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Missouri Public  
Service Commission

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of The Empire District Electric	)	
Company of Joplin, Missouri Tariffs	)	
Increasing Rates for Electric Service	)	<b>File No. ER-2012-0345</b>
Provided to Customers in the Missouri Service	)	Tariff No. YE-2013-0021
Area of the Company	)	

**STAFF'S RESPONSE IN OPPOSITION TO EMPIRE'S INTERIM RATE REQUEST**

COMES NOW the Staff ("Staff") of the Missouri Public Service Commission ("Commission"), and in pursuant to the Commission's July 12, 2012, *Order Directing Filing* states that at the Commission's Tuesday, July 17, 2012 Agenda Session the Commissioners appeared to direct the Regulatory Law Judge to prepare an order to suspend and set for hearing the interim tariff filing of The Empire District Electric Company ("Empire"). Since no order has been entered as yet literally suspending Empire's interim tariff filing and setting the matter for hearing, Staff has prepared this pleading accordingly. Therefore, for its recommendation to the Commission, Staff states as follows:

**Introduction**

1. Staff recommends, in response to *Empire's Motion Requesting Interim Rate Filing to Take Effect Without Suspension and By Operation of Law* ("Motion") that the Commission should reject the tariff sheets implementing Empire's request for an interim rate increase—Tariff No. YE-2012-0021. The Staff recommends, in the alternative, that the Commission suspend Empire's interim rate tariff sheets and proceed with the prehearing conference date of July 23, 2012, for the purpose of the parties discussing Empire's interim filing in addition to the permanent filing.

2. Staff recommends the Commission reject the interim rate increase tariff sheets on the bases that follow, which are supported by verified statements in this pleading. Empire has

not and is not experiencing financial conditions that endanger its continued ability to provide safe and adequate service to its customers. Empire's interim rate request is simply not necessary to its continued provision of safe and adequate service. Empire is financially healthy, and its earnings are protected by the Accounting Authority Order granted in Case No. EU-2011-0387. Empire is not entitled to a defined level of profit, and has presented no compelling reason for the Commission to allow it to increase its rates without the benefit of a full audit and rate case.

3. In support of its recommendation to deny Empire's request to permit the interim tariff sheets to go into effect with or without suspension, or in the alternative, suspend Empire's interim rate tariff sheets, Staff, by and through Staff Counsel's Office, states further as follows:

#### **Background**

4. On July 6, 2012, Empire filed a general rate request and effectuating tariff sheets (Tariff No. YE-2013-0020), as well as tariff sheets bearing an effective date of August 5, 2012, and a request for a rate increase to be collected interim, subject to refund (Tariff No. YE-2013-0021).

5. In its *Motion*, Empire represents that the tariff sheets contained in Tariff No. YE-2013-0021 concern Empire's request for interim rate relief in the amount of \$6.2 million, exclusive of fees and taxes, which Empire represents are related to tornado recovery costs and post-tornado cost of service.

6. Specifically, Empire represents that \$4.5 million of the request relates to rate of return, associated income taxes, and depreciation on plant placed into service in the course of the tornado recovery, \$200,000 relates to an amortization of tornado storm costs deferred pursuant to

Case No. EU-2011-0387, while \$1.4 million is based on Empire's calculation of "the ongoing loss in pre-tax net margin associated with [an estimated 1,400] lost customers."<sup>1</sup>

7. On May 22, 2011, an EF-5 tornado struck Joplin, Missouri.

8. On May 27, 2011, certain parties to File No. ER-2011-0004 filed their Stipulation and Agreement, which resolved Empire's last general rate request. The tariff sheets effectuating that rate increase took effect on June 15, 2011.

9. On June 6, 2011, Empire filed a request for an accounting authority order (AAO) relating to actual expenditures made in its tornado relief effort, as well as for deferral of a level of unrealized profits that Empire alleged it did not earn because of the displacement of customers resulting from the tornado. This case was docketed as File No. EU-2011-0387.

10. Staff recommended that the Commission grant Empire accounting authority relating to actual expenditures, but not relating to unrealized profits. On November 15, 2011, the parties to File No. EU-2011-0387 filed a stipulation generally consistent with Staff's recommendation in that matter.

11. By all accounts, the efforts of Empire and its employees to stabilize its system immediately following the tornado and to restore its system as rebuilding began have been nothing short of commendable.

12. In Kelly S. Walter's prefiled direct testimony, she identifies the tornado as a "major cost driver" of Empire's general rate request, with a revenue requirement impact of \$6.2 million.<sup>2</sup>

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<sup>1</sup> Prefiled Direct Testimony of Kelly S. Walters, pp. 10 – 11.

<sup>2</sup> Prefiled Direct Testimony of Kelly S Walters, pp. 3 – 4.

## Interim Rate Authority

13. As articulated in the Commission's *Order Further Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing*, filed October 7, 2009, in File No. ER-2010-0036, the Commission's most recent examination of its interim rate authority, occasioned by an Ameren Missouri<sup>3</sup> interim rate request,

[P]revious cases have clearly established the Commission's authority to grant such requests. In a 1976 case involving Laclede Gas Company, the Missouri Court of Appeals held "the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation."<sup>4</sup>

In that case, in denying Laclede's request for an interim rate increase, the Commission indicated it would allow such requests 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 integrity.<sup>5</sup>

That standard has come to be known as the "emergency" standard and the Commission's use of that standard was upheld by the court of appeals in the Laclede decision. The *Laclede* decision recognizes that the Commission acted within its discretion when it applied an "emergency" standard to deny Laclede's request for an interim rate increase. That decision does not, however, establish the "emergency" standard as the only standard that the Commission may lawfully apply when exercising its discretion. In fact, the court explicitly recognized that in some future case an applicant could meet a standard defined by the Commission without any emergency.<sup>6</sup> Indeed, in other cases, the Commission has found that it has authority to grant interim rate increases on the basis of something other than an "emergency" standard. For example, in a 2008 order, the Commission found it had the authority to grant an interim rate increase on a nonemergency basis where particular circumstances necessitate such relief on the basis of good cause shown by the requesting utility.<sup>7</sup>

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<sup>3</sup> At the time, doing business as AmerenUE.

<sup>4</sup> *State ex rel. Laclede Gas Co. v. Pub. Serv. Commission*, 535 S.W.2d 561, 567 (Mo. App. 1976).

<sup>5</sup> *State ex rel. Laclede Gas Co. v. Pub. Serv. Commission*, 535 S.W.2d 561, 568 - 569 (Mo. App. 1976).

<sup>6</sup> *State ex rel. Laclede Gas Co. v. Pub. Serv. Commission*, 535 S.W.2d 561, 574 (Mo. App. 1976).

<sup>7</sup> *In the Matter of the Joint Application of Stoddard County Sewer Company, R.D. Sewer Co., LLC and the Staff of the Missouri Public Service Commission for an Order Authorizing Stoddard County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co., LLC and for an Interim Rate Increase*, Report and Order, Case No. SO-2008-0289, Page 117 (October 23, 2008).

**Although 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.** A good example is found in a 1997 case. In an order rejecting an interim rate increase tariff proposed by The Empire District Electric Company, the Commission concluded that it “may authorize the implementation of interim rates upon a showing of good cause, and such good cause may be less than an emergency or near-emergency.”<sup>8</sup> Despite that conclusion, the Commission rejected Empire’s request for an interim rate increase, finding:

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. Furthermore, the Company has shown no other exigent circumstances that would merit interim relief.

**Thus, the Commission applied a good cause standard, but still required the company to demonstrate an emergency or near emergency before it would be allowed an interim rate increase. [emphasis added]**

14. When denying Ameren Missouri’s interim rate request in its *Report and Order Regarding Interim Rates*, issued January 23, 2010, in Case No. ER-2010-0036, the Commission decided:

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.

#### **Analysis**

15. At first blush, it would seem that Empire’s request for an interim rate increase is as different from Ameren Missouri’s 2009 interim request as day is from night.

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<sup>8</sup> *In the Matter of The Empire District Electric Company’s Tariff Revision Designed to Increase Rates, on an Interim Basis and Subject to Refund, for Electric Service Provided to Customers in the Missouri Service Area of the Company*, Report and Order, 6 Mo P.S.C. 3d 17, 21 (1997).

16. In its request in Case No. ER-2010-0036, Ameren Missouri did not allege a financial emergency or near emergency, Ameren Missouri stated it simply sought an interim rate increase to reduce its exposure to regulatory lag.

17. In its *Motion*, Empire states that it seeks an interim rate request because “Empire has faced and is continuing to face extraordinary circumstances, and there are compelling reasons for this Commission to allow Empire’s interim rate surcharge to take effect on August 5, 2012, the requested effective date.” Empire witness Brad P. Beecher explains that it has been over a year since the Joplin tornado, that it is time for Empire to begin to recover financially, and that, absent interim relief, it will take over two years for Empire to begin to recover from the tornado from a financial standpoint.<sup>9</sup>

18. Although Empire states as support for its request that Empire suspended its dividend following the tornado,<sup>10</sup> Empire fails to state in its *Motion* that it has since reinstated its dividend. Empire’s financial condition is discussed more fully below.

19. However, upon examination of the calculation of the respective interim rate quantifications, the Commission will discover that the alleged basis for \$4.7 million of Empire’s \$6.2 million interim request is identical to the request made by Ameren Missouri that the Commission ultimately rejected. Ameren Missouri’s request was calculated as follows:

The amount of the interim rate increase equates to the return, depreciation, and taxes on rate base additions that the Company has *actually placed in service* through May 31, 2009. Thus, the approximately \$37.3 million interim rate increase request is supported by actual investments in “steel in the ground” since the close of the true-up period in the Company’s last rate case. These assets have been fully paid for by AmerenUE and are, at this moment, being used to provide electric service to AmerenUE’s customers. Indeed, the majority of this steel in the ground arose from capital expenditures that relate directly to improving and maintaining the reliability of the Company’s electric delivery system.<sup>11</sup>

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<sup>9</sup> Empire *Motion*, p. 4; Prefiled Direct Testimony of Brad Beecher, p. 12.

<sup>10</sup> Empire *Motion*, p. 4; Prefiled Direct Testimony of Brad Beecher, p. 10.

<sup>11</sup> AmerenUE *Suggestions in Support of Interim Rate Tariff (IRT)*, in Case No. ER-2012-0036, pages 4-5.

20. Empire states that its quantification of \$4.7 million of its interim rate increase request is attributable to the same calculation the Commission rejected when Ameren Missouri requested it:

Empire has invested over \$27.6 million to replace the electric infrastructure destroyed by the tornado. We estimate the annual cost to Empire to carry this investment at approximately \$4.5 million. **This includes rate of return, associated income taxes and depreciation.** In addition, to this annual carrying cost we have added the amortization of the storm costs deferred pursuant to the Accounting Authority Order (“AAO”) authorized by the Commission in Case No. EU-2011-0387. This annual AAO amortization is almost \$198,000. In total the ongoing revenue requirement associated with the direct investment in replacement facilities is \$4.7 million. **[emphasis added]**

21. Thus, although distinguishable in that Ameren Missouri’s investments were made in the regular course of business, while Empire’s investments were occasioned by a catastrophic natural disaster, this portion of Empire’s request is, in fact, the same.

22. In another respect, however, this portion of Empire’s request has even less merit than Ameren Missouri’s. Pursuant to the *Order Approving and Incorporating Unanimous Stipulation and Agreement*, in File No. EU-2011-0387, regarding Empire’s AAO request, Empire’s earnings are protected against the depreciation and carrying charges associated with the tornado-related capital expenditures. Ameren Missouri’s earnings were not protected against the depreciation and cost of capital associated with its investment considered in Case No. ER-2010-0036. Also by the parties’ agreement, Empire’s earnings are further protected against the incremental operations and maintenance expenses associated with the tornado, which Empire was allowed to defer for later potential recovery.

23. The remainder of Empire's interim rate request relates to a "lost revenues" request. In short, Empire requests that it receive additional dollars from its current customers to equal the revenue stream Empire believes it would be receiving from customers who are no longer on the system.

24. Empire has not alleged that it is facing an "emergency" or "near emergency," i.e., a threat to its ability to continue to provide safe and adequate service or a need to finance and an inability to finance other than by an increase in customer rates. Empire has alleged nothing to substantiate an exercise of Commission discretion to authorize an interim rate increase. As discussed below, Staff's investigation indicates that Empire does not require an interim rate increase to protect its financial ability to continue to provide safe and adequate service.

#### **Empire's Financial Condition**

25. Empire has not filed sufficient evidence to justify the extraordinary rate making treatment it has requested, nor has Staff had the time to formally or informally investigate the request. That is not to say that under the present circumstances Staff would need to conduct an extensive investigation to address Empire's interim relief request in addition to the analysis provided below.

26. Staff will provide a limited discussion here of Empire's financial condition generally and as presented to investors, as well as the effects of recent Empire cases, specifically the AAO request, File No. EU-2011-0387, and its most recent rate case, Case No. ER-2011-0004, on Empire's earnings.

#### **Empire's Earnings History and Financial Ratings**

27. According to Empire's 2011 Annual Report, Empire's corporate credit ratings and the ratings for its securities are as follows:



	Fitch	Moody's	Standard & Poor's
Corporate Credit Rating	n/r*	Baa2	BBB-
EDE First Mortgage Bonds	BBB+	A3	BBB+
Senior Notes	BBB	Baa2	BBB-
Commercial Paper	F3	P-2	A-3
Outlook	Stable	Stable	Stable

\*Not rated.

28. The Company's 2011 Annual Report states:

On March 10, 2011, Standard & Poor's revised its outlook on us from stable to positive and affirmed the corporate credit rating at BBB-, citing greater-than-expected improvement in our financial condition from the winding down of our heavy construction program, sale of \$120 million of common stock in 2010, rate increases and enhanced cost recovery via new rate riders. On May 27, 2011 Standard & Poor's revised our rating outlook to stable from positive after the May 22, 2011 tornado. On April 14, 2011, and again on May 26, 2011 after the May 22, 2011 tornado, Moody's reaffirmed all of our other ratings. The rating action was not based on a specific action or event on our part, but reflected traditional linkage of long-term and short-term Issuer Default Ratings.

29. The May 27, 2011 Standard & Poor's Research Update "Empire District Electric's Outlook Changed to Stable From Positive After Missouri Tornado Disaster" states:

On May 27, 2011, Standard & Poor's Ratings Services affirmed its ratings on Joplin, Mo. -based electric and natural gas utility Empire District Electric Co. and revised the outlook to stable from positive...The outlook revision relates to the financial implications of the destructive storm earlier this week that passed through Joplin, the largest city in the company's service territory. Largely due to an anticipated loss of business that Empire estimates could reach 15% and storm repair costs estimated to be up to \$30 million in its service territory, the company suspended its quarterly dividend of 32 cents for the second and third quarters of 2011. This may impair the company's access to equity markets, and along with reduced cash flows and higher expenses, financial measures could weaken.

30. However, Empire's financial measures did not weaken during 2011. On March 23, 2012, Standard & Poor's released a research report on Empire's ratings that states:

Although Empire's **financial metrics strengthened in 2011** with its capital budget at a low point, we expect its overall financial condition to erode due to rising capital expenditures and the additional debt that will be needed to partially fund the construction program. **[emphasis added]**

31. Staff reviewed some of the key financial ratios typically considered by rating agencies. Funds from Operations (FFO) Interest Coverage ratio and FFO as a Percentage of Average Total Debt (FFO to Average Total Debt) ratios for Empire have improved from 2009 to 2011. Empire's FFO interest coverage ratio was 3.7x in 2009, 4.7x in 2010 and 5.1x in 2011. Empire's FFO/debt ratio was 14.8% in 2009, 20.0% in 2010 and 22.0% in 2011.<sup>12</sup>

32. Consequently, although Empire's corporate rating outlook was changed due to the uncertainty of the impact the tornado may have on Empire's cash flows, damages and lost revenues did not cause a decline in Empire's financial metrics. In fact, they improved.

33. Although Empire did suspend its dividend for two quarters, retaining approximately \$26.8 million of cash flow, Empire has since reinstated its dividend to \$1.00 per share on an annual basis. Although Empire's reinstated dividend is lower than its previous \$1.28 annual dividend, Empire had a payout ratio that was consistently close to or above 100% of earnings for approximately 15 years. Empire did not have the earnings to support its dividend in 10 of the past 16 years.<sup>13</sup>

34. Empire is financially sound.

#### Empire's Rate Changes, Including Its Fuel Adjustment Clause

35. While Empire's 2011 rate case, Case No. ER-2011-0004, resulted in an overall increase in Empire's rates and revenues, it also modified Empire's rate design in some significant ways. Specifically, the resulting rates reduced the summer-winter seasonal rate differential. Historically, Empire's summer per kWh rates were substantially higher than its per kWh winter rates.<sup>14</sup>

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<sup>12</sup> Standard & Poor's Analysis on Empire District Electric Co., March 23, 2012.

<sup>13</sup> Value Line Investment Survey, June 22, 2012.

<sup>14</sup> Many Empire classes have "block" per kWh rates. The applicable rate varies with usage. For example, residential customers are charged a different per-kWh rate for the first 600 kWh than for additional kWh per kWh.

36. The reduction of the summer-winter differential resulted in Empire's summer per kWh rates coming out of the case being actually lower than the summer per kWh rates under the old rate design for the residential class, commercial building class, and the small heating class, even after including the revenue requirement increase. Likewise, the first energy block rates of the total electric building class and the general power class coming out of the case being lower than the summer per kWh rates under the old rate design. In other words, on June 15, 2011, Empire customers' per usage charges were less than they would have been without the rate increase resulting from Case No. ER-2011-0004.

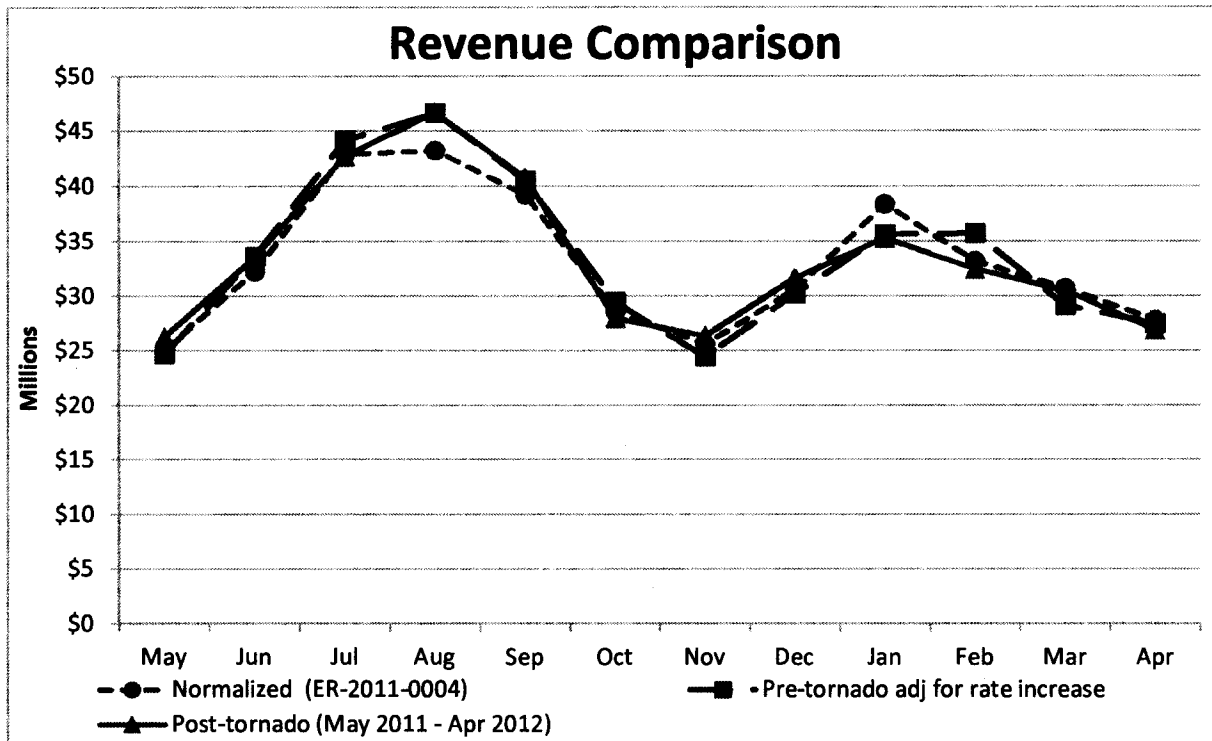
37. Empire's Summer Season is defined as "the first four billing periods billed on and after June 16, and the Winter Season will be the remaining eight monthly billing periods of the year."<sup>15</sup>

38. On approximately September 16, 2011, Empire's winter per kWh rates took effect. While Empire's winter per kWh rates resulting from Case No. ER-2011-0004 were higher than Empire's per kWh winter rates in effect before the rate case, they are lower than Empire's current summer rates.

39. Excluding Empire's Fuel Adjustment Clause (FAC) revenue, the following graph illustrates Empire's actual rate revenue since the tornado compared to normalized rate revenue from Case No. ER-2011-0004. It also illustrates Empire's, actual rate revenue since the tornado compared to Empire's rate revenue before the tornado with adjusted for the rate changes in Case No. ER-2011-0004:

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<sup>15</sup> P.S.C. Mo. No. 5, Sec. 1, 16<sup>th</sup> Revised Sheet No. 1.



40. Staff has not had adequate time to weather normalize Empire's post-tornado sales represented in the graph, nor to perform the other adjustments necessary to use actual sales for calculating reliable billing determinants for use in setting rates. However, these raw numbers do appear to indicate that any shortfall in sales Empire may be currently experiencing did not begin until the winter months of 2011-2012. While Staff has not had adequate time to study this past winter's weather, observationally, this past winter had remarkably mild weather. Without further study, Staff cannot say with certainty what percentage, if any, of Empire's apparent reduction of non-weather normalized sales is attributable to the effects of the weather, versus any tornado-related reduction in sales to specific Joplin-area customers, net of any increase in other Empire customers.<sup>16</sup>

<sup>16</sup> As an estimate of the possible impact, Empire's witness Aaron J. Doll shows a weather adjustment of approximately 9.4% for the residential class for the months of December 2011 through March 2012, i.e., given normal weather, residential usage would have been over 9% higher.

41. Empire's FAC Cost Adjustment Factor ("CAF") for the accumulation period of March 2011 through August 2011 was positive which means that Empire's fuel costs were above what was included in general retail rates. However the CAF for the accumulation period of September 2011 through February 2011 was negative which means that during the time period of September through February 2011, Empire collected in its retail rates more for fuel and purchased power costs than it actually incurred.

42. Since there is a lag from accumulation periods to recovery periods, this means Empire was collecting additional cash through its FAC at a time when its actual fuel costs were lower. Empire will return that excess to its customers in its June 2012 through November 2012 billing months. Therefore it still has access to some of the over-collection through November 2012, offsetting, at least in part, any reduction in revenue due to tornado-related customer losses.

Empire's Tornado Accounting Authority Order

43. On June 6, 2011, shortly after the occurrence of the Joplin tornado, Empire filed an AAO request In Case No. EU-2011-0387 seeking authority to defer tornado-related capital costs, tornado-related incremental O&M expenses, and "lost revenues" (also referred to in various Commission cases as "lost fixed costs") associated with customers no longer taking electric service from Empire in the aftermath of the tornado. In general terms, a request by a utility to "defer" certain costs means that it is seeking to book those costs to its balance sheet as a regulatory asset, instead of charging them as an expense on the its income statement. The Commission has historically restricted deferral authority to "extraordinary costs" that meet standards such as having been actually experienced. Deferral treatment protects utilities from the detrimental earnings impacts of certain extraordinary costs until such time as those costs can be considered for inclusion in rates in a subsequent rate proceeding.

44. On November 15, 2011, Empire, Staff, and all other parties entered into a Stipulation and Agreement that recommended the Commission authorize Empire to defer tornado-related capital costs and O&M expenses to its balance sheet. Empire agreed to withdraw the remainder of its request relating to alleged “lost revenues” or “lost fixed costs.” The Commission approved the Stipulation and Agreement on November 30, 2011. In regard to Empire’s tornado-related capital costs, the Commission’s Order authorized Empire to defer the depreciation expense and a “carrying charge” associated with those assets until its next rate proceeding. Under the terms of the Stipulation, Empire is not required to amortize any amount of the regulatory asset to its income statement prior to June 1, 2013, or until the effective date of new rates in its next rate proceeding, whatever occurs first.

45. As described above, Empire has been afforded earnings protection for the tornado-related capital costs it has incurred since May 2011 through the AAO granted to it by the Commission in Case No. EU-2011-0387. Because of this protection, there is simply no credible reason why Empire is deserving of accelerated rate recovery of these capital costs through the extraordinary mechanism of an interim rate increase. Empire has not demonstrated, nor can it demonstrate, that it will suffer any tangible financial harm if its rate recovery of tornado-related capital costs is delayed until the normal completion of its current rate case process.

#### Conclusion Regarding Empire’s Financial Condition

46. In conclusion, Empire has not and is not experiencing financial conditions that endanger its continued ability to provide safe and adequate service to its customers.

#### **Lost Revenues and Customer Numbers Request**

47. The prepared Direct Testimony of Ms. Kelly S. Walters, at pages 10 states that “[t]he rates the Commission set in Case No. ER-2011-0004 were designed to allow the Company

to recover a portion of its fixed costs from each of its customers. But when the number of customers served by Empire declined because of the tornado, rate revenues declined as well, and the Company lost the fixed cost portion of each dollar o[f] rate revenue it was unable to collect from these customers.” She goes on to state that Empire has “calculated the ongoing loss in pre-tax net margin associated with these lost customers at \$1.4 million per year.”

48. Ms. Walter’s statement that “[t]he rates the Commission set in Case No. ER-2011-0004 were designed to allow the Company to recover a portion of its fixed costs from each of its customers,” is not an accurate portrayal of the Commission’s application of cost-of-service ratemaking.

49. The Commission may consider class-cost-of-service studies in setting values for individual rate elements that appear in a tariff. Some rate elements cause the ultimate bill to vary with usage and season, while some rate elements are stable despite the level of a customer’s usage or the season. Neither of those facts means that a particular rate element is specifically identifiable to and reflective of a particular “fixed cost,” incurred by Empire in its provision of service to customers.

50. Empire has not alleged that it failed to maintain a positive earnings stream, or return, during the last 13 months nor has it alleged that it anticipates an inability to do so for the next 10 months. Thus, the \$1.4 million portion of Empire’s interim request that it characterizes as being related to “lost fixed costs” is actually related to the diminishment in a stream of return—profit—that Empire expected, but failed to realize.

51. Missouri’s courts have consistently held that investor-owned utilities, such as Empire, have no right to a return, much less a particular level of return. It is very well

established that the law does not require that rates yield any particular return.<sup>17</sup> As stated in a 2006 Missouri Gas Energy appeal of a rate case before the Missouri Western District Court of Appeals, there is no statute, rule, or case supporting that utilities have a property right to a defined level of revenue.<sup>18</sup> Empire simply does not have any sort of right to collect revenues from any particular customer or set of customers.

52. This is not to say that Empire's changes in customer numbers will not be considered in Empire's general rate case nor to trivialize the real impacts the May 22, 2011, tornado had on Empire's customers and its system—it is simply to recognize that whatever effect the ungenerated revenues from unsold power and unbilled rates had on Empire's financial ability to provide safe and adequate service does not warrant interim rate relief, much less expedited interim rate relief.

53. Empire's risk of revenue shortfall and diminished profit is a business risk for which shareholders are properly compensated. Missouri courts have held that "it is a well-accepted principle of regulation that common stockholders contribute what is known as 'risk capital' to the utility company for which they receive a compensatory rate of return. Among the uncertainties that common stockholders accept in return for this added compensation is the danger of earnings shortfall, for whatever reason."<sup>19</sup> Further, "risks are part of the utility business and that even the risk of economic catastrophe may be properly assigned to owners of

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<sup>17</sup> *State ex rel. Capital City Water Co. v. Public Service Commission of Missouri* 252 S.W. 446, 456 (Mo. 1922); *State ex rel. Missouri Gas Energy v. Public Service Com'n* 186 S.W.3d 376, 383 (Mo.App. W.D.,2005); *State ex rel. Missouri Office of Public Counsel v. Public Service Com'n of State* 293 S.W.3d 63, 80-81 (Mo.App. S.D.,2009); *Straube v. Bowling Green Gas Co.* 360 Mo. 132, 141-142, 227 S.W.2d 666, 670-671 (Mo.1950); *Reinhold v. Fee Fee Trunk Sewer, Inc.* 664 S.W.2d 599, 603-604 (Mo.App. E.D. 1984); *Lightfoot v. City of Springfield* 361 Mo. 659, 669, 236 S.W.2d 348, 352 (Mo.1951); *State ex rel. Missouri Gas Energy v. Public Service Com'n* 210 S.W.3d 330, 334-335 (Mo.App. W.D.,2006).

<sup>18</sup> *State ex rel. Missouri Gas Energy v. Public Service Com'n* 210 S.W.3d 330, 334-335 (Mo.App. W.D.,2006).

<sup>19</sup> *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.* 765 S.W.2d 618, 622 -623 (Mo.App. W.D. 1988).



the utility rather than to its customers.”<sup>20</sup> This is proper, because if a stockholder could be assured a return of his/her investment under all circumstances, it would make the investment practically risk-free.<sup>21</sup> Thus, it is not appropriate to guarantee a defined level of profit.

54. Essentially, case law makes it clear that the Commission is under no obligation to provide a utility with any level of profit, much less the precise ROE used to set rates in the preceding general rate case. Further, since shareholders are compensated for the risk of decreased profit, it is inappropriate to guarantee Empire any level of profit through the use of interim rates, much less on such an expedited basis that would permit the interim rates to go into effect by operation-of-law without any more time for discovery or a hearing.

55. In the course of recommending a revenue requirement, a rate design, and ultimately specific tariffed rates in the general rate case, Staff will examine Empire’s historic customer numbers and to perform a customer growth calculation. These are proper subjects for the general rate case, and given the impacts of the May 22, 2011, tornado on such a large portion of Empire’s customer base, Staff will pay particular attention to the billing determinants and rate design in its ultimate recommendation.

### **Conclusion**

56. The issues raised by Empire in its interim rate request—(1) increased rate base and depreciation expense associated with infrastructure placed into service in response to the tornado and the deferred expenses associated with the restoration efforts, and (2) the apparent and potentially long-term reduction in Empire’s Joplin-area customer numbers—will be examined and considered in Staff’s recommendation to the Commission concerning Empire’s

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<sup>20</sup> *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.* 765 S.W.2d 618, 626 (Mo.App. W.D. 1988).

<sup>21</sup> *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.* 765 S.W.2d 618, 622 -623 (Mo.App. W.D. 1988).

general rate request. However, neither of these issues alone, or even combined, warrant interim rate relief, much less expedited, virtually immediate interim rate relief.

57. Even when considering Empire's decisions to pay out dividends in excess of earnings for years preceding the May 22, 2011, tornado and to reinstate them soon after it, Empire is financially sound. Empire's interim rate request is simply not necessary for it to continue to provide safe and adequate service.

58. For the same reasons set out in the Commission's discussion of denial of Ameren Missouri's interim rate increase request in Case No. ER-2010-0036, the Commission should deny Empire's interim rate increase request. For convenience, that discussion is reproduced, below.

Based on its findings of fact and conclusions of law, the Commission finds that it has broad discretion to determine whether AmerenUE may implement an interim rate increase. In determining when an interim rate increase is appropriate, the Commission is not limited to an emergency or near emergency standard. However, any rate, including an interim rate, the Commission approves must be just and reasonable to both the utility and its ratepayers.

By its nature, an interim rate increase will take money from the pocket of ratepayers and give it to the utility's shareholders before the complete review of the company's earnings and expenses that will occur during the full rate case process. In some situations, an interim rate increase may be appropriate, but interim rate increases should not be granted routinely and should not be implemented simply to benefit the utility's rate of return.

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.**

The Commission is sympathetic to the financial challenges facing the investor-owned electric utilities and recognizes that excessive regulatory lag may be a part of those challenges. There may be additional mechanisms or regulatory adjustments that would allow AmerenUE and the other electric utilities to deal with those challenges in the future. 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.

AmerenUE also expresses concern about the connection between its bond rating and what it calls excessive regulatory lag. It suggests that allowing it to implement an interim rate increase would partially offset the alleged adverse effects excessive regulatory lag may have on those bond ratings. However, this is a solution without a problem in that AmerenUE already maintains stable, investment-grade bond ratings. Given the effects of the current global financial crisis, attributing AmerenUE's bond ratings and related credit problems to analyst perceptions of excessive regulatory lag is merely unsubstantiated speculation.

AmerenUE did not meet its burden of proving that it is facing extraordinary circumstances and has not demonstrated a compelling reason to implement an interim rate increase. There is no systemic problem in Missouri causing excessive regulatory lag. Rather, the ongoing global financial crisis is causing AmerenUE to experience some of the same financial difficulties currently afflicting its ratepayers. Despite the difficulties caused by the economic recession, AmerenUE continues to have a solid and stable investment grade bond rating. Most importantly, AmerenUE will continue to provide safe and adequate service to its customers without the benefit of an interim rate increase.

AmerenUE is not facing an extraordinary circumstance and there is no compelling reason to implement an interim rate increase. Therefore, the Commission will reject the tariff that would implement such an increase. **[emphasis added]**

59. Additionally, the lost "fixed cost" portion of Empire's request should be similarly denied for the same reason set out in the Commission's order denying MGE's AAO request in File No. GU-2011-0392, also related to the Joplin tornado: The Commission need not guarantee the Company's profit, nor shift the risk of disappointing profits to ratepayers, especially where the source of disappointment is the provision of no service.<sup>22</sup>

**WHEREFORE**, for the reasons set forth above, the Staff recommends that the Commission reject Empire's tariff sheets effectuating an interim rate increase. Alternatively, Staff recommends that the Commission suspend the tariff sheets and proceed with the prehearing

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<sup>22</sup> *Report and Order* in File No. GU-2011-0392, p. 23.

conference date of July 23, 2012 for the purpose of parties discussing Empire's interim filing in addition to the permanent filing.

Respectfully submitted,

/s/ Sarah L. Kliethermes

Sarah L. Kliethermes  
Senior Counsel  
Missouri Bar No. 60024

Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
Phone: (573) 751-6726  
Fax: (573) 751-2690  
E-mail: sarah.kliethermes@psc.mo.gov

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 20<sup>th</sup> day of July, 2012.

/s/ Sarah L. Kliethermes

**BEFORE THE PUBLIC SERVICE COMMISSION**

**OF THE STATE OF MISSOURI**

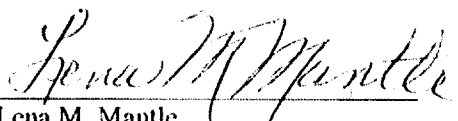
In the Matter of The Empire District Electric )  
Company of Joplin, Missouri Tariffs Increasing Rates )  
for Electric Service Provided to Customers in the )  
Missouri Service Area of the Company )

File No. ER-2012-0345

**AFFIDAVIT OF LENA M. MANTLE**

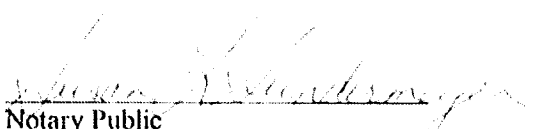
STATE OF MISSOURI            )  
  )  
COUNTY OF COLE            )            ss.

Lena M. Mantle, being of lawful age, on her oath states: that as a Utility Regulatory Manager in the Energy Unit of the Utility Operations Department, she has reviewed the facts stated in the foregoing pleading in paragraphs 41 – 42 and 49 and verifies that she has knowledge of the matters set forth and that such matters are true to the best of her knowledge and belief.

  
Lena M. Mantle

Subscribed and sworn to before me this 20<sup>th</sup> day of July, 2012.

SUSAN L. SUNDERMEYER  
Notary Public - Notary Seal  
State of Missouri  
Commissioned for Callaway County  
My Commission Expires: October 03, 2014  
Commission Number: 10042086

  
Notary Public

**BEFORE THE PUBLIC SERVICE COMMISSION**

**OF THE STATE OF MISSOURI**

In the Matter of The Empire District Electric )  
Company of Joplin, Missouri Tariffs Increasing Rates )  
for Electric Service Provided to Customers in the )  
Missouri Service Area of the Company )

File No. ER-2012-0345

**AFFIDAVIT OF DAVID MURRAY**

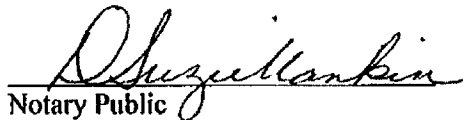
STATE OF MISSOURI        )  
                                  )  
COUNTY OF COLE         )       ss.

David Murray, being of lawful age, on his oath states: that as a Utility Regulatory Manager in the Financial Analysis Unit of the Utility Services Department, he has reviewed the facts stated in the foregoing pleading under the heading "Empire's Earnings History and Financial Ratings" and verifies that he has knowledge of the matters set forth and that such matters are true to the best of his knowledge and belief.

  
David Murray

Subscribed and sworn to before me this 20<sup>th</sup> day of July, 2012.

D. SUZIE MANKIN  
Notary Public - Notary Seal  
State of Missouri  
Commissioned for Cole County  
My Commission Expires: December 08, 2012  
Commission Number: 08412071

  
Notary Public

**BEFORE THE PUBLIC SERVICE COMMISSION**  
**OF THE STATE OF MISSOURI**

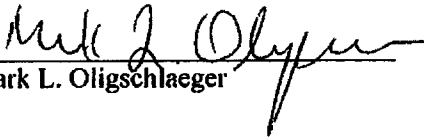
In the Matter of The Empire District Electric )  
Company of Joplin, Missouri Tariffs Increasing Rates )  
for Electric Service Provided to Customers in the )  
Missouri Service Area of the Company )

File No. ER-2012-0345

AFFIDAVIT OF MARK L. OLIGSCHLAEGER

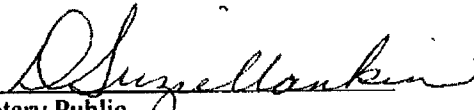
STATE OF MISSOURI            )  
  )  
COUNTY OF COLE            )            ss.

Mark L. Oligschlaeger, being of lawful age, on his oath states: that as a Utility Regulatory Manager in the Auditing Unit of the Utility Services Department, he has reviewed the facts stated in the foregoing pleading under the heading "Empire's Tornado Accounting Authority Order" and verifies that he has knowledge of the matters set forth and that such matters are true to the best of his knowledge and belief.

  
Mark L. Oligschlaeger

Subscribed and sworn to before me this 20<sup>th</sup> day of July, 2012.

**D. SUZIE MANKIN**  
Notary Public - Notary Seal  
State of Missouri  
Commissioned for Cole County  
My Commission Expires: December 08, 2012  
Commission Number: 08412071

  
Notary Public

**BEFORE THE PUBLIC SERVICE COMMISSION**  
**OF THE STATE OF MISSOURI**

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

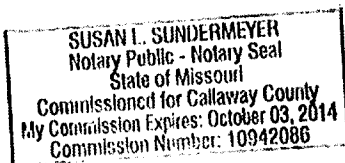
AFFIDAVIT OF MICHAEL S. SCHEPERLE

STATE OF MISSOURI        )  
                                  )        ss.  
COUNTY OF COLE        )

Michael S. Scheperle, being of lawful age, on his oath states: that as an Economic Analysis Manager in the Energy Unit of the Utility Operations Department, he has reviewed the facts stated in the foregoing pleading in paragraphs 35 - 40 and verifies that he has knowledge of the matters set forth and that such matters are true to the best of his knowledge and belief.

*Michael S. Scheperle*  
\_\_\_\_\_  
Michael S. Scheperle

Subscribed and sworn to before me this 20<sup>th</sup> day of July, 2012.



*Susan L. Sundermeyer*  
\_\_\_\_\_  
Notary Public