies Empire's Motion, good cause exists pursuant to RSMo. §393.137.4, and approval and adoption of the provisions of the Tax Stipulation would be an appropriate, lawful, and reasonable resolution of Case Nos. ER-2018-0366 and ER-2018-0228 (in conjunction with approval of Staff witness Lange's rate design proposal).

Only approval of the terms of the Tax Stipulation will provide a rate reduction for Empire's customers in the current timeframe and ensure that Empire's customers receive full reimbursement for the excess portion of Empire's ADIT balances that was previously paid by Empire's customers. Approval of the terms of the Tax Stipulation (in conjunction with approval of Staff witness Lange's rate design proposal) will reduce the likelihood of appellate risk for Empire and its customers, will best utilize the Commission's and the parties' time and financial resources, and will result in just and reasonable rates and a fair and equitable outcome for Empire and its customers.

D. <u>Contested Issues Presented for Resolution by the Commission</u>

Issue 1.[11] Should Empire District's rates be adjusted prospectively to reflect the reduction in the federal corporate income tax rate from 35% to 21% due to the Tax Cuts and Jobs Act ("TCJA")? a. If yes, what should be the amount and the timing of such rate reduction?

Empire's rates should be adjusted prospectively, with October 1, 2018, as the effective date of the $17,837,022 annual rate reduction, as set forth in the Tax Stipulation.[12] The Commission cannot adopt OPC's position in this case regarding a one-time rate reduction

[11] This section of Empire's Post-Hearing Brief uses the List of Issues contained in the "List of Issues, Order of Witnesses, Order of Cross-Examination, and Order of Opening Statements" filed by Staff on behalf of Staff, Empire, the Midwest Energy Consumers Group, and Renew Missouri. A separate List of Issues was also filed by OPC. Empire's response to Staff Issue No. 1 also addresses OPC Issue No. 3.

[12] Ex. 2, Direct Testimony of Charlotte North, pp. 3-4; Ex. 3, Rebuttal Testimony of Mark Oligschlaeger, pp. 4-5.

effective on or prior to August 30, 2018, as the only authority for OPC's recommendation is §393.137.3.

First, as discussed above, the entirety of §393.137 is inapplicable to Empire. Second, even if the statute were found to apply to Empire, the record is devoid of competent and substantial evidence to support OPC's calculations pursuant to §393.137.3. Only OPC offered testimony in response to the joint positions of Empire, Staff, and Joplin, and this was done through one witness: John Riley. Unfortunately, the testimony of OPC witness Riley in this matter lacks credibility and reliability and, therefore, may not provide the basis for a Commission decision. The material errors in Mr. Riley's testimony are discussed in the next section.

Issue 2.[13] Should Empire District's rates be adjusted prospectively to reflect a flow-back of "protected" excess accumulated deferred income taxes ("ADIT") to customers due to the TCJA? a. If yes, what is the correct balance of protected excess ADIT as of 12/31/2017 to be subject to amortization? b. If yes, what is the appropriate amortization period for protected excess ADIT?

Empire's rates should be adjusted prospectively to reflect a flow-back of excess ADIT to customers due to the Act, but it should not be done at this time. Pursuant to the Tax Stipulation, Empire should be directed to record a regulatory liability for the difference between the excess ADIT balances included in current rates, which was calculated using the 35% federal corporate income taxes, versus the now lower federal corporate income tax rate of 21%. The calculation of the regulatory liability of excess ADIT, both protected and unprotected, should begin as of January 1, 2018 (technically, December 31, 2017). The deferral provided for in the Tax Stipulation will ensure that Empire's customers receive full reimbursement.[14]

[13] Empire's response to Staff Issue No. 2 also addresses OPC Issue No. 4.
[14] Ex. 2, North Direct, p. 4; Ex. 3, Oligschlaeger Rebuttal, pp. 5-6.

This issue stems from RSMo. §393.137.3. If §393.137 were deemed to apply to Empire, the Commission would have the options of proceeding under §393.137.3 or §393.137.4.[15] When utilized, subsection 3 imposes two requirements: (1) within ninety days of June 1, 2018, an adjustment to "rates prospectively so that the income tax component of the revenue requirement used to set such an electrical corporation's rates is based upon the provisions of such federal act without considering any other factor;" and (2) deferral to a regulatory asset of "the financial impact of such federal act on the electrical corporation for the period of January 1, 2018, through the date the electrical corporation's rates are adjusted on a one-time basis as provided for in the immediately preceding sentence." Requirement one consists of three adjustments: the Commission would need to direct a going-forward rate adjustment, with the reduction to take effect by August 30, 2018, to reflect (1) the change in tax rate from 35% to 21%, (2) the return of excess ADIT classified as "protected," and (3) the return of excess ADIT classified as "unprotected." The fourth adjustment required by §393.137.3 is a deferral of the entire financial impact of the Act back to January 1, 2018, through the date of the three-prong going-forward adjustment.

Even if §393.137 were deemed to apply to Empire, the Commission could not proceed under §393.137.3. This is because adjustments two and three cannot be made at this time. It is believed Empire will be able to use the Average Rate Assumption Method ("ARAM") as a method for computing and normalizing excess ADIT, but there is still uncertainty regarding the determinations of "protected" versus "unprotected." As such, resolution of excess ADIT quantification issues should be left for resolution in Empire's next general rate case.

[15] As noted, the deferral provisions of both §393.137.3 and §393.137.4 speak only of the creation of a "regulatory asset" – and not a regulatory liability. As such, proceeding under either subsection 3 or subsection 4 of this new law may provide no benefit to Empire's customers. The distinction between regulatory asset and regulatory liability and the significance of the words used in the statute are addressed in Ex. 1, Direct Testimony of Chris Krygier. No rebuttal testimony was offered by any party on this issue.

Empire witness Charlotte North explained that Empire has only *estimated* protected and unprotected excess ADIT balances at this time and does not currently have the information available to determine proper amortization periods.[16] She also explained that Empire has currently estimated that it has a debit balance of $1,286,953 for unprotected excess ADIT, meaning that Empire needs to collect money for this "bucket."[17] On the other hand, OPC witness Riley recommends that $2,288,455 be flowed back to Empire's customers over ten years on account of his recommended unprotected excess ADIT for Empire.[18]

OPC's recommendations for adjustments two and three are detailed on pages two and three of Mr. Riley's Schedule JSR-D-4. When asked about the likelihood of the accuracy of these protected and unprotected excess ADIT recommendations, Empire witness Steve Williams, a CPA with extensive tax experience,[19] said: "It would be a million-to-one shot that they would be correct."[20] Mr. Williams also noted the following material errors in OPC witness Riley's recommendations:

1. Mr. Riley's estimates of excess ADIT include both Missouri wholesale allocations, which are sales to municipalities subject to regulation by FERC, and Missouri retail allocations, which are subject to regulation by the Commission.

2. Mr. Riley listed account 190112 (Ozark Beach lost generation) on both his protected and unprotected schedules, thus double-counting the balance.

3. Mr. Riley's protected worksheet (Schedule JSR-D-4, 2/3 of Mr. Riley's Corrected Direct Testimony) assumes all account balances appearing to relate to depreciation differences would be protected. These accounts are used to record ADIT from all differences between the book and tax treatment of fixed assets. Empire had no need to distinguish between protected and unprotected differences until enactment of the Act.

[16] Case No. ER-2018-0366: Tr. Vol. 2, pp. 125, 131, 170-171.
[17] Case No. ER-2018-0366: Tr. Vol. 2, pp. 132-133.
[18] Ex. 5, Rebuttal Testimony of John Riley, p. 3.
[19] Case No. ER-2018-0366: Tr. Vol. 2, p. 183.
[20] Case No. ER-2018-0366: Tr. Vol. 2, p. 191.

4. Account 190230, NOL carryforward, should be netted against account 282100 (the primary fixed asset deferred tax liability account), since it resulted from bonus depreciation. On Mr. Riley's worksheet, he agreed with Empire's reclassification which eliminated the NOL account, but he did not net it to 282100. This overstates his assumed EDIT by $5.4 million.

5. Mr. Riley's unprotected worksheet doesn't include 9 of Empire's general ledger ADIT accounts. These accounts total $31.4 million of deferred tax assets, and the omission increases Mr. Riley's computation of unprotected excess ADIT. Using his computed unprotected excess ADIT would result in too large a reduction in customer rates. This would have to be recaptured through higher future rates.

6. Account 283123, hedge transaction losses, was partially excluded from rate base in prior cases, and Empire's computations removed the excluded portion from its excess ADIT computation. However, Mr. Riley's schedule has a second adjustment which restores the entire account balance to the "Included in Rate Base" column and computes an amount of excess ADIT upon it.

7. Account 283915, deferred tax liability FAS 109, is an account that contains the deferred tax side of prior tax-gross up adjustments. On Empire's schedules, we eliminated this account as a "non-cash" adjustment. Mr. Riley's schedules do not eliminate the account, which has a $13.3 million credit balance. As it flows through his worksheet, it overstates the amount of ADIT being revalued and overstates his estimate of unprotected excess ADIT.[21]

Mr. Williams explained that Empire cannot accurately determine the protected and unprotected excess ADIT balances at this time, that there are grave consequences to using incorrect numbers and improper amortization periods, and that Empire will be able to accurately make the determinations of protected versus unprotected by the fourth quarter of 2018.[22] Adjustments two and three, which would be required if §393.137.3 is utilized, simply cannot be made at this time. Mr. Riley's testimony to the contrary must be disregarded. There are the material errors discussed above, and there are also general issues of credibility and reliability.

Mr. Riley's redlined testimony (Ex. 15) demonstrates Mr. Riley's struggles in drafting pre-filed testimony. At the hearing, OPC witness Riley admitted that he *still* did not understand

[21] Case No. ER-2018-0366: Tr. Vol. 2, pp. 195-
[22] Case No. ER-2018-0366: Tr. Vol. 2, pp. 188-191, 191-193, 203-212.

that Empire's books and records currently show only a total excess ADIT balance and that journal entries to protected or unprotected have not yet been made, even though that fact had been explained during OPC's deposition of Empire witness Steve Williams prior to the time Mr. Riley filed his original testimony and his corrected testimony.[23] Mr. Riley also admitted that, to him, Empire's statement that it is not yet able to accurately determine the protected portion of total excess ADIT means that Empire is unable to use ARAM as a method for computing and normalizing excess ADIT.[24] He also acknowledged that he improperly included excess ADIT related to wholesale service in both his protected and unprotected totals, stating: "Well, at the time I did these calculations, I didn't know what it was, so it was included."[25] Mr. Riley also admitted that his recommendations to the Commission are based on his inclusion of a gross up for taxes for both retail customers and wholesale customers in both his protected and unprotected buckets,[26] while Empire witness Williams explained the impropriety of including the gross up amounts.[27] Mr. Riley's lack of credibility in this case is also evidenced by the fact that he had no additional workpapers for his corrected testimony, no revised or new schedules for his corrected testimony, and no documentation showing his starting point for Empire's total excess ADIT.[28]

Empire's rates should be adjusted prospectively to reflect a flow-back of excess ADIT to customers due to the Act, but it should not be done at this time. Instead, the provisions of the Tax Stipulation should be accepted as a resolution of this issue.

Issue 3.[29] Should Empire District's rates be adjusted prospectively to reflect a flow-back of "unprotected" excess ADIT to customers due to the TCJA? a. If yes, what is the correct balance of unprotected excess ADIT as of 12/31/2017 to be subject to amortization? b. If yes, what is the appropriate amortization period for unprotected excess ADIT?

[23] Case No. ER-2018-0366: Tr. Vol. 3, pp. 298, 309-310.
[24] Case No. ER-2018-0366: Tr. Vol. 3, pp. 300-301.
[25] Case No. ER-2018-0366: Tr. Vol. 3, pp. 307-308.
[26] Case No. ER-2018-0366: Tr. Vol. 3, p. 308.
[27] Case No. ER-2018-0366: Tr. Vol. 2, pp. 198-199.
[28] Case No. ER-2018-0366: Tr. Vol. 3, pp. 303-305, 312.
[29] Empire's response to Staff Issue No. 3 also addresses OPC Issue No. 5.

Yes, but not at this time. Please refer to Empire's response regarding Issue No. 2. The arguments and testimony references are identical for "protected" and "unprotected" ADIT flow-back.

Issue 4.[30] Should the financial impact of the TCJA corporate income tax rate reduction from 35% to 21% be deferred by Empire District from January 1, 2018 forward to the date customer rates are adjusted to reflect this impact?

The Commission should not order a deferral for this "stub period." This issue also stems from RSMo. §393.137.3. As discussed, the entirety of §393.137 does not apply to Empire, as Empire was the subject of a general rate proceeding on June 1, 2018, and §393.137 took effect on June 1, 2018. Also, as discussed, if §393.137 is deemed to apply to a utility, the Commission would have the options of proceeding under subsection three or under subsection four. In Empire's case, however, even if §393.137 is deemed applicable, the Commission cannot proceed under subsection three. While subsection three provides for a going-forward adjustment and a deferral of the entire financial impact of the Act, subsection four authorizes only a deferral, in whole or in part, and does not authorize an immediate going-forward adjustment.

If the Commission denies Empire's Motion to Dismiss or for Summary Determination, Empire urges the Commission to exercise its discretion under §393.137.4 and refrain from ordering a deferral for the stub period. Instead, Empire urges approval of the terms of the Tax Stipulation as a resolution of all issues (excluding rate design flow back which is addressed in Staff witness Lange's Rebuttal Testimony).

As noted, the first hurdle to the applicability of the new law is the absence of a rate case pending before the Commission on June 1, 2018. Next, there cannot have already been an adjustment to reflect the effects of the Act. Then, §393.137.4 provides the Commission with discretion:

[30] Empire's response to Staff Issue No. 4 also addresses OPC Issue Nos. 1, 2, and 6.

> Upon good cause shown by the electrical corporation, the commission may, as an alternative to requiring a one-time change and deferral under subsection 2 of this section, allow a deferral, in whole or in part, of such federal act's financial impacts to a regulatory asset starting January 1, 2018, through the effective date of new rates in such electrical corporation's next general rate proceeding. . . .

"Good cause" is not defined in the statute and is not defined in the Commission's rules. The courts and this Commission, however, have defined good cause as "showing a 'legally sufficient ground or reason' under the circumstances. Good cause means a good faith request for reasonable relief. To constitute good cause, the reason 'must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical, and good faith is an essential element.'"[31]

First, the customer benefits of the Tax Stipulation are sufficient "good cause" under §393.137.4. As discussed above, only approval of the terms of the Tax Stipulation will provide a rate reduction for Empire's customers in the current timeframe and ensure that Empire's customers receive full reimbursement for the excess portion of Empire's ADIT balances that was previously paid by Empire's customers. Second, the potential disparity of treatment of the various Missouri utilities constitutes the requisite "good cause." There is no rational basis to impose a deferral for the stub period on Empire, while allowing the large majority of Missouri's regulated utilities to address the impact of the Act on only a going-forward basis.[32] Lastly, if the Commission determines that §393.137 is applicable to Empire, the inability to proceed under §393.137.4 necessitate a finding of "good cause" to proceed under §393.137.3.[33]

In the event the Commission grants Empire's Motion, approval and adoption of the provisions of the Tax Stipulation would be an appropriate, lawful, and reasonable resolution of Case No. ER-2018-0228. In the event the Commission denies Empire's Motion, good cause

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[31] *In the Matter of the Union Electric Company d/b/a Ameren Missouri's Voluntary Green Program*, Order Regarding Motion to Intervene issued March 6, 2013 (internal citations omitted) (emphasis removed).

[32] Ex. 1, Direct Testimony of Chris Krygier, pp. 2-6; Ex. 2, North Direct, pp. 2-3; Ex. 3, Oligschlaeger Rebuttal, pp. 2-8.

[33] Case No. ER-2018-0366: Tr. Vol. 2, pp. 170-172.

exists pursuant to RSMo. §393.137.4, and approval and adoption of the provisions of the Tax Stipulation would be an appropriate, lawful, and reasonable resolution of Case Nos. ER-2018-0366 and ER-2018-0228.

Issue 5. Should the financial impact of the amortization of protected excess ADIT be deferred by Empire District from January 1, 2018 forward to the date customer rates are adjusted to reflect this impact?

Pursuant to the Tax Stipulation, Empire should be directed to record a regulatory liability for the difference between the excess ADIT balances included in current rates, which was calculated using the 35% federal corporate income taxes, versus the now lower federal corporate income tax rate of 21%. The calculation of the regulatory liability of excess ADIT, both protected and unprotected, should begin as of January 1, 2018 (technically, December 31, 2017).[34]

The deferral treatment provided for in the Tax Stipulation "will ensure that Empire District customers receive full reimbursement for the excess portion of Empire District's ADIT balances that was previously paid in by ratepayers."[35] Staff witness Oligschlaeger further explained that customers are currently receiving a "return" on the excess ADIT being deferred by Empire.[36]

Issue 6. Should the financial impact of the amortization of unprotected excess ADIT be deferred by Empire District from January 1, 2018 forward to the date customer rates are adjusted to reflect this impact?

Yes. Please refer to Empire's response regarding Issue No. 5. The arguments and testimony references are identical for "protected" and "unprotected" ADIT flow-back.

Issue 7.[37] What modifications should be made to Empire's tariff to implement the revenue requirement reduction?

[34] Ex. 2, North Direct, p. 4; Ex. 3, Oligschlaeger Rebuttal, pp. 5-6.
[35] Ex. 3, Oligschlaeger Rebuttal, p. 6.
[36] Case No. ER-2018-0366: Tr. Vol. 2, p. 239.
[37] Empire's response to Issue No. 7 also addresses OPC Issue No. 7.

Appendix A to the Tax Stipulation displays the appropriate annual rate reduction, along with the revised annual revenue requirement and the allocation of the reduced revenue requirement to the individual rate classes. For the remaining rate design issue and tariff sheet changes, Empire does not object to Staff's proposal as set forth on page two, line 17 through page three, line 5 of the Rebuttal Testimony of Sarah Lange.[38]

OPC's rate design proposal is not supported by competent and substantial evidence in the record. OPC's proposal to flow back any rate reduction through the customer charge fails to take into account the potential negative impact on Empire – and, in the long run, Empire's customers. The rate decrease being suggested by OPC, if flowed through the customer charge, could create the impression that there is no cost to having a customer on the system and could result in Empire being unable to recover its fixed costs.[39] OPC's proposal also failed to take into account that Empire's non-residential customers are billed differently from the residential class and failed to take into account the impact its rate design proposal would have on Empire's low income pilot program (which provides a credit offset to the customer charge).[40] There was simply no credible evidence offered by OPC to support a reduction in Empire's customer charge in this proceeding.

WHEREFORE, Empire submits this Post-Hearing Brief, requests an order of the Commission granting Empire's Motion to Dismiss or for Summary Determination, and requests an order of the Commission approving the terms of the Tax Stipulation and the rate design proposal set forth in the Rebuttal Testimony of Staff witness Sarah Lange. Empire requests such further relief as is just and proper under the circumstances.

[38] Ex. 4, Rebuttal Testimony of Sarah Lange, pp. 2-3.
[39] Case No. ER-2018-0366: Tr. Vol. 3, pp. 275-276.
[40] Case No. ER-2018-0366: Tr. Vol. 3, pp. 276-277.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was filed in EFIS on this 30th day of July, 2018, with notice of the same being sent to all counsel of record.

/s/ Diana C. Carter