BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Empire District Electric Company, Liberty Utilities (Central) Co., and Liberty Sub Corp. Concerning an Agreement and Plan of Merger and Certain Related Transactions	))))	Case No. EM-2016-0213

MISSOURI DIVISION OF ENERGY'S STATEMENT OF POSITION

COMES NOW the Missouri Division of Energy, by and through the undersigned counsel, and for its *Statement of Position* in the above styled matter, states:

1. Detriment to Public Interest

a. Will the acquisition by LU Central and Liberty Sub Corp. of all of the capital stock of The Empire District Electric Company under the terms of the Agreement and Plan of Merger dated February 9, 2016, be detrimental to the public interest?

No, the acquisition by LU Central and Liberty Sub Corp. (herein after referred to collectively as the "Joint Applicants") of all of the capital stock of The Empire District Electric Company under the terms of the Agreement and Plan of Merger dated February 9, 2016, will not be detrimental to the public interest; however, the stipulation and agreements voluntarily entered into by the Joint Applicants with various parties to date mitigates any potential detriment to individual parties impacted by the merger and further strengthens the proposition that the merger is not detrimental to the public interest. Section 393.190.1 reads, in pertinent part:

> **No** gas corporation, **electrical corporation**, water corporation or sewer corporation **shall** hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, **merge or consolidate such works or system, or franchises**, or any part thereof, **with any other corporation, person or public utility, without having first secured from the**

> **commission an order authorizing it so to do**. Section 393.190.1 RSMo. (emphasis added)

Section 393.190.1 does not set forth a standard or test for the PSC's approving a proposed utility merger. However, the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission of Missouri,* 335 Mo. 448, 73 S.W.2d 393, 395 (1934), recognized that the standard for the PSC's approval was whether the merger "would be detrimental to the public." *Id.* at 400. In *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466, 468 (Mo. App. 1980), the Court of Appeals stated, "the Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is **detrimental to the public interest** since to deny a property owner the opportunity to dispose of such assets, in the absence of a showing of detriment to the public, would be to deny the property owner an important aspect of property ownership." Citing, *State ex rel. City of St. Louis v. Public Service Commission of Missouri,* 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934). (Emphasis added). This standard begs the question, what facts will provide evidence of a "detriment" to the public interest?

In *State ex rel. City of St. Louis,* the Court upheld the Commission's decision that "the transfer of the stock in question to the applicant 'can have no detrimental effect upon the public interest.'" *Id.* at 399. Additionally, in *State ex rel. Fee Fee,* the Missouri Court of Appeals stated in regard to the purpose of Section 393.190.1, "The obvious purpose of this provision is to **ensure the continuation of adequate service to the public** served by the utility." *Id.* at 468. (Emphasis added). More recently the Missouri Supreme Court has found that a Commission report and order approving a merger may be lawful, but still unreasonable, if it did not decide whether the inclusion of the acquisition premium in the Commission's cost analysis of the merger would make the merger detrimental to the public interest. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State,* 120 S.W.3d 732, 736 (Mo. 2003). An acquisition premium is

the difference between the purchase price of an asset and the net original cost of an asset. Allowing a utility to recover an acquisition premium from ratepayer results in a detriment to ratepayers because ratepayers would have to pay the purchasing utility more than what an asset is actually worth. In the present case these are not issues as the Joint Applicants in their Agreement and Plan of Merger stated, (1) The Joint Applicants are only seeking approval for LU Central to acquire the capital stock of Empire and the assets of Empire will remain subject to Commission jurisdiction,[1] (2) "Empire's employees and experienced management team will remain in place evidencing Liberty Utilities' commitment that Empire will continue to provide customers with safe, reliable and cost-effective utility services."[2], and (3) "LU Central will not seek any recovery of the premium paid over book value, or any transaction costs associated with the transaction in future Empire rate cases."[3]

As the relevant judicial decisions cited above suggest, the Commission may consider service quality and economic impact to ratepayers when determining whether a merger is detrimental to the public interest, but it is not limited to only those considerations. In its first report and order approving the merger of Utilicorp with St. Joseph Power and Light Company the Commission stated,

> What then does it mean for the Commission to find that the proposed merger is 'not detrimental to the public'? Furthermore, who is 'the public' that is to be protected from detriment? The parties suggest that the public that the Commission is obligated to protect is the ratepayers and the detriments from which they are to be protected are higher rates or a deterioration in the level of customer service. Certainly the Commission has utilized those definitions in past cases. .... There **does not, however, appear to be any controlling authority that would firmly limit the Commission to those definitions**.

[1] Agreement and Plan of Merger, p. 6.
[2] Id.
[3] Agreement and Plan of Merger, p. 7.

> *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State of Missouri*, WD60631, 2003 WL 1906385, at *9 (Mo.App. W.D. Apr. 22, 2003), as modified (May 27, 2003). (Emphasis added).

Since the Commission is not required to limit its evaluation of public detriment in merger cases to impacts on ratepayers, the Commission must also determine the proper scope of "public interest" in evaluating the present merger.

The proper process for determining the public interest has been discussed in previous judicial decisions. The Commission provided a summary of those decisions in, *In the Matter of the Application of KCP&L Greater Missouri Operations Co. for Permission & Approval & A Certificate of Pub. Convenience & Necessity Authorizing It to Acquire, Construct, Install, Own, Operate, Maintain, & Otherwise Control & Manage Elec. Prod. & Related Facilities in Certain Areas of Cass County, Missouri Near the City of Peculiar*, EA-2009-0118, 2009 WL 762539 (Mo. P.S.C. Mar. 18, 2009), in where it stated:

> The legislature delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission's authority. **The public interest is a matter of policy to be determined by the Commission.**[4] It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.[5] Determining what is in the interest of the public is a balancing process.[6] **In making such a determination, the total interests of**

[4] *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980), The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

[5] *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

[6] *In the Matter of Sho-Me Power Electric Cooperative's Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993 , 1993 WL 719871 (Mo. P.S.C.).

> **the public served must be assessed.**[7] This means that some of the public may suffer adverse consequences for the total public interest.[8] Individual rights are subservient to the rights of the public.[9] **The "public interest" necessarily must include the interests of both the rate[-]paying public and the investing public**; however, as noted, the rights of individual groups are subservient to the rights of the public in general. (Emphasis added).

The public interest in the present case must be determined not by solely evaluating the impact on Empire's ratepayers, but by evaluating the impact on the public generally. While it is ultimately the Commission who must determine whether a merger is in the public interest, the Commission's determination is guided by the expressed will of the people of the State of Missouri.

> The public interest is found in the positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, … **[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation.** *Id*. (Emphasis added).

Therefore the Commission must also look to public policy as defined in applicable legislation in determining whether or not a merger is detrimental to the public interest. Therefore, in the present case the Commission must determine whether the proposed merger is detrimental to the public interest not only by evaluating the impact on Empire's customers, but by also evaluating the impact on the investing public and state public policy goals. While there may be some detriment to a part of the public, if the net effect of the merger is not detrimental to the public generally the Commission must approve the merger. A decision to the contrary would infringe on Empire's property rights.

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[7] Id.
[8] Id.
[9] *State ex rel. Mo. Pac. Freight Transport Co. v. Public Serv. Comm'n*, 288 S.W.2d 679, 682 (Mo. App. 1956).

When evaluated under the proper scope the acquisition by the Joint Applicants of all of the capital stock of Empire under the terms of the Agreement and Plan of Merger is not detrimental to the public interest. Additionally, the stipulation and agreements voluntarily entered into by the Joint Applicants with various parties to date mitigates any potential detriment to individual parties impacted by the merger and further strengthens the proposition that the merger is not detrimental to the public interest.

b. *To the extent there are any claimed detriments, what conditions, if any, are proposed by the parties that, if adopted by the Commission, would mitigate any such potential detriment or in the aggregate would offset any potential detriments?*

The Joint Applicants have voluntarily agreed to enter into several stipulation and agreements to address the concerns of the various parties to those agreements. Without taking a position on the specific agreements that DE is not a party to, these voluntary agreements by the Joint Applicant's mitigates any potential detriment to individual parties impacted by the acquisition and further strengthens the proposition that the acquisition is not detrimental to the public interest. Therefore the Commission should approve the acquisition along with the various stipulation and agreements voluntarily entered into by the Joint Applicants to date.

DE is a signatory to a stipulation and agreement with the Joint Applicants filed as *Stipulation and Agreement as to Division of Energy and Renew Missouri* (hereinafter "Stipulation"), on July 19, which will not be detrimental to the public interest, and that will provide additional value to Empire customers and further the public policy goals of the state of Missouri. The Stipulation provides commitments by the Joint Applicants to:

- File a future Missouri Energy Efficiency Investment Act ("MEEIA") application after Empire files an Integrated Resource Plan ("IRP") subsequent to a Commission approved statewide Technical Resources Manual ("TRM").

- Collaborate with the Midwest Combined Heat and Power Technical Assistance Project (hereinafter "Midwest CHP TAP") to conduct a survey of potential CHP customer's in Empire's natural gas service territory. The costs of which will be accounted for in a regulatory asset.
- Engage with DE to consider the development of a microgrid interconnection tariff based off industry best practices.
- Meet with stakeholders to consider the development of a community solar program offering.

All of these commitments by the Joint Applicants will provide additional customer value to ratepayers and further public policy goals. Approving the Stipulation is consistent with the public interest of the State of Missouri. As previously stated, "[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation."[115] *Id.* The Commission must therefore look to public policy as defined in applicable legislation in determining the public interest.

As described in the Rebuttal Testimony of DE witness Martin Hyman, there are state policy goals valuing efficiency and renewable energy;[10] These state policy goals can be found at §393.1030 RSMo., the Renewable Energy Standard ("RES"), at §393.1075 RSMo., the MEEIA, and §393.1040 RSMo., which states in part, "it is also the policy of this state to **encourage electrical corporations to develop and administer energy efficiency initiatives** that reduce the annual growth in energy consumption and the need to build additional electric generation capacity." (Emphasis added.) In addition to meeting these state policy goals, other

[10] *Missouri Public Service Commission Case No. EM-2016-0213, In The Matter of the Joint Application of the Empire District Electric Company, Liberty Utilities (Central) Co., and Liberty Sub Corp. Concerning an Agreement and Plan of Merger and Certain Related Transactions, Rebuttal Testimony of Martin R. Hyman on Behalf of the Missouri Department of Economic Development – Division of Energy, July 20, 2016,* , pages 4-5, lines 14-22 and 1-2, pages 8-9, lines 12-17 and 1-3, and page 11, lines 6-9.

benefits to customers from the types of initiatives in the Stipulation include economic development and environmental gains and increased reliability and resiliency.[11] Demand-side management ("DSM"), CHP, and microgrids provide customers with greater control over their energy usage by encouraging energy efficiency and/or self-generation. Microgrids in particular improve resiliency and reliability for both utilities and individual customers. Additionally renewable energy provides numerous benefits, such as cleaner air, reduced risks from future environmental compliance mandates, and the potential for customers to self-generate.

The Stipulation encourages more DSM on the part of Empire by stating that Empire will file for approval of an application under the MEEIA after Empire files an IRP subsequent to a Commission approved statewide TRM. The Stipulation also provides that Empire will encourage CHP implementation by completing an outreach survey report of potential CHP customers in The Empire District Gas Company's service territory; this outreach survey report will involve DE and the Midwest CHP TAP, resulting in limited costs to Empire and its customers. While DE expects the costs to Empire to be minimal, ratepayers will benefit from CHP projects; therefore, allowing rate recovery of the costs associated with the initiatives contemplated in the Stipulation is appropriate. Empire also agreed to work with DE to consider microgrid interconnection best practices which were recommended by the Missouri University of Science and Technology's Microgrid Industrial Consortium. Finally, Empire agreed to consider proposing a community solar initiative.

Because the Stipulation will further the state public policy goals of encouraging the development of additional renewable energy and energy efficiency it is therefore in the public interest for the Commission to approve the Stipulation between the Joint Applicants, DE,

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[11] Id. pages 8-9, lines 14-17 and 1, page 11, lines 6-9, and page 13, lines 1-4.

and Renew Missouri in addition to approving the Joint Applicant's acquisition of Empire's capital stock.

WHEREFORE, the Missouri Division of Energy respectfully files its *Statement of Position*.

Respectfully submitted,

/s/ Alexander Antal

Alexander Antal
Associate General Counsel
Missouri Bar No. 65487
Department of Economic Development
P.O. Box 1157
Jefferson City, MO 65102
Phone: 573-522-3304
Fax: 573-526-7700
alexander.antal@ded.mo.gov
Attorney for Missouri Division of Energy

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served electronically on all counsel of record this 23rd day of August, 2016.

/s/ Alexander Antal

Alexander Antal