

**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) Case No. ER-2018-0366
Rates of The Empire District Electric Company)

**EMPIRE’S RESPONSE TO OPC’S MOTION REQUESTING THAT THE
COMMISSION TAKE ADMINISTRATIVE NOTICE**

COMES NOW The Empire District Electric Company (“Empire” or “Company”), by and through counsel, and for its Response to the Office of the Public Counsel’s (“OPC”) Motion Requesting that the Commission Take Administrative Notice, respectfully states as follows to the Missouri Public Service Commission (“Commission”):

1. A hearing was held in this matter on July 20 and 23, 2018, where witnesses took the stand and the Commission accepted evidence into the record.
2. Post-Hearing Briefs were due July 30, 2018, and were filed by Empire, the Staff of the Commission (“Staff”), OPC, and the Midwest Energy Consumers Group (“MECG”).
3. Contained on page 21 of the “Initial Brief of the Office of the Public Counsel” is a request for the Commission to “take notice of both” documents attached to OPC’s Brief. OPC claims that these documents demonstrate that “so long as this Commission attempts to comply with the normalization requirements,” the concerns Empire witness Steve Williams expressed regarding the consequences of normalization violations will not come to fruition.
4. Contrary to OPC’s representation, these documents demonstrate that the Commission’s adoption of OPC’s recommendations in this case may lead to normalization violations which would carry with them grave consequences and would not lead to “inadvertent normalization violations” to which the IRS “safe harbor” would apply.

A taxpayer’s Inconsistent Practice or Procedure **is neither inadvertent nor unintentional if the Taxpayer’s Regulator specifically considered and**

specifically addressed the application of the Normalization Rules to the Inconsistent Practice or Procedure **in establishing or approving the taxpayer's rates** even if at the time of such consideration the Taxpayer's Regulator did not believe the practice or procedure was inconsistent with the Normalization Rules.

Attachment 1, p. 8 of 13, OPC's Brief (emphasis added). This is exactly what would be happening in this case, if the Commission adopts OPC's recommendations regarding excess ADIT. The IRS has clearly stated that the negative consequences of a normalization violation will result if a regulatory body such as the Commission sets a utility's rates, having considered application of the normalization rules, "even if at the time of such consideration the [Commission] did not believe the practice or procedure was inconsistent with the Normalization Rules."

5. Missouri's Administrative Procedure Act allows the Commission to take official notice under the following circumstances:

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

§536.070(6) RSMo.

6. The documents attached to OPC's Motion are not the Commission's own records or documents (§536.070(5)). Also, they do not represent "technical or scientific facts, not judicially cognizable," within the Commission's expertise (§536.070(6)). The question then is whether the documents represent the type of facts of which the court may take judicial notice (§536.070(6)).

7. Missouri courts may take judicial notice of facts that are: (a) part of the common knowledge of every person of ordinary understanding and intelligence; or (b) capable of accurate and ready determination by resort to sources the accuracy of which cannot reasonably be

questioned. Courts may not take judicial notice of facts which the court cannot know without resort to expert testimony or other proof. *Timson v. Manufacturer's Coal and Coke*, 119 S.W. 565, 569 (Mo. banc 1909). "It follows, therefore, that judicial notice must be exercised cautiously, and if there is doubt as to the notoriety of such fact, judicial recognition of it must be declined." *English v. Old American Insurance Co.*, 423 S.W.2d 33, 41 (Mo. 1968).

8. The information contained in the documents attached to OPC's Brief is not "common knowledge" of every person, nor is it information that is "capable of accurate and ready" determination. This is the type of information that should have been presented in pre-filed testimony or during the hearing, not slipped in through a notice request in a post-hearing brief.

9. Empire, however, does not object to the Commission re-opening the record and accepting into evidence Attachment 1 to OPC's Brief, so long as this Response is taken into consideration as Empire's argument along with Empire's Post-Hearing Brief.

10. Although Attachment 2 to OPC's Brief does not advance OPC's positions in this case, and, instead, provides further support for Empire's testimony, Empire must object to its admission on the basis that it contains no probative value for the Commission. As discussed above, it would not be proper for the Commission to take official notice of Attachment 2. With regard to admissibility, the document itself provides that it is "generic legal advice" and "may not be used or cited as precedent."

WHEREFORE, Empire respectfully submits this Response to OPC's Motion. Empire requests such relief as is just and proper under the circumstances.

Respectfully submitted,

Brydon, Swearngen & England, P.C.

By: /s/ Diana C. Carter
Diana C. Carter MBE#50527

312 East Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
Telephone: 573/635-7166
Facsimile: 573/635-3847
Email: dcarter@brydonlaw.com

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was filed in EFIS on this 31st day of July, 2018, with notice of the same being sent to all counsel of record.

/s/ Diana C. Carter