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September 12, 2001

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Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED³

SEP 12 2001

RE: Case No. ER-2001-299

Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **STAFF'S MOTION TO STRIKE PORTIONS OF COMPANY'S TRUE-UP REPLY BRIEF OR, IN THE ALTERNATIVE, FOR LEAVE TO RESPOND TO COMPANY'S TRUE-UP REPLY BRIEF.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Keith R. Krueger
Deputy General Counsel
(573) 751-4140
(573) 751-9285 (Fax)

KRK/lb
Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³
SEP 12 2001
Missouri Public
Service Commission

In the Matter of The Empire District)
Electric Company's Tariff Sheets)
Designed to Implement a General Rate)
Increase for Retail Electric Service)
Provided to Customers in the Missouri)
Service Area of the Company.)

Case No. ER-2001-299
Tariff No. 200100518

STAFF'S MOTION TO STRIKE
PORTIONS OF COMPANY'S TRUE-UP REPLY BRIEF
OR, IN THE ALTERNATIVE, FOR LEAVE TO RESPOND
TO COMPANY'S TRUE-UP REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, and, for its Motion to Strike Portions of Company's True-Up Reply Brief or, in the Alternative, for Leave to Respond to Company's True-Up Reply Brief, states to the Missouri Public Service Commission as follows:

1. In its True-Up Reply Brief in this case, Empire District Electric Company has improperly included argument on two subjects that were not subject to true-up, were not directly addressed in the prefiled true-up testimony that any party filed in this case, and were not addressed in the initial true-up briefs to which the Company was responding. Those two subjects concern the proper return on equity and the use of a hypothetical capital structure. The Company's argument on those two issues should be stricken. Alternatively, the Staff and other parties should be given an opportunity to respond to the Company's argument on those issues.

2. On January 4, 2001, the Commission issued its Order Setting Test Year, Setting True-Up Hearing and Adopting Procedural Schedule (the "True-Up Order") in this case. In Ordered

Paragraph 1 of the True-Up Order, the Commission adopted the test year and true-up recommendations of the parties and stated: "The test year in this matter shall be the twelve months ending December 31, 2000, updated with respect to certain agreed items for known and measurable changes."

3. In the True-Up Order, the Commission summarized the agreement among the parties with respect to true-up as follows:

The parties are agreed that the proper test year is the twelve-month period ending December 31, 2000, updated for known and measurable changes through June 30, 2001, for utility plant in service, accumulated depreciation, deferred taxes, fuel prices, cash working capital, *capital structure and cost of capital*, customer growth revenues, payroll, fuel and purchased power expense, depreciation expense, system loads, rate case expense, property insurance, income and property taxes, purchased power demand charges, and allocation factors. The parties agree that "updates" are *known and measurable changes* which occur within a reasonable time after the close of the test year. (Emphases added).

4. The Commission included in the True-Up Order the following quotation from the Missouri Court of Appeals:

The criteria used to determine whether a post-year event should be included in the analysis of the test year is whether the proposed adjustment is (1) "known and measurable," (2) promotes the proper relationship of investment, revenues and expenses, and (3) is representative of the conditions anticipated during the time the rates will be in effect.

State ex rel. GTE North, Inc. v. Missouri Public Service Commission, 835 S.W.2d 356, 368 (Mo. App., W.D. 1992). The Commission also noted that "the adjustment of the test year figures for known and measurable events outside the test year is referred to as a 'true-up,'" citing *State ex rel. Missouri Public Service Commission v. Fraas*, 627 S.W.2d 882, 888 (Mo. App., W.D. 1981).

5. In its True-Up Reply Brief, the Company devoted two pages of argument to the following issue: "*What return on common equity is appropriate for Empire?*" In addition, the

Company devoted one long paragraph to the following issue: “*What capital structure is appropriate for Empire?*”

6. The parties did not identify either of the issues mentioned in Paragraph 5 as subject to true-up, and the Commission did not order true-up with regard to either of these issues. The only issues regarding capitalization that were subject to true-up were the capital structure and the cost of capital. But, as noted in Paragraphs 3 and 4 above, the capital structure should have been trued up only for “known and measurable changes” in the actual capital structure – and not for reargument on the question of whether a hypothetical capital structure should be used. Likewise, the true-up of the cost of capital issue should have been confined to “known and measurable changes” in the cost of capital that result from actual changes in the capital structure or in the embedded cost of debt or of preferred stock. The Company’s arguments had nothing to do with any “known and measurable change” in the Company’s capital structure or with any “known and measurable change” in the Company’s cost of capital.

7. Three witnesses filed true-up testimony on capital structure and cost of capital, namely: Staff witness Roberta A. McKiddy, Public Counsel witness Mark Burdette, and Company witness David W. Gibson. None of these witnesses directly addressed the issue of return on equity, although Mr. Gibson did *mention* return on equity, apparently to support his argument that the Company’s actual capital structure should not be used.

8. A party should limit its true-up reply brief to issues that have been addressed in the initial true-up briefs that the other parties filed. This is the standard practice before the Commission. In this case, no other party addressed the issue of return on equity or the issue of use of a hypothetical capital structure in its initial true-up brief. The Company was not deterred by this silence. It first noted its dismay over the failure of the Staff to address the issue: “Empire

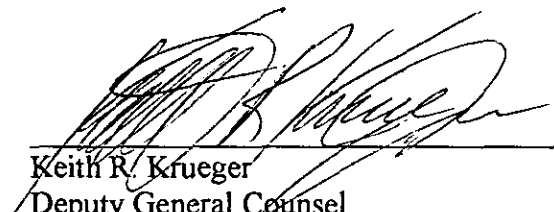
had hoped that given the circumstances the Staff would make an upward adjustment to its return on common equity recommendation in its Initial True-Up Brief, but this did not occur.” The Company then plunged forward, responding to an argument that had not been made.

9. In its True-Up Reply Brief, the Company presented a new argument – or, perhaps, new evidence – that had never been presented in this case. This argument was based upon a decision of the Kansas Corporation Commission that was issued on July 25, 2001. If the Company’s argument regarding the return on equity issue is not stricken, the Staff will never have an opportunity to respond to this improper argument. In addition, the Company included in its True-Up Reply Brief argument about the Staff’s alleged “minimal solvency” standard. This term “minimal solvency” is new to the Staff, having never been used in this case. Furthermore, the Company’s use of this term distorts and misstates the Staff’s position in this case. Because the Company made these new arguments, for the first time, in its True-Up Reply Brief, this portion of the Company’s True-Up Reply Brief should be stricken, or in the alternative, the Staff and other parties should be given an opportunity to respond to these new arguments.

WHEREFORE, the Staff moves the Commission for its order striking Article III, Section A and C of the Company’s True-Up Reply Brief in this case or, in the alternative, granting to the Staff the opportunity to respond to the arguments made in the said sections.

Respectfully submitted,

DANA K. JOYCE
General Counsel

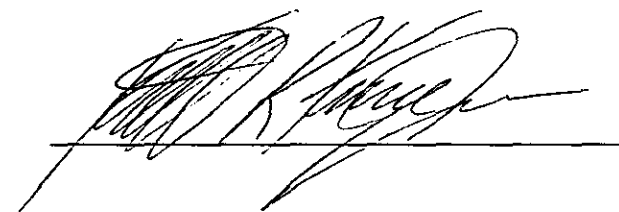


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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 12th day of September 2001.



Service List for
Case No. ER-2001-299
Verified: September 12, 2001 (lb)

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