

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

In the Matter of The Empire District)
Electric Company’s Request for Authority)
to File Tariffs Increasing Rates for Electric)
Service Provided to Customers in its)
Missouri Service Area)
Case No. ER-2019-0374

Public Counsel’s Positions on Jointly Listed Issues

COMES NOW the Office of the Public Counsel and for its positions on the jointly listed issues states:

While the Office of the Public Counsel has a number of issues with Empire, from a revenue requirement perspective two stand out starkly: (1) Empire’s insistence on treating Asbury as one of its electricity supply-side resources *after* Empire intentionally cutoff Asbury’s fuel supply so that it last produced electricity on December 12, 2019 (primarily Issue 13), and (2) Empire’s failure to show its affiliate transactions are prudent as required by law (Issue 18). From a customer service perspective one issue—Empire’s history of estimating its customers’ bills over more than the past two-years—also stands out (Issue 22).

Public Counsel requests a Commission order finding that it would be unreasonable and unlawful to require Empire’s customers to pay for the operation of the Asbury coal plant when Empire intentionally ceased generating electricity at Asbury 50 days before the ordered true-up cutoff date (January 31, 2020) in this case, and some 212 days before the July 11, 2020, “operation-of-law” date. This is worth anywhere between \$32.9 and \$43.5 million in Empire’s revenue requirement.¹

In *Office of the Public Counsel v Mo.PSC* 409 S.W.3d 371 (Mo. banc 2013), the Missouri Supreme stated that utilities have the burden of proof to show the costs which form the basis for their rates (§ 393.150.2, RSMo), and that when those costs are from transactions with their affiliates, then the utility must show those transactions are prudent, *i.e.*, there is no presumption of prudence when a utility transacts with its affiliate. This case is barren of such evidence. Absent showing they are prudent, Public Counsel requests the Commission order that these transactions must be considered imprudent. This is worth about \$100 million in Empire’s revenue requirement, and is a dispositive issue for Empire’s requested rate increase—there is insufficient evidence for Empire to increase general (base) rates.

Issues listed that Public Counsel believes are no longer contested among the parties are shown, but with strikethrough.

¹ Case No. ER-2019-0374 Final Reconciliation page 5, lines 161, 167, and 169, filed Aril 10, 2020. Low range sum of lines 161 and 167. High range sum of lines 161, 167, and 169.

PUBLIC COUNSEL'S POSITIONS

1. Rate of Return—Return on Equity, Capital Structure, and Cost of Debt

Public Counsel's witness on these issues is David Murray (including Public Counsel's failure to comply with Commission order adjustment to ROE (Issue 46); except that Public Counsel's witness Geoff Marke testifies to a service quality adjustment to ROE (Issue 22)).

a. Return on Common Equity – what return on common equity should be used for determining rate of return?

The Commission should use an allowed return on equity of 9.25% for determining Empire's rate of return. Public Counsel witness David Murray used cost of equity models and assumptions consistent with those investors use. His cost of equity estimates are corroborated by those investors use to value utility stocks. While Mr. Murray's cost-of-equity estimates are significantly below the allowed return on equity he recommends that the Commission use, Mr. Murray recognizes that investors do not expect commissions, including this Commission, to use allowed returns on equity at parity with utilities' costs of equity. However, investors do expect commissions to gradually reduce their allowed returns on equity closer to 9% because of the recent sustained period of low long-term interest rates. These low long-term rates have caused utility valuation levels, as measured by price-to-earnings (P/E) ratios, to reach all-time highs as recently as February of 2020. High P/E ratios for low-growth utility stocks translate into a higher investment cost for utility investors, but lower equity costs for utility stock issuers. Therefore, it is understandable that investors would expect commissions to lower allowed returns on equity, since the lower interest rates have caused unanticipated increases in shareholder wealth.

Mr. Murray recognizes this Commission may hesitate to set Empire's allowed return on equity significantly below 9.5%, since 9.5% has been the Commission's floor since 2015; but, as Mr. Murray demonstrates in his testimony, a reduction below 9.5% is overdue. Mr. Murray hesitated to continue to recommend a reduction to 9.25% when he filed surrebuttal testimony in this case, due to the instability in the markets related to COVID-19, but because of the recovery of credit markets and utility stocks since then and the appearance that recovery is not transient, Mr. Murray has returned to his position that for this Commission to use an allowed return on equity of 9.25% for Empire in this case is more than fair in the current economic and capital market environment. Therefore, Public Counsel recommends that the Commission allow a return of equity of 9.25% for Empire in this case for determining Empire's rate of return, before the Commission makes any downward adjustments to Empire's allowed return on equity for Empire's failures to comply with Commission-ordered conditions (Issue 46) and poor customer service (Issue 22), but only if the Commission also adopts Public Counsel's recommended capital structure for Empire of 46% common equity and 54% long-term debt. See Public Counsel's following position statement on capital structure.

b. Capital structure – what capital structure should be used for determining rate of return?

The Commission should set Empire's rate-of-return ("ROR") based on a capital structure of 46% common equity and 54% long-term debt, as Public Counsel witness David Murray

recommends. Mr. Murray based his recommended capital structure for Empire on Liberty Utility Company's ("LUCo") average capital structures as of the test year (March 31, 2019) and the updated test year (September 30, 2019). Mr. Murray dismissed Empire's per books capital structure because Empire no longer raises capital for itself. Algonquin Power & Utilities Corp. (APUC) decided to consolidate Empire's debt financing needs with those of the rest of its utility affiliates at the LUCo level. LUCo's capital structure is now the primary focus of debt investors providing capital for investing in APUC's North American regulated utility assets. In fact, APUC communicates to LUCo's debt investors that it considers a common equity ratio in the range of ~~**_____**~~ to be a reasonable target for its lower-risk regulated utility assets. Since Empire's assets account for about half of LUCo's lower-risk regulated utility assets, it is illogical for Empire to be requesting a 53% equity ratio in its capital structure in this case. There is also no reason for the Commission to determine what capital structure to use for Empire any differently than it did when determining what capital structure to use for Empire's affiliates, Liberty Utilities (Midstates Natural Gas) Corp ("Liberty Midstates") and Liberty Utilities (Missouri Water) LLC ("Liberty Water"). In Case Nos. GR-2014-0083 and WR-2018-0170, respectively, the Commission used LUCo's capital structure. In Case No. GR-2014-0083 the Commission used an equity ratio of 45.89%. In Case No. WR-2018-0170 the Commission used an equity ratio of 42.83%.

c. Cost of debt – what cost of debt should be used for determining rate of return?

The Commission should use an embedded cost of debt of 4.65% based on all the third-party debt LUCo guarantees and the regulated subsidiary debt it consolidates on its balance sheet. Using this debt cost appropriately matches the debt costs to the capital structure where they reside. Additionally, this debt cost is reasonable, considering Ameren Missouri's cost of debt was 4.6% in its recently completed rate case, Case No. ER-2019-0335.²

2. Rate Design, Other Tariff and Data Issues

Public Counsel's witness on the remaining issue is Geoff Marke.

- ~~a. Should the GP and TEB rate schedules be fully consolidated?~~
- ~~b. Should the CB and SH rate schedules be partially consolidated?~~
- ~~c. Should "grandfathered" multifamily customers taking service through a single meter be given the option of being served on the CB/SH rate schedule?~~
- ~~d. How should Empire's revenue requirement be allocated amongst Empire's customer rate classes (Class revenues responsibilities)?~~
- ~~e. How should the rates for each customer class be designed?~~
- ~~f. What should be the amount of the residential customer charge?~~
- ~~g. Should Empire continue its Low Income Pilot Program as is, or modify it?~~
- ~~h. Should Empire be ordered to consolidate the PFM rate schedules into the GP/TEB rate schedule in a future proceeding?~~
- ~~i. Should Empire be ordered to incorporate shoulder months into the Special Contract/Praxair rate structures in the next rate proceeding?~~

² Ex. 210NP, Public Counsel witness David Murray direct testimony, p. 14.

- ~~j. Should Empire be ordered to work to incorporate shoulder months into the rate structures of all non-lighting rate schedules?~~
- ~~k. Should Empire be ordered to retain each of the following: Primary costs by voltage; Secondary costs by voltage; Primary service drops; Line extension by rate schedule and voltage; Meter costs by voltage and rate schedule~~
- ~~l. Should Empire be ordered to use of AMIs for near 100% sample load research as soon as is practical, but no more than 12 months after 90% of AMI are installed~~
- ~~m. Should Empire be ordered to retain individual hourly data for future bill comparisons~~
- ~~n. Should Empire be ordered to retain coincident peak determinants for use in future rate proceedings~~
- ~~o. How should the amount collected from customers related to the SBEDR charge be billed, and should there be a separate line item on customers' bills?~~
- ~~p. By when should Empire move customers served on CB/SH that exceed the demand limits of those schedules to the appropriate rate schedule.~~
- ~~q. What, if any, revenue neutral interclass shifts are supported by the class cost of service study?~~
- r. How should any revenue requirement increase or decrease be allocated to each rate class?

Because of the flawed billing data caused by the high number of customer bills that Empire estimated as described under Issue 22 and in Public Counsel witness Geoff Marke's testimony, Public Counsel cannot recommend any revenue neutral shifts between classes in this case. However, both Staff's and Public Counsel's filed cases show that Empire's current rate revenues exceed its revenue requirement and, therefore, overall its rates should be reduced. Given the unprecedented turmoil in the economy caused by the COVID-19 national emergency, Public Counsel primarily recommends that if the Commission finds that Empire's rates should be reduced, it is only the residential customer class' rates that should be reduced, and that the rates of all of the other customer classes remain unchanged. As a secondary alternative to 100% of the reduction going to residential customer class rates, Public Counsel recommends for 75% of the reduction go to residential customer class rates and the remaining 25% go to commercial service/small heating service customer class rates.

Public Counsel witness Geoff Marke's recommendation primarily has two bases. First, the data used to inform the parties' Class Cost of Service ("CCOS") studies are flawed and inaccurate due to the excessive amount of estimated bill data upon which they are based. Second, this nation is in the midst of a national emergency due to the COVID-19 pandemic that has triggered an economic downturn nationally and around the world, likely of historic proportions, and which is most directly impacting Empire's residential customers in terms of their utility bills, because physical distancing requirements force residential customers to self-isolate at their homes. Residential customers cannot "shut down." The nature of this pandemic requires physical distancing and quarantining, which necessitates continued utility service to maintain social order and to flatten the curve of patients who require intensive medical care. Empire is one of many utilities who have responded by suspending utility service disconnections for non-payment. Quite simply, relative to Empire's other customer classes, Empire's residential customers are in the worst position to recover from the economic impacts of the COVID-19 pandemic and the recovery of

the commercial and industrial customers depend first on the health and well-being of their employees and customers.

Public Counsel's recommendation is based primarily upon an attempt to allocate costs in a way Public Counsel believes is best designed to help the public during this time of crisis. Public Counsel would not have put forth this proposal if it believed such allocation would negatively impact Empire's commercial customers. In fact, Public Counsel recommends an outcome where commercial customers would see no rate increase, whereas the non-unanimous stipulation agreed to by Empire's commercial customers contemplates a revenue increase.

- ~~s. How should any residential revenue requirement increase or decrease be apportioned to the energy (kWh) rates?~~
- ~~t. What, if any, changes to the CB, SH, GP and TEB customer charge are supported by the class cost of service study?~~
- ~~u. What, if any, changes to the CB, SH, GP and TEB customer charge should be made in designing rates resulting from this rate case?~~
- ~~v. How should any CB and SH revenue requirement increase or decrease be apportioned to the energy (kWh) rates?~~
- ~~w. How should any GP and TEB revenue requirement increase or decrease be apportioned to the demand (kW) and energy (kWh) rates?~~
- ~~x. How should any LP revenue requirement increase or decrease be apportioned to the demand (kW) and energy (kWh) rates?~~
- ~~y. What, if any, changes to the current SC-P energy (kWh) rates should be made to align with Market Prices?~~
- ~~z. How should production related costs be allocated to each rate class?~~
- ~~aa. How should plant accounts 364, 366 and 368 be classified?~~
- ~~bb. How should primary and secondary distribution plant facility costs be allocated to each rate class?~~
- ~~cc. How should General plant facility costs be allocated to each rate class?~~

3. Jurisdictional Allocation Factors

To the extent this is an issue related to affiliate transactions, Public Counsel's witness is Robert Schallenberg

- a. What is the appropriate jurisdictional allocation factors to be used in the cost of service?*

Any allocation factors for affiliate transactions should be based on the costs and values of the goods or services provided.

4. WNR and SRLE Adjustment Mechanisms

Public Counsel's witnesses on these issues are Lena Mantle and Geoff Marke.

- a. *Should the Commission approve, reject, or approve with modifications Empire's proposed Weather Normalization Rider?*

The Commission should reject it. Empire's proposed weather normalization rider should be dismissed out-of-hand and not even be considered before Empire demonstrates with historical empirical data that it can provide consistently accurate bills to its customers. The number of customer bills that Empire estimated increased 654% in 2018 from 2017 levels, and 293% in 2019. The Commission should have no faith in Empire's proposed weather normalization rider when Empire does not have even basic billing and metering data for its billing system as a daily course of business. Empire would be adding a layer of complexity to bills, here weather fluctuations, when Empire, as a normal course of its business is estimating so many of its customers' bills. Further, Empire has not considered many details and their ramifications when creating its proposal. Among those is how it will explain such a complex rider to its customers and how it would present it on their bills.

In addition to the foregoing, the General Assembly has not mandated that the Commission must permit utilities such as Empire to use a weather normalization rider. It is not a utility entitlement, but an option the Commission may authorize, circumstances warranting. Empire's quarterly FAC surveillance reports show that Empire has been able to earn a fair return without a weather normalization rider.

Instead of entertaining Empire's request for a weather normalization rider in this case, the Commission should begin a working file for obtaining input for a rule for applications for and designs of such a mechanism for electric and gas utilities, a rulemaking provided for in section 386.266.3 RSMo. Such a rule would provide consistency in weather normalization mechanisms and reporting requirements that would help Staff and other parties review the implementation and financial true-ups of such mechanisms.

- b. *Is it lawful for the Commission authorize Empire to implement a Sales Reconciliation to Levelized Expectations ("SRLE") mechanism, such as those Staff and Empire are proposing in this case?*

No, it is not lawful for the Commission to authorize a SRLE, either as proposed by Staff or Empire. The SRLE is proposed as a rate adjustment mechanism presumably to account for the impacts on utility revenue caused by weather and conservation under Subsection 3 of Section 386.266, RSMo. However, Subsection 13 of the same statute plainly states that the Commission "shall have previously promulgated rules to implement the application process for any rate adjustment mechanism under subsections 1 to 3 of this section prior to the commission issuing an order for any such rate adjustment."³ Following statutory language, a mechanism under Subsection 3 of Section 386.266, including the SRLE, cannot be approved before the Commission promulgates rules for the application thereof. This Commission has not promulgated any such rules, and so any SRLE proposal should be rejected. This Commission should begin its rulemaking

³ § 393.266.13, RSMo.

process though for the implementation of any such mechanism to provide clear guidance to all parties.⁴

Approving a SRLE as proposed by Staff is additionally unlawful, because, as conceived, Staff's SRLE does not solely compensate the utility for revenue fluctuations due to weather and conservation. Section 386.266.3, RSMo, limits the scope of such a rate adjustment mechanism to addressing revenue impacts from weather, conservation, or both. Staff's proposal goes beyond that to reconcile any discrepancy in utility revenues on an annual basis.⁵ The SRLE thereby attributes any revenue fluctuation to weather or conservation, regardless of the cause. Customers simply using less energy, or customers moving in and out of Empire's service territory, are thus treated as conservation and weather, and Empire is rewarded. Therefore, the SRLE does not follow statutory guidance, and should be rejected as unlawful.

c. Should the Commission adopt Staff's Sales Reconciliation to Levelized Expectations Proposal ("SRLE") or approve the SRLE with modifications as suggested by the Company?

No. Staff's proposed methodology is not an appropriate substitute for Empire's proposed weather normalization rider, nor should the Commission feel that it has to provide a substitute for Empire's proposal since a weather normalization rider is a privilege, not a right. Staff witness Robin Kliethermes testified that the billing data it is relying on in this case is of poor quality and the Commission should be cautious in using it. When the unprecedented economic conditions brought forward by the national emergency of the COVID-19 pandemic are taken into account, the economy will prove to be a greater confounding variable than weather at least until Empire's next rate case. The SLRE is designed so that Empire is held harmless from reductions in usage, even if those reductions are due to customer efforts to be able to afford a minimal amount of service. Public Counsel urges the Commission not to experiment with a shareholder risk reduction mechanism when it lacks credible empirical data for designing that mechanism, and when economic forecasts predict pronounced economic hardships for Empire's customers due to the COVID-19 pandemic.

5. FAC

Public Counsel's witness on these issues is Lena Mantle.

a. What is the appropriate incentive mechanism in Empire's FAC for sharing between Empire and its retail customers the difference between its actual and base net fuel costs?

The appropriate mechanism for sharing between Empire and its customers for costs for which Empire recovers through its FAC is a sharing of 85% to Empire and 15% to Empire's customers. Changing the sharing mechanism in Empire's FAC from 95/5% to 85/15% would better incentivize Empire's efficiency with its fuel operations.⁶ Empire's hedging losses, and subsequent change in hedging policy only

⁴ Ex. 204NP, *Rebuttal Testimony of Lena M. Mantle*, p. 7.

⁵ Ex. 205NP, *Surrebuttal Testimony of Lena M. Mantle*, p 24.

⁶ Ex. 203NP, *Direct Testimony of Lena M. Mantle*, p. 8.

after a contested prudence review of its FAC charges, particularly support the need for a stronger sharing incentive mechanism.⁷

b. ~~What FAC-related reporting requirements should the Commission impose?~~

c. What is the appropriate base factor?

The Commission should require its Staff to determine the correct base factor with fuel costs and revenues for Asbury generation excluded from its calculation. Public Counsel has always worked in rate cases with an objective of the Commission setting the most accurate base factor possible. This is why Public Counsel is requesting that the Commission recognize the impact on the fuel base of Empire ceasing to run Asbury before the Commission sets rates in this case. Empire last ran Asbury on December 12, 2019.⁸ Even the March 1, 2020, retirement Empire claims for the Asbury plant is well before the July 11, 2020, operation of law date in this case. An Empire FAC base factor that includes Empire's annual Asbury generation costs and revenues based on a functional, dispatchable Asbury generating unit in the fuel run used to calculate it cannot be correct, and is wrong from the outset.

d. What costs and revenues should flow through Empire's FAC, including, but not necessarily limited to, the following?

The costs and revenues that flow through Empire's FAC should remain the same as those which currently flow through it, with the exception of the addition of transmission revenues and the removal of short-term capacity costs as described in Public Counsel's positions to the more specific issues below.

i. What is the appropriate percentage of transmission costs for the FAC?

The appropriate percentages of transmission costs and revenues to flow through Empire's FAC should be modified to match the supply-side mix circumstances that will impact those transmission costs and revenues when rates from this case become effective; *i.e.*, 50% percent of MISO transmission costs and a percentage of SPP costs based on a Staff fuel run that does not include Empire's Asbury plant as a supply-side resource.⁹ These percentages would be consistent with the Commission's determination in Empire's last general electric rate case, Case No. ER-2016-0023, and reflect the policy that Empire's customers pay only for the transmission costs Empire necessarily incurs to meet its Missouri retail customers' needs.

The transmission revenues that should flow through Empire's FAC are only those transmission revenues that are consistent with (complement) the transmission costs that flow through Empire's FAC, and should flow through in the same percentages as the costs.¹⁰ Empire receives revenues under the same SPP schedules for which it is assessed charges, and some of those charges flow through its FAC. Empire also receives revenues from MISO for reactive power.

⁷ Ex. 205NP, *Surrebuttal Testimony of Lena M. Mantle*, pp. 3-4.

⁸ Ex. 219C, John A. Robinett, *Surrebuttal/True-up Direct testimony*, Sch. JAR-S-2C.

⁹ Ex. 203NP, *Direct Testimony of Lena M. Mantle*, ER-2019-0374, pp. 14-16.

¹⁰ Ex. 203NP, *Direct Testimony of Lena M. Mantle*, ER-2019-0374, p. 15-16

For consistency, the costs for that reactive power service should be offset by the revenues Empire receives for that reactive power service.

- ii. *What, if any, portion of the MJMEUC contract should be included or excluded from the FAC? ~~Should the Company provide any additional reporting requirements within its FAC monthly reporting in regards to MJMEUC?~~*

When MJMEUC's purchased power contract with Empire goes into effect on June 1, 2020, it should be treated under Empire's FAC as any other contract for the sale of power would.¹¹ Accordingly, energy sales revenues should flow through Empire's FAC, and Empire's fuel and O&M reimbursements from MJMEUC should apply as offsets to the fuel costs that flow through Empire's FAC. Empire's revenues from MJMEUC for contracted capacity should not flow through its FAC because Empire's contract with MJMEUC is for a period greater than one year, and, per Empire's FAC tariff sheets, those revenues are excluded from flowing through Empire's FAC.

Empire's FAC tariff sheets state that Empire's revenue from full and partial requirement sales to municipalities shall be excluded from its FAC.¹² However, MJMEUC's purchased power contract with Empire is not the same as Empire's current full requirements contracts with municipalities, including Monett and Mount Vernon, which take service from Empire under its FERC Open Access Transmission Tariff ("OATT"). ***_____

_____ *** Therefore, Empire's revenues from MJMEUC's purchased power contract with Empire cannot be excluded from flowing through Empire's FAC.

- iii. *~~Should any wind project costs or revenues flow through the FAC before the wind projects revenue requirements are included in base rates?~~*

- iv. *Should any short-term capacity costs flow through the FAC from the effective date of this rate case?*

No. Empire's short-term capacity costs should be excluded from flowing through Empire's FAC.¹³ Staff witness J Luebbert testifies that Staff is concerned Empire may need to enter into contracts for short-term capacity due to its retirement of Asbury. Because Empire chose to retire Asbury, and when to retire it, to eliminate the possibility that Empire's customers may pay for additional capacity due to Empire's decision to retire Asbury early, any short-term capacity payments should not be allowed to flow through Empire's FAC for recovery from retail customers.

- e. *~~When should Empire be required to provide its quarterly FAC surveillance reports?~~*

6. Credit Card Fees

¹¹ See Ex. 203NP, *Direct Testimony of Lena M. Mantle*, pp. 16-18.

¹² Ex. 205NP, *Surrebuttal Testimony of Lena M. Mantle*, pp. 10-17.

¹³ Ex.205NP, *Surrebuttal Testimony of Lena M. Mantle*, p. 20.

Public Counsel’s witness on this issue is Amanda Conner.

a. Should Empire’s credit card fees be included in Empire’s revenue requirement?

No. Many credit card users are eligible for cashback, rewards and other financial benefits from or through their credit card issuer. These benefits reduce and may more than completely offset the convenience fees these customers are incurring to pay Empire using their credit cards. Empire’s customers have available to them the option of making direct payments from their financial institutions without incurring any fee—by using automated clearing house (“ACH”) payments. It is unduly discriminatory to require these customers, those who cannot get credit cards, and those who do not wish or have no way to pay their bills online to pay in their rates for customer credit card convenience fees of a subset of customers, convenience fees that the credit card companies otherwise would require merchants such as Empire to pay for accepting payment by credit card.

Public Counsel is recommending that Empire should not be allowed to add the credit card convenience fee to their cost of service. The socialization of these fees are not only unjust for those unable to pay in this method, but it is charging customers twice for their internet payment option, and this is not fair to those who cannot or will not be using this method to pay their Empire electric bills.

b. If so, what level of fees should be included?

N/A.

7. Rate case Expense

Public Counsel’s witness on these issues is Amanda Conner.

a. How much of Empire’s rate case expenses should be included in Empire’s revenue requirement?

Empire’s expense for using a chartered plane for four individuals to travel between the cities of Joplin and Jefferson in Missouri should not be included when the cost of renting a car, hotel rooms, and three meals a day for them is less. After the Commission determines the amount of allowable rate case expenses, then it should reduce that amount by the shared mechanism chosen by the Commission for determining the amount of Empire’s rate case expense to include in Empire’s revenue requirement.

b. Should Empire’s prudent rate case expenses be normalized or amortized, and over what period of time?

Since Empire files rate cases every three years, and no more than four to continue its Fuel Adjustment Clause, its rate case expenses should be normalized over three years since this is the normalized time period over which Empire comes in for rate cases.

c. Should Empire’s prudent rate case expenses be shared between Empire’s shareholder and Empire’s retail customers? If so, how?

Recognizing that both the utilities and their customers benefit by matching prospective rates with what it takes for the utility to provide prospective service—investment, costs, etc.—the purpose of general rate cases, the Commission ordered in Case No. ER-2014-0370 that Kansas City Power & Light Company’s rate case expenses be shared between it and its customers based on a ratio of the amount of increase requested and the amount granted by the Commission. The Commission’s same rationale applies in this case. As Public Counsel and the Commission’s Staff both recommend, the appropriate sharing in this case should be calculated in this same manner using Staff’s rate case expense amount.

8. Management expense

Public Counsel’s witness on this issue is Amanda Conner.

- a. Should any of Empire’s management expenses not be included in Empire’s revenue requirement?*

Yes. Empire’s management expense includes meal costs for what Empire claims without support are business meetings in the amount of \$686,087. The disallowance of all other charges Public Counsel has deemed unreasonable or unjustifiable due to lack of justification of how these charges benefit Empire’s retail customers is \$3,021,797. The total test year disallowance of \$3,707,884 recorded in account 923 for the test year. Public Counsel also has a disallowance of \$3,006,363 in account 923 for the true-up. Since Staff’s account 923 number is based only on the test year, the amount that should be removed from account 923 is \$3,707,884.

9. Allowance for Funds Used During Construction

Public Counsel’s witness on this issue is David Murray.

- a. What metric should be used for Empire’s carrying cost rate for funds it uses during construction that are capitalized?*

The Commission should require Empire to use a short-term debt rate to determine 100% of the allowance for funds used during construction (“AFUDC”) for its construction work in progress (“CWIP”) subsequent to the effective date of its Order. Empire no longer manages its dividend payments, capital structure, liquidity and long-term debt as if it were a stand-alone entity. If Empire were still a stand-alone publically-traded entity with general public shareholders, it would pay a quarterly dividend to its shareholders, which would require Empire to issued short-term debt to fund its CWIP. However, Empire did not pay a dividend to LUCo at all in two quarters of 2019, thereby reducing the amount of short-term debt Empire would have needed to issue as a stand-alone entity to fund its capital expenditures. This causes a higher AFUDC rate due to the fact that only higher-cost long-term debt and equity capital is used to determine the AFUDC carrying charge. To ensure Empire’s ratepayers are not charged excessive AFUDC because it is no longer financially managed as a standalone entity, the Commission should order Empire’s AFUDC be determined based only on Empire’s short-term debt costs, including those from its refinancing of its \$90 million of first mortgage bonds in June of 2018.

- b. Should Empire’s rate base be reduced to reflect the source and cost of the financial transaction behind Empire’s \$90 million promissory note with LUCo?*

Yes. It is Public Counsel’s position that Empire’s June 1, 2018, refinancing of its mortgage bonds was not a normal business decision; instead, by refinancing secured first mortgage bonds with proceeds of

an unsecured 15-year promissory note with LUCo where LUCo obtained the funds from its line-of-credit facility provided LUCo a preference—a financial advantage—and was contrary to the affiliated services agreement cost allocation manual for transactions between Empire and LUCo.¹⁴ That agreement states that LUCo is to charge Empire based on LUCo’s actual costs to provide its goods and services to Empire. LUCo did not incur the \$450,000 note origination fee it charged Empire, and LUCo’s actual interest costs were, and are, much less than what LUCo is charging Empire for interest. Because the true cost of the first mortgage bond refinancing is the short-term interest rate LUCo incurred, that short-term debt impacts Empire’s AFUDC charges included in Empire’s rate base. In short, Empire’s AFUDC charges included in Empire’s rate base would be overstated if this short-term debt is not considered properly. It is Public Counsel’s position that these excess AFUDC charges that both Empire and Staff have included in their determinations of Empire’s rate base must be removed.

10. Cash Working Capital

Public Counsel’s witness on this issue is John Riley.

- a. *What is the appropriate expense lag days for measuring Empire’s income tax lag for purposes of cash working capital?*

The Commission should assign an expense lag of 365 days as the appropriate metric for measuring Empire’s income tax lag for purposes of cash working capital (“CWC”) due to the Company’s lack of income tax liability. This will reduce Empire’s CWC by \$14,002,453. CWC represents the net amount of funds required to finance the day-to-day operations of a regulated utility. In this case, the adjustment deals specifically with the amount of funds necessary to cover the difference in time between when Empire pays income taxes to a government agency and when it collects the money for those payments. However, Empire has not actually paid income tax to a government agency in at least four years. Acknowledging that Empire receives the income tax expense from its customers through its rates, but never uses those funds to pay government agencies demonstrates an indefinite expense lag. If an expense lag of 365 days is applied to Staff’s current income tax calculation of \$15,829,209, the reduction in CWC is \$14,002,453. This is Public Counsel’s position.

- ~~b. *What is the appropriate expense lag days for cash vouchers?*~~
- ~~c. *Should bad debt expense be a component of cash working capital? If so, what is the appropriate lag days?*~~
- ~~d. *What is the appropriate expense lag days for employee vacation?*~~

11. Accumulated Deferred Income Tax

Public Counsel’s witness on this issue is John Riley.

- a. *Should Empire’s booked accumulated federal income tax include a reduction for net operating loss?*

No. Empire’s proposed accumulated deferred income tax (“ADIT”) reduction of \$2,621,928 by an accounting entry labeled, Net Operating Loss (“NOL”), should be disregarded. When Empire was included as part of the consolidated group in Liberty’s consolidated tax returns, it no longer had the use of

¹⁴ Ex.220NP, Public Counsel witness *Robert E. Schallenberg*, Direct Testimony, Sch. 16 (LUCo ASA); Ex. 221 (APUC CAM).

specific NOL tax deductions. NOLs are tax return items, and Empire cannot randomly apply them to its rate base.

~~b. Should FAS 123 deferred tax asset for stock-based compensation be included in ADIT balances for rate base?~~

12. Tax Cut and Jobs Act of 2017 federal income tax rate reduction from 35% to 21% impact for the period January 1 to August 30, 2018

Public Counsel's witness on this issue is John Riley.

a. *How should the Commission treat the 2017 TCJA regulatory liability the Commission established in Case No. ER-2018-0366 when setting rates for Empire in this case?*

The Commission should recognize that Empire has had the use of interest free money as a result of the Tax Cuts and Jobs Act stub period and, therefore, reduce Empire's rate base, just as the Commission reduces rate base for accumulated deferred taxes. Section 393.137.3, RSMo, requires the stub period amount to be included in this general rate case, and amortized over a period the Commission establishes. The stub period tax overearning of \$11,728,453 should be returned to Empire's Missouri retail customers as quickly as possible and, so long as Empire continues to have the free use of the funds, then the funds balance should be applied as an offset to Empire's rate base.

13. Asbury

Public Counsel's witnesses on these issues are John Robinett and Geoff Marke.

a. *Is it lawful to require Empire's customers to pay for Asbury costs through new rates?*

No. In 1898, the U.S. Supreme Court said in *Smyth v. Ames*, 169 U.S. 466, 546-47 (1898),¹⁵ "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public," and "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." This is the core of public utility ratemaking commonly expressed by the phrase "used and useful." Phrased differently the concept is that a utility's customers should not pay for the utility's investment in plant or profit on that investment unless the investment is useful for and actually being used to provide utility service to them—here electrical service used by the utility's customers.¹⁶ As Public Counsel explained in its *Reply to Empire's and Staff's Responses to Public Counsel's Motion for the Commission to Reconsider its Order Denying Public Counsel's Motion to Modify Test Year* filed in this case on February 11, 2020:

¹⁵ <https://advance.lexis.com/document/searchwithindocument/?pdmfid=1000516&crd=ed6c19db-704f-4be4-bb46-988b45207d8f&pdsearchwithinterm=used&comp=73h9k&prid=134f54cf-6bf6-4ce4-b38e-a1a253684be4>.

¹⁶ *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 889-90 (Mo. App. 1981) (Error to disallow cost recovery for investment that is being used to provide service, and is also "fully operational and used for service."); *State ex rel. Missouri Power & Light Co. v. Public Service Com.*, 669 S.W.2d 941, 90 (Mo. App. 1984).

Unless Empire's Asbury costs and revenues are excluded when determining Empire's revenue requirement in this case, then rates based on that revenue requirement will be designed to recover ongoing costs, and revenues, that Empire ceased incurring, and realizing, months before those rates take effect. To so design rates would violate the fundamental goal of ratemaking—for Empire's prospective retail customer revenues to match Empire's net costs, return of investment, and return on investment ***required for it to provide the electric service*** for which those retail customers are paying.

Quite simply, when an electric generating plant is no longer used to provide electric service to a utility's customers, it is unlawful for the utility to continue to collect through its customers' rates a return of or on that utility's investment, or for the costs of operating that plant.¹⁷ Here, the rates Empire's retail customers pay in the future should not be designed for Empire to recover nonexistent costs and revenues for a generating plant that Empire is no longer operating and does not intend to operate.

The date by which the Commission is required by law to act on Empire's tariff sheets by which it initiated this general rate case is July 11, 2020. Empire has represented to the Commission that it retired Asbury on March 1, 2020.¹⁸ Empire notified the Commission by letter dated October 22, 2019, that it "ha[d] reached a reduction of coal inventory below a thirty (30)-day full capacity burn supply (which does not equate to calendar days)."¹⁹ Empire last received delivered coal at Asbury on November 14, 2019, when it received 202.5 tons.²⁰ Empire shut Asbury down on December 12, 2019,²¹ after consuming all of the usable coal inventory available at the Asbury site. The undisputed facts show that Empire functionally retired Asbury on December 12, 2019, well within the ordered true-up period with its cut-off date of January 31, 2020, and Asbury had only remained in service on paper until Empire retired it on its books on March 2, 2020.²² Public Counsel urges the Commission to remove these costs from Empire's rate base because it would be unlawful to disregard the relevant factor that Asbury will not be running when new rates from this case take effect on or about July 11, 2020, particularly when the Commission knows that factor months before that date.²³

The Commission should be aware of Empire's lack of transparency in this rate case, not only with the extent and duration of estimating its customers' bills, but also the dates of its actions to shutdown Asbury, *i.e.*, the dates when Empire's coal inventory fell below a thirty (30)-day full capacity burn supply, the date it last received delivered coal at Asbury and the date Asbury last generated electricity. Public Counsel first learned that Empire last generated electricity at Asbury through Empire's FAC and Rule 3.190 data submissions. It then garnered more information this month through Empire's responses to data requests. Perhaps most telling about how Empire is

¹⁷ *State ex rel. City of St. Louis v. Pub. Serv. Comm'n*, 47 S.W.2d 102, 111 (Mo. banc 1931); *State ex rel. Mo. Off. of Pub. Counsel v. Pub. Serv. Comm'n*, 293 S.W.3d 63, 76 (Mo. App. S.D. 2009); *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App. W.D. 1988).

¹⁸ Ex. , *Rebuttal Testimony of Aaron J. Doll*, p. 2 (Mar. 3, 2020).

¹⁹ Ex. 260, 30-day fuel supply notice BEGR-2020-0183 10-22-19.

²⁰ Ex. 267, Empire response to mo er-2019-0374 mpdc dr 0337.

²¹ Ex. 268C, *Surrebuttal Testimony of John A. Robinett*, p. 2.

²² Ex. , *Rebuttal Testimony of Aaron J. Doll*, p. 2 (Mar. 3, 2020).

²³ *State ex rel. Util. Consumers Council, Inc. v. Pub. Serv. Com.*, 585 S.W.2d 41, 49 (Mo. 1979) (citing to *State ex rel. Missouri Water Co. v. Public Service Comm'n*, 308 S.W.2d 704, 718-19, 720 (Mo. 1957); § 393.270.4, RSMo.

spinning what it did regarding Asbury is revealed in an Asbury shift supervisor log entry of December 11, 2019 (personnel identifying information redacted):

0700 [initials]

-[initials] trailer finished around 0730

-estimated shut down at 0800 Thurs.

-sent messages or spoke to everybody on the list for last shutdown

-NOTICE: Don't say last shutdown, we are on outage until retirement date (Emphasis added).

-dropped ash inventory to 6500

-raised bed [initials] to help scrub, 2.5 on top and 2.25 at lower loads

-out of AGC at 1206 for fuel derate to 120MW gross, #1 belt trouble

-back in AGC at 1437

-crossing out of service at 0836, back in service at 1530

-when we come off, run fans and puff bags for 12 hours while reducing the ash inventory to 4000ish

-been adjusting SO2 with lime feed and leaving the scrubber outlet temp at +50 for now

-[name] here in the shop

It is evident from APUC's project "Red Balloon"²⁴ through Empire's Customers' Savings Plan Case, EO-2018-0092,²⁵ its 2019 Chapter 22 resource planning filing,²⁶ and its October 17, 2018, notice of change in preferred plan²⁷ that APUC always planned for Empire to retire Asbury prematurely, and was targeting by the end of 2019 to do so. It succeeded.

b. Is it reasonable to require Empire's customers to pay for Asbury costs through new rates?

No. For the same reasons it is not lawful for customers to pay for non-existing plant costs, it is not reasonable to require Empire's customers to pay for them. There is no logical or equitable reason why Empire should continue to charge its customers as if Asbury is continuing to operate, when Empire ceased operating Asbury on December 12, 2019.²⁸ Reasonable rates compensate a public utility for its investment in, and its operation and maintenance expense associated with,

²⁴ Ex 206HC, Direct Testimony of Public Counsel witness Geoff Marke, Sch. GM-6 HC.

²⁵ Ex. 272, EO-2018-0092- report and order- final.

²⁶ Ex. 273C, vol 1 empire exec summary_irp_c 2019.

²⁷ Ex. 276, EO-2019-0106 Empire notice change in preferred plan.

²⁸ Ex. 219C, *Surrebuttal/True-up Direct Testimony of John A. Robinett*, p. 2.

Public Counsel's witness on this issue is John Robinett to the extent it involves Asbury expenses.

- a. *What is the appropriate level of operation and maintenance expense to be included in the cost of service?*
- b. ~~*Should inflation factors be used to calculate operation and maintenance expense?*~~
- c. ~~*What is the appropriate normalized average of years to be used for the Riverton, State Line Combined Cycle Unit, the Common Unit and State Line 1 Unit?*~~

No amount should be included for Asbury operation and maintenance expense because Asbury is not operating or being maintained.

~~17. Pension and OPEB (FAS 87 and FAS 106)~~

18. Affiliate Transactions

Public Counsel's witness on this issue is Robert Schallenberg.

- a. *Are Empire's transactions with its affiliates imprudent?*

Empire's June 1, 2018, refinancing of its \$90 million first mortgage bonds by executing a 15-year \$90 million unsecured promissory note with its affiliate LUCo is imprudent. Moreover, there is insufficient evidence to opine that any of Empire's separate annual \$100 million of transactions with its affiliates³³ are prudent. Finding that they are prudent is a prerequisite to the Commission including them in Empire's cost of service it uses for setting Empire's rates. *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371 (Mo. 2013), and § 393.150.2, RSMo.

Empire's failure to comply with the Commission's electric utility affiliate transactions rule 20 CSR 4240-20.015 as explained in part in subpart B below is also imprudent. By complying with that rule Empire not only should have established that the costs of having affiliates provide the goods and services was prudent, it would also have created the documentation from which the prudence of Empire entering into transactions with its affiliates could be evaluated, i.e., had Empire complied with that rule it would have established that the costs of having affiliates provide the goods and services was prudent, and there would be sufficient information to reach a conclusion as to the prudence of the costs Empire incurred in its annual \$100 million of transactions with its affiliates. The Commission promulgated its documentation rules for the same reason Public Counsel seeks to enforce them now – they provide the basis for determining prudence, and when complied with, the rules work to prevent this contentious issue from coming before the Commission for decision.

Empire's \$90 million first mortgage bonds refinancing is imprudent because Empire had better refinancing terms available to it—either by issuing new first mortgage bonds or by issuing commercial paper. First mortgage bonds and commercial paper have lower interest rates than unsecured promissory notes and lines-of-credit, respectively, because they are secured financings.

³⁴ Ex. 242, Empire response to AO-2018-0179 OPC DR 1028, and Ex. 243, Empire response to AO-2018-0179 OPC DR 1091.

The Algonquin enterprise’s Treasury Department—comprised of eight individuals (one employed by Liberty Utilities Corp. and the other seven employed by Liberty Utilities (Canada) Corp.)³⁴—developed the refinancing, which the boards of directors of Empire and LUCo authorized be executed.³⁵

Mr. Timpe is principally responsible for the Treasury functions for Empire and its Midwest affiliates.³⁶ This common control over the terms of transactions between utilities and their affiliates goes to the heart of why the utility must show those transactions are prudent before the costs of those transactions can be included in the utility’s cost of service used for setting rates.

Public Counsel does not concede that it would have been prudent for Empire to do the following, but in response to Empire’s argument that LUCo used its line-of-credit to finance its 15-year note with Empire because it gets better terms for its long-term bond issuances when it aggregates short-term debt into a larger issuance, Public Counsel points out the following: Empire would have been better off retaining the \$90 million debt by paying off its first mortgage bonds with proceeds from commercial paper it issued, and then, when LUCo had available sufficient short-term debt to aggregate to obtain better long-term bond terms, Empire could have refinanced its short-term commercial paper debt by executing long-term debt with LUCo on the same terms that LUCo got for its long-term bonds. Instead, LUCo drew \$90 million on its line-of-credit, the rates of which have ranged from 3.25% to 3.8125%, for the \$90 million it loaned to Empire, charged Empire an origination fee of \$450,000, and executed a 15-yr unsecured promissory note with Empire at a 4.53% interest rate and a “make whole” provision, i.e., all interest is due, regardless of when Empire pays off the note.

b. Do Empire’s transactions with its affiliates comply with Commission Rule 20 CSR 4240-20.015 (Affiliate Transactions)?

No. The Commission’s affiliate transactions rule requires that, for rate purposes, the cost of an electric utility’s transactions to acquire goods or services is the lesser of the utility’s fully distributed cost to provide the good or service itself and the fair market value of the good or service.³⁷ It also requires that “[w]hen a regulated electrical corporation purchases information, assets, goods or services from an affiliated entity, the regulated electrical corporation shall either obtain competitive bids for such information, assets, goods or services or demonstrate why competitive bids were neither necessary nor appropriate.”³⁸ Empire did not obtain competitive bids when it entered into its \$90 million 15-year promissory note with LUCo. Nor has Empire obtained competitive bids for any of its other affiliate transactions, including those for the services Liberty Utilities Service Corp. provides.

Empire attempts to support the terms of its \$90 million first mortgage bond refinancing by relying on comparisons to financings its affiliates engaged as proxies for the terms of the \$90

³⁴ Ex. 242, Empire response to AO-2018-0179 OPC DR 1028, and Ex. 243, Empire response to AO-2018-0179 OPC DR 1091.

³⁵ Ex. 244; Empire response to AO-2018-0179 OPC DR 1119, and Ex. 245, Empire response to AO-2018-0179 OPC DR 1121.

³⁶ Ex. 246; Empire response to OPC DR 1085.

³⁷ 20 CSR 4240 -20.015(2)(A)1.

³⁸ 20 CSR 4240 -20.015(3)(A).

million 15-year promissory note it executed with LUCo.³⁹ Empire has not demonstrated why it obtaining competitive bids for this refinancing was neither necessary nor appropriate, and Empire was capable of refinancing these bonds itself, i.e., there was no reason it could not have competitively bid the refinancing. The Commission's Staff concurs that Empire violated the Commission's affiliate transactions rule in this refinancing.⁴⁰ In her rebuttal testimony Staff witness Kimberly K. Bolin testifies, "This is a violation because LUCo is charging its affiliate, Empire, a higher interest rate for money it obtained at a lower rate."⁴¹ In her surrebuttal testimony she recommends that the Commission treat Empire's interest cost of its \$90 million 15-year promissory note with LUCo to be 2.15% for purposes of matching Empire's interest cost for the \$90 million to match LUCo's. While treating the interest on Empire's note with LUCo at LUCo's cost of funds to lend the \$90 million would eliminate LUCo's interest profiting at the cost of Empire's retail customers, it probably does not bring Empire's cost of the \$90 million refinancing down to fair market value and the cost at which Empire could have obtained the funds itself— Empire, in an arms'-length transaction, could have issued commercial paper at a lower interest cost and, likely, a lower origination fee.

While the Commission's affiliate transactions rule allows the use of Commission-approved cost allocation manuals that may include benchmarking to satisfy the rule's market value requirements,⁴² the Commission has not approved the cost allocation manual Empire is using,⁴³ nor should it. That manual would replace the requirement of using the lesser of the utility's fully distributed cost or fair market value with using the lesser of "a fully distributed cost ("FDC") basis to reflect all costs incurred in providing goods, assets, information, and services, or the current fair market price ("FMP")."⁴⁴ It would also allow Empire to assign costs from its affiliates, primarily Liberty Utility Services Company, based on the Massachusetts' Formula,⁴⁵ which it describes as follows: "The Massachusetts Formula approved for this allocation is an arithmetic average of total company revenues (electric, water, and gas), total company payroll (Electric and Gas) excluding Empire Electric payroll related to the provision of activities that benefit common entities, and net plant in service (electric, water, and gas) excluding Empire Electric plant in service that benefit common entities."⁴⁶ As Public Counsel witness Robert Schallenberg observes, these factors are wholly unrelated to either the nature or quantities of the goods and services Empire's affiliates are providing it.⁴⁷

How Empire was charged for its \$90 million first mortgage bond refinancing is persuasive evidence that Empire is not complying with the cost allocation manual it says it is following. Had it complied with that manual, Empire's cost for the \$90 million 15-year note would have been based on LUCo's fully distributed cost. That primarily was LUCo's cost to draw \$90 million on its line of credit. LUCo did not incur \$450,000 to originate the 15-year promissory note with

³⁹ Ex. Empire witness Timpe rebuttal testimony, pp. 7-8.

⁴⁰ Ex. , Staff witness Kimberly K. Bolin, rebuttal testimony, pp. 11-13.

⁴¹ *Id.* at p. 12.

⁴² 20 CSR 4240 -20.015(3)(D).

⁴³ Ex. 220NP, OPC witness Robert Schallenberg, direct testimony p. 7; Ex. , Empire witness Jill Schwartz rebuttal testimony, pp. 3-4.

⁴⁴ Ex. 221, AO-2017-0360 app. (APUC CAM), Appendix 9 to APUC CAM, p. 4, 16-17 of 24.

⁴⁵ Ex. 221, AO-2017-0360 app. (APUC CAM), Appendix 9 to APUC CAM, pp. 7 of 24.

⁴⁶ Ex. 221, AO-2017-0360 app. (APUC CAM), Appendix 9 to APUC CAM, p. 10 of 24.

⁴⁷ Ex. 220NP, OPC witness Robert Schallenberg, direct testimony, p. 6.

Empire, but charged Empire that amount as an origination fee. Because Empire did not comply with the 20 CSR 4240 -20.015(3)(A) requirement to obtain competitive bids for that refinancing, what Empire's fully distributed costs to refinance those bonds—including any origination fee—is unknown, and unknowable.

Through its witness Jill Schwartz, Empire points to 20 CSR 4240 -20.015(2)(B) for Empire's authority for how Empire costs the corporate support that its affiliates, primarily Liberty Utility Services Company, provide it. As Ms. Schwartz testifies, that subsection states:

Except as necessary to provide corporate support functions, the regulated electrical corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time.

A plain reading of that rule provision shows the exception is directed at activities the utility performs, not those of an affiliate. In other words, only when the utility is providing corporate support functions is this exception available. Empire has no employees and its affiliate Liberty Utility Services Company is the primary provider of Empire's corporation support functions. The exception does not apply here. It makes no sense to interpret this provision in a way that would permit affiliates to be treated preferentially for their charges to a utility for corporate support functions when the whole purpose of the rule is to protect the utility's customers from costs that are higher than they would have been if an affiliate was not involved in the transaction. In short, it makes sense to allow subsidies to flow from the affiliate to the utility, but not from the utility to the affiliate.

While Public Counsel could raise additional arguments, and may do so in its brief, Public Counsel believes these are sufficient to show the merit of its position on this issue.

c. What amount should be included in Empire's revenue requirement for its transactions with its affiliates?

None, except as noted following. Empire admits that it included affiliate transactions in its cost of service,⁴⁸ but neither Empire nor Staff can quantify the dollar value of Empire's affiliate transactions they included in their cases.⁴⁹ Based on Empire's 2018 and 2019 affiliate transactions reports,⁵⁰ Empire has about \$100 million of transactions with its affiliates annually. Since Empire did not provide information to show these transactions were prudent, it must be assumed that they were imprudent. Therefore, at a minimum, Empire's and Staff's costs-of-service for Empire should be reduced by \$100 million. Both should also be reduced by the effect of the \$450,000 origination fee LUCo charged Empire for their \$90 million 15-year promissory note, and Empire's also should be reduced for the interest rate difference between that note and the interest LUCo pays for its \$90 million draw on its line-of-credit it used to finance that note. (Staff has addressed that in its case, but not the interest rate impact on Empire's allowance for funds used during construction). Further, in both Empire's and Staff's costs-of-service for Empire their rate base

⁴⁸ Ex. 226, Empire response to OPC DR 1001; Ex. 227, Empire response to OPC DR 1005; Ex. 228, Empire response to OPC DR 1006.

⁴⁹ Ex. 225, Empire response to OPC DR 1000; Ex 253, Staff response to OPC DR 0326.

⁵⁰ Ex. 220C, Robert Schallenberg Direct, Sch. RES-D-6 C (Empire's 2018 affiliate transactions report); Ex. 229 (Empire's 2019 affiliate transactions report).

should be reduced by \$4,719,774 for the impact on Empire’s allowance for funds used during construction rate caused by not including the impact of Empire being treated as having \$90 million of short-term debt after it refinanced its first mortgage bonds.

19. Riverton 12 O&M Tracker

20. Software Maintenance Expense

21. Advertising Expense

22. Customer Service

Public Counsel’s witness on this issue is Geoff Marke.

a. Is Empire providing satisfactory customer service?

i. If not, what should the Commission order to ensure better customer service?

Empire serves approximately 175,000 retail electric customers, of which approximately 156,000 (nearly 90%) are in Missouri.⁵¹ During the six months before Algonquin acquired Empire in July of 2017 Empire estimated fewer than 1,000 of its customers’ bills each month. However, afterward Empire’s estimated customer bills skyrocketed to a high of 25,578 in December of 2019 (30 months later) before Empire finally reduced that level to 5,658 in January 2020 and 1,179 in February 2020.⁵² At the Commission’s local public hearings in Bolivar, Joplin and Branson many members of the public testified about the extent to which Empire estimates their bills, and one, Ms. Kathleen McCarthy testified to getting an estimated bill that was about 50% higher (over \$120) than her corrected bill.⁵³ Further, this issue was so pervasive that KY3 news in Springfield covered it in July of 2018.⁵⁴ Public Counsel first became aware of this issue and the extent of it through comments filed in EFIS (255), evidence at the Bolivar, Joplin and Branson local public hearings, including a Change.org Investigation Petition (4,452),⁵⁵ and Staff and Public Counsel discovery.

Following, by month, are the number of customer bills Empire estimated from January 2019 through February 2020⁵⁶:

⁵¹ Ex. , Staff direct cost-of-service report p. 3, ll. 5-7.

⁵² Ex. 207NP, Geoff Marke Rebuttal Rev. Req. testimony, Sch. GM-R-3 (Empire response to Staff data request no. 255).

⁵³ Tr. 5:48-51; Branson, MO LPH - February 4, 2020.

⁵⁴ <https://www.ky3.com/content/news/Liberty-Utilities---Empire-District-has-been-estimating-on-some-customers-bills-488678541.html>.

⁵⁵ Bard, J. (2020) Investigate Liberty Utilities (Empire). *Change.Org*. <https://www.change.org/p/missouri-public-service-commission-investigate-liberty-utilities-empire>.

⁵⁶ Ex. 207NP, Geoff Marke Rebuttal Rev. Req. testimony, Sch. GM-R-3, Empire response to Staff data request no. 255.

	2017	2018	2019	2020
January	742	5594	1730	5668
February	362	10639	663	1179
March	232	19393	1114	
April	521	14469	682	
May	545	20874	1011	
June	354	17894	997	
July	1866	17982	2864	
August	637	14388	5557	
September	1001	6309	9681	
October	509	15534	19306	
November	2769	9810	15593	
December	11517	9644	25578	

Further on the issue of customer service, Public Counsel witness Geoff Marke testifies, “Empire’s customers pay in the upper quartile to receive bottom quartile service when benchmarked against other utilities.”⁵⁷ This is illustrated in the following figure and tables from this testimony (Figure 1, and Tables 1, 2, 3, 4, 5, and 6):

⁵⁷ Ex. 209, Surrebuttal Testimony of Geoff Marke, p. 5, ll. 16-17.

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⁵⁸ Ex. 206C, Direct Testimony of Geoff Marke, p.7, 1-3.

Table 1: _____

Table 2: _____

Table 3: _____

**

⁵⁹ Ibid. p. 8, 1.

⁶⁰ Ibid. p. 8, 1.

⁶¹ Ibid. p. 8, 3.

Table 4: 2018 EIA utility bundled retail sales of “comparable” Missouri utilities ⁶²

Utility	Ownership	Customers	Sales (MW)	Revenues	Average Price
Barton County	Coop	6,564	159,345	17,763,000	11.15
Sac Osage	Coop	11,121	151,722	19,353,200	12.6
Ozark	Coop	33,324	535,3186	1,925,200	11.57
Barry	Coop	9,667	182,820	20,639,500	11.29
New-Mac	Coop	17,740	413,943	44,041,000	10.64
Southwest	Coop	41,317	611,562	65,113,000	10.65
Webster	Coop	18,520	384,763	31,904,000	8.29
White River Valley	Coop	44,231	787,048	97,635,000	12.41
Laclede	Coop	37,064	685,606	69,410,800	10.12
Se-MA-NO	Coop	6,106	112,216	9,955,800	8.87
Springfield	Muni	115,823	3,142,918	272,379,900	8.67
Empire	IOU	154,042	4,321,595	522,849,900	12.10
Evergy West	IOU	326,627	8,385,396	805,203,200	9.60
Evergy Metro	IOU	289,299	8,675,389	966,953,500	11.15
Ameren Missouri	IOU	1,223,595	33,699,583	3,161,693,900	9.38

Table 5: S&P Global Market Intelligence 2018 four largest average annual electric residential bills for Investor Owned Utilities in the United States ⁶³

US Rank	Utility	Largest Average Residential Annual Bill
1	Maui Electric	\$2,141
2	Hawaii Electric Light	\$2,096
3	Nantucket Electric Co.	\$2,077
4	Empire District Electric	\$1,936

These cost figures are compounded by the fact that Empire is the only Missouri investor-owned utility whose shareholders do not contribute a cent to low-income bill assistance (all of these costs are borne by ratepayers) despite Empire’s service territory operating in 13 out of 16 counties with larger poverty rates (below \$24,600 for a family of four) than the Missouri average (14.2%).⁶⁴ In fact, Empire has collected over \$500 million in revenues each of the past three years and donated less than \$500 thousand in charitable giving to support its community.⁶⁵

Public Counsel urges the Commission to find this quality of service is unacceptable, and recommends that the Commission explicitly reduce the return on equity the Commission would otherwise allow Empire by 60 basis points in response. Public Counsel witness Geoff Marke provides two empirical studies which show the relationship between utility customer satisfaction

⁶² *Ibid.* p. 18, 9-11.

⁶³ Ex. 206C, Direct Testimony of Geoff Marke pp. 19, 3.

⁶⁴ *Ibid.* p. 20.

⁶⁵ Ex. 209, Surrebuttal Testimony of Geoff Marke p. 6, ll. 4-8.

and return on equity, and which support the Commission imposing a 60 basis point reduction from the return on equity it would be appropriate for the Commission to award Empire if Empire provided satisfactory customer service. He also summarizes Public Counsel's position:

By every metric I have seen, Empire has scored poorly relative to the industry norms when it comes to customer satisfaction. The sheer number of estimated bills over such an extended time has only served to reinforce my position that Empire should be held accountable for its failure in quality of service. I strongly recommend that the Commission hold the Company accountable and make the explicit reduction in ROE tied to their overall failure in providing appropriate quality of service. Empire's customers pay in the upper quartile to receive bottom quartile service when benchmarked against other utilities. The Commission issuing a reduced ROE as a result of poor quality of service should produce better results.⁶⁶

b. —Is Empire providing reliable service?

i. —If not, what should the Commission do?

~~23. Estimated Bills~~

~~24. Material and Supplies~~

~~25. Asset Retirement Obligations~~

~~26. LED Replacement Tracker~~

~~27. May 2011 Tornado Unamortized AAO Balance~~

28. Depreciation and Amortization

Public Counsel's witness on this issue is John Robinett, but only as to Asbury.

a. What is the appropriate level of depreciation and amortization expense of plant to include in the cost of service?

See Public Counsel's positions on Issue 13 (Asbury).

b. —Should depreciation expense for transportation equipment that was charged through a clearing account be removed from depreciation expense?

i. —What are the authorized depreciation rates for accounts 371 & 373 to be used in the cost of service?

~~29. Iatan/Plum Point Carrying Costs~~

~~30. Incentive Compensation~~

~~31. Customer Demand Program (DSM)~~

~~32. Bad Debt Expense~~

⁶⁶ Ex. 209, Surrebuttal Testimony of Geoff Marke, p. 7, ll. 4-12.

33. Retail Revenue

Public Counsel's witnesses on this issue are Geoff Marke and John Robinett, but only as to Asbury impacts.

- a. *What is the appropriate amount to remove from retail revenue for unbilled revenue, franchise tax revenue, and FAC revenue?*
- b. *What is the level of billing determinants per rate schedule that should be used to calculate retail rate revenue in this case?*
- c. *Should the billing adjustment and the retail revenues be trued up to January 31, 2020 in the cost of service?*

See Public Counsel's positions on Issue 13 (Asbury) for all subparts.

~~34. Other Revenue~~

35. Tax Cut and Job Acts Revenue

Public Counsel's witnesses on this issue is John Riley.

- a. *What is the appropriate amount of tax cut and job act revenue to remove from test year revenues?*
- b. *Should revenues associated with the tax cut and job act stub period be removed from revenue?*

~~36. Property Insurance~~

~~37. Injuries and Damages~~

38. Payroll and Overtime

Public Counsel's witnesses on this issue is Robert Schallenberg.

- a. *What is the appropriate test year amount of payroll expense?*
- b. *What is the appropriate test year amount for overtime expense?*

Both should be adjusted to disallow affiliate transactions.

~~39. Retention Bonuses~~

40. Employee Benefits

Public Counsel's witness on this issue is Robert Schallenberg.

- a. *What is the appropriate level of employee benefits to include in the cost of service?*

It should be adjusted to disallow affiliate transactions.

41. Property Taxes

Public Counsel’s witnesses on this issue are John Robinett and Robert Schallenberg.

a. What is the appropriate amount of property taxes to include in the cost of service?

See Public Counsel’s positions on Issue 13 (Asbury)—property taxes for Asbury should not be included.

~~*b. What is the proper method to be used for calculating the property tax amount to be included in the cost of service?*~~

~~42. Dues and Donations~~

43. Outside Services

Public Counsel’s witness on this issue is Robert Schallenberg.

a. What is the appropriate amount of outside services to include in the cost of service?

It should not include affiliate transactions.

44. Common Property Removed from Plant and Accumulated Depreciation

To the extent it involves Asbury, Public Counsel’s witness on this issue is John Robinett

a. What is the appropriate method and amount for removal of common property from plant in service and accumulated depreciation?

The impacts of Asbury should be excluded.

45. Retirement

46. Case No. EM-2016-0213 Commission-ordered conditions

Public Counsel’s witness on this issue is David Murray.

a. Has Empire complied with Condition A.4 the Commission imposed in Case No. EM-2016-0213?

No. This condition states:

A.4. Empire shall not seek an increase to the cost of capital as a result of this Transaction or Empire’s ongoing affiliation with Algonquin Power & Utilities Corp. and its affiliates other than Empire after the Transaction. Any net increase in the cost of capital Empire seeks shall be supported by documentation that: (a) the increases are a result of factors not

associated with the Transaction or the post Transaction operations of Algonquin Power & Utilities Corp. or its non-Empire affiliates; (b) the increases are not a result of changes in business, market, economic or other conditions caused by the Transaction or the post Transaction operations of Algonquin Power & Utilities Corp. or its non-Empire affiliates; and (c) the increases are not a result of changes in the risk profile of Empire caused by the Transaction or the post Transaction operations of Algonquin Power & Utilities Corp. or its non-Empire affiliates. The provisions of this section are intended to recognize the Commission's authority to consider, in appropriate proceedings, whether this Transaction or the post Transaction operations of Algonquin Power & Utilities Corp. or its non-Empire affiliates has resulted in capital cost increases for Empire. Nothing in this agreement shall restrict the Commission from disallowing such capital cost increases from recovery in Empire's rates.

Empire has not provided any testimony comparing Empire's cost of capital before APUC acquired it with its cost of capital after APUC acquired it. In fact, Public Counsel witness Murray testifies that Empire requested a rate of return in its last rate case, Case ER-2016-0023, based on a requested return on equity of 9.9% applied to a common equity ratio of 49.01%. Now, under APUC's ownership, Empire is requesting a rate of return based on a return on equity of 9.95% applied to a common equity ratio of 53.07% (see p. 21 of Ex. , Empire witness Sheri Richard's True-up Direct Testimony). Empire's higher requested return on equity applied to a higher equity ratio violates this condition A4. Empire has not provided any evidence to demonstrate why Empire needs to maintain a higher equity ratio that it maintained when it was a standalone entity. The primary consequence of a higher equity ratio under Empire's new circumstance of it being owned by APUC is that it generates a higher revenue requirement for its shareholders at the expense of its retail customers—ratepayers. Additionally, although Empire requests a more equity-rich capital structure upon which to set its rates, it assigns the cost to an affiliate promissory note to Empire from LUCo, based on LUCo's more leveraged capital structure. Although this mismatch is inappropriate, perhaps more inappropriate is the fact that this affiliate note was funded by lower-cost short-term debt LUCo incurred to fund it.

i. If not, what relief should the Commission grant?

The Commission should adopt Public Counsel's recommended use of LUCo's adjusted capital structure and resulting rate of return positions and consider this item for choosing the low end of Public Counsel's reasonable ROE range, which is 8.5%.

b. Has Empire complied with Condition A.5 the Commission imposed in Case No. EM-2016-0213?

No. Condition A.5 states:

A5. If Empire's per books capital structure is different from that of the entity or 5 entities in which Empire relies for its financing needs, Empire shall be required to provide evidence in subsequent rate cases as to why Empire's per book capital structure is the most economical for purposes of determining a fair and reasonable allowed rate of return for

purposes of determining Empire's revenue requirement. If Empire's per books capital structure is different from that of the entity or 5 entities in which Empire relies for its financing needs, Empire shall be required to provide evidence in subsequent rate cases as to why Empire's per book capital structure is the most economical for purposes of determining a fair and reasonable allowed rate of return for purposes of determining Empire's revenue requirement.

In its direct case Empire did not show a comparison of Empire's capital structure to those of the entities on which it relies for its financing needs to first, determine whether they differed, and second, justify why Empire's capital structure is the most economical among them. Empire's rate-of-return witness Hevert claims he complied with this condition by comparing Empire's per books capital structure to those of his proxy group. This does not comply with the condition. The condition requires a comparison of Empire's capital structure to that of the entity or entities on which it relies for its financing needs. The financing transactions Empire and its immediate parent company, LUCo establish and confirm that LUCo is the primary platform used to issue debt to third-party debt investors for Empire and LUCo's other subsidiaries. These third-party debt investors determine their required compensation, *i.e.*, coupon rate on debt, for buying LUCo's debt issuances by determining LUCo's entire debt responsibility, which includes the debt it unconditionally guarantees. The only party in this case that thoroughly addressed this condition is Public Counsel, although it was not Public Counsel's obligation to do so. Even when Empire was given the chance to respond to Public Counsel's direct evidence in its rebuttal, Empire still did not do so. Empire clearly has failed to comply with this condition. Not only has Empire failed to comply with this condition, through Empire's discovery responses, Public Counsel found documents which confirm that APUC targets a **_____ ** equity ratio for its regulated utilities, as compared to the **_____ ** equity ratio it targets for its non-regulated utility investments. Empire's equity ratio does not match its lower business risk.

i. If not, what relief should the Commission grant?

The Commission should adopt Public Counsel's recommended use of LUCo's adjusted capital structure and resulting rate of return positions and consider this item for choosing the low end of Public Counsel's reasonable ROE range, which is 8.5%.

c. Has Empire complied with Condition A.6 the Commission imposed in Case No. EM-2016-0213?

No. Condition A. 6 states:

A. 6. The Joint Applicants will not obtain Empire financing services from an affiliate, unless such services comply with Missouri's Affiliate Transaction Rules.

Empire has not demonstrated how its decision to provide funds to Empire through an affiliate promissory note issued by LUCo was more economical to Empire than if Empire had issued debt directly to third-party debt investors. In fact, the cost of the long-term debt LUCo provided to Empire was not based on the blended cost of debt LUCo issued in March 2017, which consisted of 6 differing maturities-3-year, 5-year, 7-year, 10-year, 20-year and 30-year (Ex. , Empire witness Cochrane Surrebuttal testimony, p. 13). Apparently Empire decided that using an

implied spread from 10-year and 20-year promissory notes was sufficient for an affiliate transaction, even though this was not how these arms-length transactions were executed. Empire also transferred its short-term financing functions and facilities to LUCo, even though Empire does not have direct access to this liquidity and has more stringent terms than the terms of Empire's prior standalone credit facility.⁶⁷

i. If not, what relief should the Commission grant?

The Commission should adopt Public Counsel's recommended use of LUCo's adjusted capital structure and resulting rate of return positions and consider this item for choosing the low end of Public Counsel's reasonable ROE range, which is 8.5%.

d. Has Empire complied with Condition G.3 the Commission imposed in Case No. EM-2016-0213?

No. Condition G.3 states:

G.3 Empire shall provide Staff and OPC access to and copies of, if requested by Staff or OPC, the complete Liberty Utilities Co, LU Central and Empire Board of Directors' meeting minutes, including all agendas and related information distributed in advance of the meeting, presentations and handouts, provided that privileged information shall continue to be subject to protection from disclosure and Empire shall continue to have the right to object to the provision of such information on relevancy grounds.

After requesting Algonquin Power & Utilities Corporation's and The Empire District Electric Company's Board of Director minutes and materials as they relate to The Empire District Electric Company's assets/operations (OPC DR 3003), Empire made minutes/materials related to Empire, LU Central and some LU Combined (East, Central and West) available. However, available information did not include information related to Liberty Utilities Company, Liberty Utilities Finance Company GP1 and/or Algonquin Power & Utilities Corporation's financing decisions related to managing LUCo's capital structure and/or APUC's capital structure. Access to information as it relates to managing corporate level capital structures were specifically contemplated by Condition A.5. Additionally, when Public Counsel followed-up with data requests asking for copies of specific materials/documents cited in the documents Public Counsel reviewed in response to DR 3003, Empire did not provide them (OPC DR No. 3022-3028). Empire asserts that it not required to provide this information to Public Counsel because the condition contemplated its "right to object to the provision of such information based on relevance grounds." It was APUC's decision to consolidate Empire's financing needs with the rest of its affiliates at the LUCo corporate level. If Empire still had its own financing functions, financings and external capital structure, then objections to providing such information on relevance grounds might be understandable, but this is not the case. APUC makes material and consequential financing decisions for the management of its regulated investments held in subsidiaries of LUCo. The conditions the Commission imposed on Empire when it conditionally approved APUC's acquisition of Empire anticipated this potential obstruction to information, and were intentionally

⁶⁷ Ex. 211C, Public Counsel witness Murray, Rebuttal Testimony, p. 38.

designed for the purpose of providing transparency into corporate level decisions that may impact Empire’s access to financing and the management of its capital structure.

i. If not, what relief should the Commission grant?

The Commission should adopt the low end of Public Counsel’s return-on-equity range for non-compliance—8.5%, and compel Empire to comply with this condition prospectively.

WHEREFORE, the Office of the Public Counsel states its positions on the listed issues as set forth above.

Respectfully,

/s/ Nathan Williams

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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 17th day of April 2020.

/s/ Nathan Williams