BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Request of the Empire District Gas Company d/b/a Liberty for Authority to File Tariffs Increasing Rates For Gas Service Provided to Customers In its Missouri Service Area.	)))))	**File No. GR-2021-0320**

REPLY BRIEF OF THE EMPIRE DISTRICT GAS COMPANY D/B/A LIBERTY

COMES NOW, The Empire District Gas Company d/b/a Liberty ("Empire" or "EDG"), and hereby submits its Reply Brief in this matter.

I. INTRODUCTION

EDG has anticipated and adequately addressed the issues raised by the Missouri School Boards' Association ("Association" or "MSBA") in its initial brief, but a few additional observations and responses are appropriate in reply to the initial brief filed by MSBA.

First, much of MSBA's brief is essentially an improper and prohibited collateral attack upon the Commission's Order in EDG's 2009 rate case which approved the current aggregation, balancing and cash-out rates.[1] For example, MSBA alleges "(i)t is clear the 2009 rate case created an ESE [Eligible School Entities] charge that was unlawful under the school statute and that unlawful tariff exists today." (MSBA Brief, p. 9)

Section 386.550 RSMo. states: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." If a statutory review of

[1] *Order Approving Partial Stipulation And Agreement on Transportation Tariff Issues*, Re: The Empire District Gas Company, File No. GR-2009-0434 (Issued: 1/20/2010).

a PSC order is unsuccessful, the order is final and cannot be attacked in a collateral proceeding. State of Missouri ex rel. Licata, Inc. v. Public Service Commission of the State of Missouri, 829 S.W.2d 515 (Mo.App.1992); State ex rel. Mid-Missouri Telephone Co. v. Public Service Com'n, 867 S.W.2d 561, 565 (Mo.App. W.D. 1993); State ex rel. Harline v. Public Service Commission of Mo., 343 S.W.2d 177 (Mo. App. 1960). EDG's 2009 rate case order was a final order and it was not appealed.

Notwithstanding this clear prohibition against collateral attacks of a final Commission order, MSBA spends much of its brief lamenting the fact that the Commission has conclusively approved EDG's aggregation, balancing and cash-out rates in its 2009 rate case. The Commission must by law disregard such collateral attacks as improper and unlawful.

Second, many "facts" included in MSBA's initial brief are not supported by citations to the record. In fact, there are few, if any, citations to the transcripts or specific exhibits introduced in the record in this case. For example, on page 7 of MSBA's brief, MSBA recites many "facts" related to EDG's 2009 rate case without any citation to the record. While MSBA acknowledges that it did not participate in the 2009 EDG rate case (MSBA Brief at 6), MSBA alleges that "EDG and Staff errored in GR-2009-0434. . . by not following the cost-based legal standards. . . " (Id.) Without any citation to the record, MSBA alleges: "Staff and Company manufactured balancing cost data by applying pipeline storage rates as the presumed method of balancing." (MSBA Brief at 7) Such arguments without citation to the record or other evidentiary support should be stricken or otherwise ignored by the Commission.

MSBA also alleges that on two occasions that eighty percent of the ESEs imbalance gas volumes are reconciled and repaid to the gas corporation in kind by netting, or "carry-over," of physical gas against the following month ESE gas deliveries. (MSBA Brief, pp. 2, 10) Again, MSBA

does not include any citation to the record, and there is no competent and substantial evidence in the whole record to support this assertion.

Finally, the Commission Staff has thoroughly reviewed the record in this case and has concluded: "Staff recommends the Commission reject MSBA's requests in this case as they are not supported by the evidence in this record, nor are they practically necessary or required by law." (Staff Brief, p. 6) On this ultimate recommendation, EDG wholeheartedly agrees with Staff.

II. CONTESTED ISSUES

1. Should the Commission approve the recommendations filed on behalf of the MSBA?

As mentioned above, both EDG and the Commission Staff recommend that the Commission reject the recommendations filed on behalf of the MSBA. (Staff Brief, pp. 1-6; EDG Brief, pp. 1-13; Ex. 1, Earhart Rebuttal, pp. 4-5; Ex. 2, Earhart Surrebuttal, pp. 1-2; Ex. 100, Patterson Rebuttal, pp. 3-17)

Legal Standard for Approval of Rates

Before addressing the merits of the issues in the case, MSBA argues that the Commission must determine if the rates and charges to the customer are just and reasonable, and that the burden of proof in rate cases is on the public utility. (MSBA Brief, p. 3) This bare-bones proposition does not mean that all rates of the Company must be modified in every rate case or that the Company has a burden to justify the rates that have already been approved by the Commission.

Section 386.430 RSMo. states:

> **Burden of proof on adverse party**. — In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear

> and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.

In this case, EDG did not propose to change the aggregation, balancing, and cash-out rates which were previously approved by the Commission. Instead, the Company proposed to increase the rates for other classes of service. It has met its burden of proof to demonstrate that residential, commercial and industrial rates should be increased, as recommended by the unanimous stipulation and agreement filed by the parties on April 12, 2022.

Contrary to the arguments of MSBA (MSBA Brief pp. 6, 8), Staff has not inappropriately attempted to meet EDG's burden of proof. EDG has met its own burden of proof to demonstrate that a $1 million overall increase is justified, and that the additional revenue requirement should be allocated to the residential, commercial and industrial rate classes. Staff witness Patterson did provide analysis that suggested that the existing aggregation, balancing and cash-out rates are reasonable, or perhaps will need to be increased in the future.

As Staff has pointed out, MSBA has not provided competent and substantial evidence to (1) show what the aggregation, balancing and cash-out rates should be (Staff Brief, p. 2), or (2) set aside the Commission-approved aggregation, balancing, and cash-out rates in this case. In other words, MSBA has not met the burden of proof that would be required in this case to set aside EDG's aggregation, balancing and cash-out rates approved by Commission order in a prior rate case. Instead, MSBA has collaterally attacked that order, and argued that there are no cost studies to support those rates. The Commission should reject this attempt to collaterally attack the Commission's previous determination that the aggregation, balancing and cash-out rates are just and reasonable.

a. Should the Commission modify EDG's Aggregation, Balancing, and Cash-out Charges in this case?

For the reasons stated herein, the Commission should not modify EDG's existing aggregation, balancing and cash-out charges, as suggested by MSBA. (EDG Brief, pp. 3-9; See also Ex. 1, Earhart Rebuttal, pp. 4-5; Ex. 2, Earhart Surrebuttal, pp. 1-2; Ex. 100, Patterson Rebuttal, pp. 3-17)

MSBA's principal argument against EDG's aggregation, balancing, and cash-out fees are that these fees are not supported by cost studies filed by EDG and these charges must be established "at cost." (MSBA Brief, pp. 5 8) As Staff pointed out in its brief, EDG's rates were approved by the Commission in Case No. GR-2009-0434. (Staff Brief, pp. 2, 4-5) These charges came about as a result of a settlement in the 2009 rate case. There was extensive testimony on the transportation tariffs and fees from six witnesses representing Empire, Staff, and a gas marketing company that supplied gas to transportation customers. The Commission approved a stipulation that settled the issue in that case and established the current fees for aggregation, balancing and cash-out charges for small and medium transportation customers.

These fees have remained unchanged for the last 12 years. Since these rates were originally approved by the Commission in Case No. GR-2009-0434, they are presumed to be lawful and reasonable under Section 386.270 RSMo. As Staff pointed out, Section 393.310.4 RSMo provides that aggregation and balancing fees are <u>to be determined by the Commission</u> (Staff Brief, p. 5), but the statute does not mandate a particular methodology for determining the appropriate aggregation and balancing rates. Section 393.310 requires that the aggregation and balancing fee must be set at the level determined by the Commission. The statute does not mandate that the method to be used

or that the Commission must establish the aggregation, balancing and cash-out fees "at cost." The statute also does not require that the Commission re-determine these rates in every case.

The Commission often takes other factors besides "cost" into account when it establishes public utility rates, including rate impacts, rate gradualism, efficiency, and other non-cost factors. Throughout the years, the Commission has remained mindful that the cost of service is but one consideration in determining the reasonableness of rates. *Shepherd v. Wentzville*, 645 S.W.2d 130 (Mo. App. 1982). It is not just the methodology or theory behind any proposed rates but the rate impact which counts in determining whether rates are just, reasonable, lawful, and nondiscriminatory. State ex rel. Associated Natural Gas Co. v. Public Service Commission, 706 S.W.2d 870, 879 (Mo. App. 1985). The quintessence of a just and reasonable rate is that it is just and reasonable to both the utility and its customers. State ex rel. Val Sewage Co. v. Public Service Commission, 515 S.W.2d 845 (Mo. App. 1974) cited In re Missouri Gas Energy, 1998 WL 673219, at *25T.

Both EDG and Staff support the existing charges for Empire. (Tr. 13) However, as Staff pointed out, MSBA has not provided any proposal for modified rates or any analysis on what an appropriate alternative rate for these fees would be. (Staff Brief, p. 8) Staff witness Patterson suggested that since these types of charges have not changed across the LDC industry for so many years, they may not be high enough to cover the current cost for providing these services. (Ex. 100, Patterson Rebuttal, p. 10, lines 16-19)

MSBA states that it is not opposed to EDG's "cash-out method if it complies with the cost-based requirement of the statute." (MSBA Brief, p. 9) As demonstrated above, Section 393.310 does not mandate that aggregation, balancing and cash-out fees must be set at "cost." Instead, the

Commission may use its expertise and discretion to determine the best method to establish just and reasonable rates for such services.

EDG's Commission-approved cash-out fees are based upon the multipliers used by up-stream interstate pipelines. (Tr. 29) As Mr. Patterson pointed out, the multiplier schedule used by Empire is the same one used by ANR. SSC is more severe in that, even though its top tier multiplier is also 1.5, it reaches this level for imbalances greater than 15 percent rather than the larger 20 percent used by ANR. The PEPL tariff applies the same 1.5 multiplier as the ANR tariff at a 20 percent imbalance, but it is more severe in that it applies a multiplier for the smallest tier of imbalances of 5 percent or less. Empire applies no multipliers to imbalances of 5 percent or less. Of the three upstream pipelines, Empire's cash-out multipliers and tiers are based on the least severe. Empire is passing on the multipliers that apply to its imbalances on upstream pipelines to its transportation customers. Each of these pipelines has its own schedule of cash-out multipliers, but Empire applies the least severe of them to all of its service areas. (Ex. 100, Patterson Rebuttal, pp. 15-16)

The Commission recognized that the cash-out method was a just and reasonable method of resolving imbalances of school aggregation pools and other transportation customers when Atmos Energy Corporation, whose prior Missouri assets are now owned by Empire's sister company Liberty Utilities (Midstates Natural Gas) Corp., implemented cash-out balancing. The Commission found in that case it was "just and reasonable to have a standardized policy regarding cash-outs" and that "the Cash-Out Policy…provide[s] for just and reasonable rates." *Report and Order*, p. 37, Re Atmos Energy Corporation, Case No. GR-2006-0387 (February 22, 2007).

In this case, MSBA has suggested that "Spire's Commission-approved STP carry-over and netting imbalances is fair and simple to administer." (MSBA Brief, p. 9) However, MSBA is

ignoring the differences between Missouri's largest LDC and one of Missouri's smallest LDCs. Mr. Patterson succinctly explained the differences between Spire Missouri and Empire with regard to these two methods. (Ex. 100, Patterson Rebuttal, p. 7). During questioning by Judge Pridgin, EDG witness Earhart also explained the problems with the carry-over method for EDG. (Tr. 45-47) Given the differences between Empire and Spire, EDG does not believe it would be appropriate to switch balancing methods at this time.

b. Should the Commission establish a section within EDG's tariff or standalone rate schedule applicable only to special statutory provisions for School Transportation Program? If so, when should a revised tariff be submitted to the Commission?

MSBA spends little of its brief justifying its recommendation that the Commission order EDG to set out the unique provisions regarding the STP in a standalone rate schedule or a separate section of EDG's tariff. (MSBA Brief, p. 1, 14) EDG has fully addressed this issue in its initial brief, and will not re-iterate those arguments herein. For the reasons stated in EDG's initial brief, the Commission should not adopt MSBA's recommendation to establish a section within EDG's tariff or a stand-alone rate schedule applicable only to the special statutory provisions for the School Transportation Program.

WHEREFORE, EDG respectfully submits its Reply Brief for consideration by the Commission in this proceeding.

Respectfully submitted,

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ATTORNEYS FOR THE EMPIRE DISTRICT GAS COMPANY D/B/A LIBERTY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 2nd day of June, 2022, to all counsel of record.

/s/ James M. Fischer
James M. Fischer