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

The Office of the Public Counsel's Reply Brief

Respectfully submitted,

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Denotes Highly Confidential Information has been Redacted

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May 18, 2020

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COMES NOW the Office of the Public Counsel and for its Reply Brief states:

Introduction

In this brief Public Counsel responds to arguments and assertions other parties make in their responsive briefs and in answers to Commission questions. Due to time and resource constraints Public Counsel will not respond to every argument and assertion, but by not doing so Public Counsel is not conceding to any of them. While its arguments may encompass other listed issues as well, Public Counsel's reply arguments are primarily directed to the following listed issues: rate-of-return (Issue 1), rate design (rate class responsibilities for any ordered rate change due to revenue requirement increase or decrease) (Issue 2 Rate Design, Other Tariff and Data Issues, subissue r. How should any revenue requirement increase or decrease be allocated to each rate class?), WNR and SRLE adjustment mechanisms (Issue 4), FAC (Issue 5), management expense (Issue 8), cash working capital (Issue 10, subpart a. What is the appropriate expense lag days for measuring Empire's income tax lag for purposes of cash working capital?), Asbury (Issue 13), fuel inventories (Issue 14), affiliate transactions (Issue 18), customer service (Issue 22), and Case No. EM-2016-0213 Commission-ordered conditions A5 (Issue 46, subissue b).

Public Counsel is structuring this brief to follow the list of issues, including Issue 9.b., an AFUDC issue which Staff omitted from the joint issues list it filed: *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?* For subissues, Public Counsel first states its positions on each, then presents its arguments in reply to the arguments and testimony of the other parties.

As indicated by Empire's response filed on May 11, 2020, and as stated in its responsive brief, the parties view the following issues to not be before the Commission for decision: Issue 2

(Rate Design, Other Tariff, and Data Issues), subparts f-q and s-y; Issue 5 (FAC), subparts b, second sentence of d-ii, d-iii, and e; Issue 15 (energy efficiency); Issue 22 subpart b (reliable service); Issue 23 (estimated bills); and Issue 45(retirement). Public Counsel has included these issues in its brief, and used yellow highlighting to identify them. The issues to which Public Counsel is not taking a position are also included and shown by strikeout.

PUBLIC COUNSEL'S REPLIES TO ARGUMENTS OF OTHER PARTIES

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

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

Public Counsel's position has not changed from its initial brief. If the Commission adopts Public Counsel's recommended capital structure of 46% common equity and 54% long-term debt for Empire for purposes of setting rates in this case, then the Commission should use a return on equity (ROE) of 9.25%. However, if the Commission adopts Empire's recommended capital structure of 53.07% common equity and 46.93% long-term debt, then the Commission should use a ROE of 8.5%.

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

Public Counsel's position has not changed from its initial brief. The Commission should adopt Public Counsel's recommended capital structure of 46% common equity and 54% long-term

[1] 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)).

debt for purposes of setting rates in this case, as Public Counsel witness David Murray recommends.

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

Public Counsel's position has not changed from its initial brief. If the Commission adopts Public Counsel's recommended capital structure of 46% common equity and 54% long-term debt for Empire for purposes of setting rates in this case, then the appropriate, fair and reasonable cost of debt that the Commission should authorize Empire is LUCo's embedded cost of debt of 4.65%.

RATE-OF-RETURN REPLY ARGUMENT

Capital structure

As of September 30, 2019, Empire's and LUCo's per books common equity ratios are 52.48% and 53.00%, respectively.[2] Empire's requested common equity ratio as of the true-up date, January 31, 2020, is now 53.07% based on its determination of Empire's per books capital structure.[3] Empire did not provide Public Counsel with true-up capital structure information for LUCo.[4] Empire primarily relies on LUCo for its financing needs.[5] While Empire's and LUCo's per books common equity ratios are unusually close, they are misleading because LUCo has guaranteed $395 million of off-balance sheet debt used to invest in LUCo's regulated utilities.[6] When this $395 million of off-balance sheet debt is properly considered, LUCo's actual common equity ratio is approximately 46% as of the test-year and update period.[7] This is corroborated by

[2] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 9.
[3] Ex. 7, Empire witness Sheri Richard, true-up direct testimony, p. 21.
[4] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, p. 34.
[5] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 6-7.
[6] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 10.
[7] *Id.*

comparing Empire's and LUCo's FFO[8]/debt ratios—21%-to-23% and 15%-to-16%, respectively.[9] Those ratios contradict that Empire's and LUCo's actual capital structures are so closely matched.[10] APUC's[11] communications to debt investors that it targets a 45% to 50% equity ratio for LUCo[12] also contradicts LUCo's per books balance sheet equity ratio.[13] Because Empire's affiliate LUCo is the entity who primarily satisfies Empire's financial needs, it is LUCo's actual capital structure that the Commission should use for Empire in this case for purposes of determining Empire's rate of return—46% common equity and 54% long-term debt.

By keeping LUCo's $395 million of debt off of its balance sheet, when LUCo is Empire's primary source of funds for its financial needs and it is LUCo who issues third-party debt through Liberty Utilities Finance GP1, Empire and its affiliates have made it appear that Empire and LUCo have nearly identical capital structures. Public Counsel witness David Murray demonstrates by (1) comparing and contrasting Empire's capital structure to the capital structures of the entities on which it relies for financing,[14] (2) comparing Empire's and LUCo's FFO/debt ratios,[15] (3) finding LUCo's $395 million of off-balance sheet debt used to invest in LUCo's regulated utilities,[16] and (4) demonstrating that LUCo's actual capital structure is 46% common equity and 54% long-term debt, the appropriate capital structure to use for purposes of setting Empire's rates in this case is

[8] Funds from operations.
[9] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 16.
[10] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 16-17.
[11] Algonquin Power & Utilities Corp.
[12] Liberty Utilities Co.
[13] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 12-13.
[14] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 5-13.
[15] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 16.
[16] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 10 and Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, pp. 15-16.

the actual capital structure of the entity upon which Empire primarily relies for its financial needs—LUCo's capital structure of 46% equity and 54% debt.

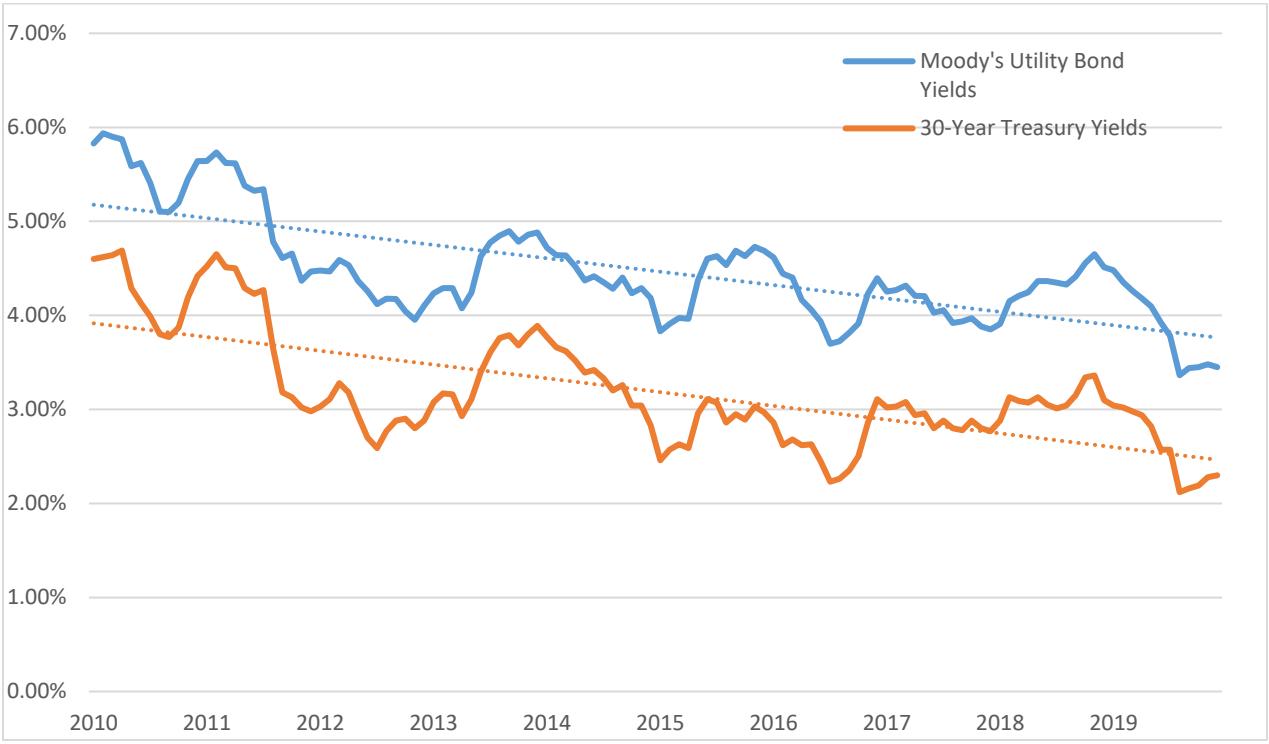
ROE

In its responsive brief, Empire not only disputes how Public Counsel determined a COE[17] for Empire by DCF[18] and CAPM[19] modeling using a group of similar utilities as a proxy for Empire, it also disputes that commissions have been using ROEs[20] above actual COEs for a number of years.[21]

Public Counsel witness Murray used the ROE's of approximately 9.5% the Commission last explicitly used for setting the rates of the major electric utilities it rate regulates as a frame-of-reference for determining a fair and reasonable allowed ROE for Empire in the current utility capital market environment.[22] The Commission used that ROE of 9.5% around 2015, but at that time utility bond yields were higher and utility stock valuations were lower than they are now.[23] With such contextual data and information in mind, Public Counsel witness Murray performed his analysis and provided his informed opinion that capital market conditions justify this Commission reducing the ROEs it uses when setting new rates for the major electric utilities it rate regulates.

[17] Cost of equity
[18] Discounted cash flow.
[19] Capital asset pricing method.
[20] Returns on equity.
[21] Empire has incorrectly stated on page eight of its responsive brief that Mr. Murray's cost of equity estimates for Empire are 4.63% to 5.43% from his multi-stage DCF modeling. Instead, as stated on page nine of Public Counsel Initial Brief and on page 35 at lines 4-8 of exhibit 210C, Public Counsel witness David Murray, direct testimony, his multi-stage DCF modeling results are approximately 6.5% for the pure-play regulated utilities in his proxy group, and 6.5% to 6.75% for various subsets of his proxy group utilities.
[22] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 17-18, 28-29 and p. 40.
[23] *Id.*

Because both long-term bonds and utility stocks are low risk investments, the trend in long-term treasury and utility bond yields is generally indicative of the trend in utility stock P/E (price/earnings per share)—typically, they are inversely correlated, *i.e.*, as bond yields drop, utility stock P/E ratios rise.[24] This relationship is so well known that the investment community uses bond yield regressions to estimate fair utility stock prices, and often refers to utility stocks as "bond-substitutes" or "pseudo-bonds."[25] Public Counsel witness David Murray graphically demonstrates, both treasury and utility bond yields have trended downward by over 2%[26]:



But, during that same time period utility stock P/E ratios increased to all-time high levels of 21x to 22x.[27] . Utility stock high P/E ratios are due to the decline in bond yields, *i.e.*, a decline

[24] Ex. 210C, Public Counsel witness David Murray, direct testimony, p., pp. 21-24.
[25] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 21.
[26] Ex. 210C, Public Counsel witness David Murray, direct testimony, p., p. 21.
[27] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 24.

in utilities' cost of capital—a decline to levels in 2019 and now not seen before in modern times.[28] However, this and other commissions, including the FERC, have used returns on equity during this same timeframe that are inconsistent with this observed continued actual downward trend in utilities' cost of equity.[29] The result is an increasing divergence between utilities' actual costs of capital and those commissions have used.

Investors expect commissions to continue to use ROEs above the actual COE, but they also expect that commissions will recognize that the decline in the cost of capital and reduce those ROEs accordingly.[30] Therefore, because long-term interest rates (*i.e.* yields) in the United States have been in secular decline reducing the cost of capital, investors expect that utility commissions will gradually reduce the ROEs they use to approximately 9% to 9.25%, and consider such scenarios when valuing utility stocks.[31] In fact, as noted in Schedule DM-R-2 attached to Public Counsel witness Murray's rebuttal testimony, investors have noted the Texas PUC's deliberations on a possible 9.25% ROE applied to Houston Electric's 40% equity ratio.[32] Stated differently, utility equity investors expect commissions to reduce the ROEs they are using because the decline in bond yields has caused utility stock P/E ratios to increase, despite no fundamental change in expected long-term earnings growth for the electric utility industry.[33]

Hevert tries to mask this simple relationship by distancing himself from the logical results achieved by a rational DCF analyses, and placing more weight on methods that use market risk premium estimates; estimates that are twice those used by investors to value utility stocks.[34] In

[28] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 21-24.
[29] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 23.
[30] Ex. 210C, Public Counsel witness David Murray, direct testimony, p., pp. 25-26.
[31] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 32.
[32] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, Sch. DM-R-2, p. 1.
[33] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 28.
[34] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, pp. 19-31.

contrast, both Public Counsel witness David Murray's and Staff witness Peter Chari's COE estimates are corroborated by those used by investors to value utility stocks, but also recognize that investors expect the ROEs commissions use for ratemaking to be higher than the COE. Public Counsel and Staff recommend that the Commission use a ROE above Empire's COE, in order to compress the regulatory premium between the two.[35] They recognize the adverse impacts on Empire, and other utilities this Commission rate regulates, that a precipitous downward move toward the actual COE, a reduction of four, three, two or even one percent below the ROEs this Commission has historically used for setting rates over the past several years would have on investors' perception of Missouri's regulatory environment. Therefore, they tempered their independently determined recommended ROEs of 9.25% in this case in light of this reality.

In summary, Public Counsel witness David Murray and Staff witness Peter Chari are the more credible witnesses on the issue of the ROE the Commission should use for setting Empire's rates in this case.

2. Rate Design, Other Tariff and Data Issues[36]

~~*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?*~~

[35] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, p. 4. ll. 20-22.
[36] Public Counsel's witness on the remaining issue is Geoff Marke.

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~~*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?*~~

~~*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?

As Public Counsel advocated in its initial and responsive briefs, because of the unprecedented turmoil in the economy caused by the COVID-19 national emergency, which is impacting residential customers in ways they cannot evade and from which it will be difficult if not impossible for them to recover, 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 the rates of all of the other customer classes should 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.

REVENUE REQUIREMENT CHANGE RATE CLASS ALLOCATION REPLY ARGUMENT

With regard to the MECG's arguments about shifting any immediate overall rate increases to increase residential customers rates above the overall average, or shifting any immediate overall rate decrease to decrease residential customers' rates less than the overall average, Public Counsel emphasizes the following:

1) Because of the extent of estimated billings in the data used in the class cost-of-service studies, they are unreliable;
2) Despite its apparent assertions to the contrary, MECG has agreed to an overall rate increase, albeit not immediate, with no immediate change in the rates of any customer class;

3) Like studying return on equity, performing class cost-of-service studies is as much art as science;

4) Class cost-of-service studies are only one factor the Commission should consider when designing rates—rate continuity, affordability, cost hurdles, impact on conservation, impact on efficiency, public desires, etc. are all appropriate factors the Commission may consider when designing rates.

In light of the recent stay-at-home orders and encouragement of physical distancing, including working at home due to the national emergency of the COVID-19 pandemic, Public Counsel reasonably anticipates that residential customer electricity usage has increased after the January 31, 2020, true-up cutoff date in this case, and that those customers, without choice, will be more adversely impacted with relatively higher utility bills than other customer classes, and recommends that, depending on the amount of the decrease, they get either all or the lion's share of any rate decrease the Commission orders in this case.

~~*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[37]

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

Public Counsel's position has not changed from its initial brief. Any allocation factors for affiliate transactions should be based on the costs and values of the goods or services provided and received.[38]

4. WNR and SRLE Adjustment Mechanisms[39]

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

[37] To the extent this is an issue related to affiliate transactions, Public Counsel's witness is Robert Schallenberg.
[38] Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, pp. 6-7, 17-19.
[39] Public Counsel's witnesses on these issues are Lena Mantle and Geoff Marke.

Public Counsel's position has not changed from its initial brief. 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.

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

Public Counsel's position has not changed from its initial brief. It is not lawful for the Commission to authorize a SRLE, either as proposed by Staff or Empire.

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?

Public Counsel's position has not changed from its initial brief. 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.

WNR AND SRLE REPLY ARGUMENT

The WNR and SRLE as proposed by both Empire and Staff, respectively, are unlawful and unwarranted. The Commission should promulgate rules for an application process for a recovery mechanism under Section 386.266.3 to fulfill the directive of subsection 13 of the same section.

Empire disputes Public Counsel's reading of the statute, by relying upon statutory language that an electric utility may "apply for any adjustment mechanism under" Section 386.266. Public Counsel does not disagree with the notion that Empire can apply for a WNR or SRLE.[40] However, Section 386.266 also 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 mechanism," which includes the subsection 3 relied upon for a WNR or SRLE.[41] Empire does not address how this provision is satisfied, but rather asks the Commission to ignore it by turning to other statutory language such as subsection 10 and 3 of Section 386.266; neither of which say that subsection 13 does not apply.

Empire also claims that its past earnings are irrelevant to considering whether the current WNR or SRLE is currently designed to provide Empire with a sufficient opportunity to earn a fair return.[42] Empire misses the point of Public Counsel's objections. Public Counsel's contention is that there is little justification for a recovery mechanism when Empire has no recovery deficiencies. Public Counsel raises this point because Section 386.266 casts the contested recovery mechanism as being the result of an "application"; meaning that Empire must apply and demonstrate that its requested secured recovery is warranted. A recovery mechanism under Section 386.266.3 is not an entitlement, but a tool that should only be used when necessary. Empire has not shown that necessity.

[40] Empire responsive brief, p. 24.
[41] § 386.266.13, RSMo (Emphasis added).
[42] Empire responsive brief, p. 25.

Staff responds to Public Counsel's legal and technical arguments against the SRLE by claiming that the Commission need not adopt any rules under subsection 13 of section 386.266 because Public Counsel agreed to a similar recovery mechanism in the previous Ameren Missouri Gas rate case.[43] Likewise, Staff's responsive brief also defends its admitted "broad interpretation" of conservation because Public Counsel agreed to the same assumptions for Ameren Missouri Gas.[44] The Ameren Missouri Gas rate case was resolved by a global stipulation, which Public Counsel signed onto because of considerations and benefits ancillary and incidental to the recovery mechanism therein. Public Counsel in no way relented to future mechanisms, as Staff implies, and, in fact, the stipulation Public Counsel and Staff agreed to states that the signatories, including Public Counsel, "shall not be prejudiced, bound by, or in any way affected by the terms" of said agreement in a future proceeding or have otherwise relented to any ratemaking methodology.[45] Staff's use of that agreement against Public Counsel is counter to the very terms of that agreement.

The MECG defends the use of a WNR or SRLE by presenting the novel argument that it somehow addresses the supposed "residential subsidy."[46] This is a *non-sequitur*. Section 386.266 does not in anyway, either by text or inference, indicate that the recovery mechanism contemplated by subsection 3 of the aforementioned statutory section resolves any kind of "residential subsidy." The MECG is conflating issues.

[43] Staff responsive brief, pp. 15-16.
[44] *Id*. at 16.
[45] First Amended Nonunanimous Stipulation and Agreement.
[46] MECG responsive brief, p. 22.

5. FAC[47]

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?

Public Counsel's position has not changed from its Initial Brief. 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's customers and 15% to Empire.

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

c. What is the appropriate base factor?

Public Counsel's position has not changed from its Initial Brief. The base factor is a price per energy value derived from the NBEC. The NBEC or base factor the signatories to the stipulation offer the Commission does not accurately reflect Empire's fuel and purchased power costs.

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

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

Public Counsel's position has not changed from its initial brief. The nature of 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

[47] Public Counsel's witness on this issue is Lena M. Mantle.

short-term capacity costs as described in Public Counsel's positions to the more specific issues below.

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?~~

Public Counsel's position has not changed from its initial brief. When the purchased power contract Empire entered into with the Missouri Joint Municipal Electric Utilities Commission ("MJMEUC") 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.[48] Empire's contract with MJMEUC is not a full or partial requirement sales contract, and should not be treated as such.

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

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

Public Counsel's position has not changed from that its Initial Brief. Empire's short-term capacity costs should be excluded from flowing through Empire's FAC.[49]

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

[48] *See* Ex. 203NP, Public Counsel witness Lena Mantle, direct testimony, pp. 16-18.
[49] Id. at 20.

FAC 85/15, 5.a.

Empire's defense of a 95/5 sharing mechanism rely more upon expecting Public Counsel to prove a case rather that supporting Empire's burden as the applicant. Empire's responsive brief merely repeats the contention that Empire will be exposed to more risk under an 85/15 sharing.[50] This is technically true, since 15 is a bigger number than 5, but that does not invalidate the value of an 85/15 sharing. Empire is not entitled to exist with no risk, and the entire point of an incentive mechanism is to incent prudent behavior in the face if risk. Empire also disputes the timing as to when it abandoned its previous gas hedging strategy, but that defense involves the inconsistency of defending both an old hedging policy and the decision to stop hedging as prudent.[51] Which is it? Was the nearly $100 million loss in gas hedging just a course of business, or was it something that could have been avoided by stopping that particular hedging practice? Public Counsel submits that the answer is the latter, and that future losses can be avoided by providing more incentive through an 85/15 sharing.

Staff's responsive pleading claims that the "only evidence" OPC presented for the 85/15 sharing is Empire's failed gas hedging program.[52] Staff's ignores the numerical reality of fifteen being a bigger number than five. Of course the prospect of securing three times as many gains from decreasing fuel costs should incent behavior more than the 95/5 sharing.

Staff also believes that the FAC prudency reviews are good enough to incent prudent utility behavior, and that losing the FAC is the Commission's "most drastic carrot"[53] that it can employ

[50] Empire responsive brief, p. 27.
[51] Empire responsive brief, pp. 28-29.
[52] Staff responsive brief, p. 21.
[53] Public Counsel suspects that Staff meant to refer to a "stick" instead of a "carrot."

to induce customer savings.[54] Staff's belief is misguided, as this Commission has advised that prudence reviews alone are insufficient to ensure that only prudent fuel costs pass through a FAC.[55] Staff's point that the Commission could simply disallow a FAC as an incentive seems insincere given that the Commission has never declined to authorize a utility to use a FAC once having first authorized its use. Staff has not made such a recommendation in response to any utility behavior in recent years, and Staff's reaction to Empire's WNR is to not recommend it solely be rejected, but, instead, to concoct a new mechanism.

Regardless, Staff accuses Public Counsel of "shoehorning" the plant-in-service accounting (PISA) statute into the FAC statute to justify an 85/15[56] sharing. Staff employs several canons of statutory construction, and argues that Public Counsel has invalidly attempted to argue that the PISA statute controls over the FAC statute. That is not Public Counsel's argument. Staff miscasts Public Counsel's mere suggestion that the PISA statute provides a sharing ratio that has some basis of objective guidance. The PISA statute is the latest substantiation of what sharing percentage the Missouri's body politic endorses, and so Public Counsel believes it can serve as a good starting point for determining the sharing mechanism in a FAC. On the other hand, the 95/5 sharing has no objective basis. There is nothing in the record to support a 95/5 sharing as a sufficient incentive mechanism as opposed to a 94/6 or 90/10 sharing. Staff's reading of the 2008 Commission *Report and Order* also ignores that the 95/5 value was selected in that case despite no party to the progenitor case adducing evidence intended to support those sharing values. This is what Public Counsel refers to as "out of whole cloth" in its initial brief.[57] The 95/5 sharing value was then a

[54] Staff responsive brief, p. 22.
[55] *Report and Order*, Case No. ER-2008-0318, p. 72.
[56] Staff responsive brief, pp. 24-25.
[57] Public Counsel's initial brief, p. 34.

Commission compromise, and it need not be the final word on incenting efficient utility behavior with regard to fuel and purchased power costs and revenues.

Base Factor, 5.c.

Public Counsel continues to advocate that the Commission should order its Staff to calculate a proper base factor for Empire's FAC by treating Asbury as no longer operating, which it most assuredly is not. Empire complains that Public Counsel's opposition to the Stipulation's base factor involves "far-reaching and brazen allegations," and yet Empire does nothing to dispute Public Counsel's central point that Empire's supported base factor inaccurately presumes that Asbury is operational and operating.[58] The most glaring technical issue is that the base factor offered by the stipulation and agreement assumes that a major baseload generating plant is still producing revenues and still consuming fuel.[59]

Staff admonishes Public Counsel for not providing its own calculated base factor.[60] The base factor is not a simple calculation. To run a fuel model, Staff utilizes an engineer to run the model, an engineer to determine market prices, an economist to estimate normalized load, another economist to estimate the normal weather for the load, an auditor to determine fuel prices, and other auditors to determine appropriate transmission costs and other FAC costs. There are more Staff technical experts used to determine the FAC base than all of the technical experts that are employed by Public Counsel. Staff's investment in this work is appropriate and necessary because of the importance of setting accurate FAC base factors. Public Counsel's inability to produce a base factor should not override a glaring error such as including a plant that is no longer operating.

[58] Empire Brief p. 30.
[59] Lena testimony
[60] Staff brief p. 25.

Staff's support for the stipulation and agreement's base factor is particularly dubious given that Staff simultaneously claims that there is no agreement to the date Empire retired Asbury.[61] If there is no agreed upon retirement date, why is Empire claiming that that there should be "no dispute" that the retirement date is March 1, 2020?[62] Why is Staff reserving its right to contest the retirement date, while also determining its recommended FAC base using a March 1, 2020 retirement date, agreeing to not flow Asbury-related costs through Empire's FAC starting January 1, 2020, and starting an AAO as if Asbury ceased operating on January 1, 2020?[63] Public Counsel asks these hypotheticals to highlight the irrationality of treating Asbury as if it is operating for setting fuel rates going forward, and the inconsistency of maintaining that a party may litigate the retirement date in a future proceeding despite setting a FAC base factor as if a generating plant has not ceased operating.

6. Credit Card Fees[64]

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

Public Counsel's position has not changed from its initial brief. No. Empire should not be allowed to add the credit card convenience fee to its 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.

[61] Staff brief p. 25.
[62] Reply in Support of Objections to Offers of Evidence, ER-2019-0374.
[63] Staff's Initial Post-Hearing Brief, p. 81.
[64] Public Counsel's witness on this issue is Amanda Conner.

7. Rate case Expense [65]

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

Public Counsel's position has not changed from its initial brief. 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.[66] 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?

Public Counsel's position has not changed from its initial brief. 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.[67]

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

Public Counsel's position has not changed from its initial brief. Recognizing that both the utilities and their customers benefit by matching prospective rates with what it takes for the utility

[65] Public Counsel's witness on these issues is Amanda Conner.
[66] Ex. 101, Staff's Cost of Service Report, Staff Witness Angela Niemeier, p. 73, ll. 11-15.
[67] Ex. 200, Public Counsel witness Amanda Conner, direct testimony, p. 6, ll. 1-2.

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.[68] 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[69]

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

Public Counsel does not agree that its adjustment should be reduced by $904.32 for the Bermuda trip, as Empire has not shown that it did not include that cost in its cost-of-service. Public Counsel's position has not changed from its initial brief. 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 less $904.32 = $3,020,892. Public Counsel's total test year disallowance of $3,707,884 is recorded in account 923 for the test year.[70] 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 in Staff's case after true-up is $3,707,884.

[68] Ex. 200, Public Counsel witness Amanda Conner, direct testimony, p. 4, ll. 1-10.
[69] Public Counsel's witness on this issue is Amanda Conner.
[70] Ex. 202, Public Counsel witness Amanda Conner, surrebuttal & true-up direct testimony, Sch. ACC-S-1.

MANAGEMENT EXPENSE REPLY ARGUMENT

LUSC employee expenses

In her testimony responding to Public Counsel witness Amanda Conner's testimony answering Commissioner questions on management expense, Empire witness Sheri Richard charges that "[Ms. Conner's] justification for her recommendation to disallow the cost is misleading at best," because Empire responded Public Counsel data request OPC 1214 (See Ex. 299-5, Response to OPC DR 1214) asked, "Provide the total amount of the expenses of each and every Liberty Utilities Service Corp. employee who has any expense charged to any expense or asset account of **The Empire District Electric Company**." This assertion has no merit. The question itself limits the expenses to be provided to the persons for whom Empire incurred expenses. On its face it asks for all of the expenses of those individuals, not just those charged to Empire. In any event, as Ms. Conner testified,

> There has been no documentation provided that the meetings or training were caused by Empire, let alone needed by Empire to serve its Missouri retail electric ratepayers. Empire did not provide enough information regarding any of these charges. The information provided was the officer's expenses, with little to no description other than for a meeting or training. They did not state what these meetings or trainings were for, nor were there good invoices to match with these charges.

Foreign trips

On pages 7 and 8 of her testimony responding to Public Counsel witness Amanda Conner's testimony answering Commissioner questions (Ex. 1018) about expenses for trips to Bermuda, Australia, London and Peru, Ms. Richard, based on the following language, asserts the charges of

$904.32 for the Bermuda trip were not included in Empire's cost-of-service, pointing to the following language: "The Company's response to this data request stated that 'it should be noted the receipts included on David Pasieka's expense reports that relate to Bermuda are not allocated through the indirect invoice and have been direct charged to that project.'" Then she testifies, "Said another way, these [Bermuda trip] costs were never allocated to Empire and were not included in its cost of service."

Public Counsel disallowed management expenses, including foreign travel in its direct filing, putting the issue of travel to Bermuda at issue then. Not until the last opportunity to file testimony does Empire claim it did not include this $904 expense in its cost-of-service, quoting from a data request response without even identifying who requested the data or in which request it was made. Immediately before filing this brief, Public Counsel found this disclaimer and does not dispute that Empire has not included the $904 Bermuda trip expense in its cost-of-service. Public Counsel concedes that its adjustment reducing Empire's cost-of-service by $904 for the Bermuda trip should not be made. However, Public Counsel's adjustments to remove the expenses of the Australian, and London and Peru trips of $268.77 and $2,268.09, respectively, are still appropriate.

APUC officer expenses

On page 8 at lines 10-11 of her testimony responding to Public Counsel witness Amanda Conner's testimony answering Commissioner questions (Ex. 1018) Ms. Richard states, "The Company fully answered the data request," referring to Public Counsel's data request no. 1214. Empire's responses to that request are in Exhibit 299-6, with Public Counsel's request, which, for convenience, follows:

> Please provide a complete copy of each and every expense report document (including all attachments and all other documentation) that each and every

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Algonquin Power & Utilities Corp. officer submitted with a request for reimbursement where the expense was charged to an expense or asset account of The Empire District Electric Company for the period of April 1, 2018, through the end of the true-up period in this case (January 31, 2020, unless otherwise ordered).

a) Please make sure the data provided include the following:

• Expense Date
• Transaction Date
• Officer
• Type of charge
• Vendor and location of charge
• Amount of charge
• MO Allocation
• Account Number
• Company charged to
• Notes/description of the reason for the charge

b) Include the actual expense reports submitted, the approval documents, dates, accounts charged, business purpose of the expense, and expense receipts if required by policy to be included with expense reports submitted for approval, as well as identify by name, title and employer, who approved the expense.

As the Commission can see by reviewing Ex. 299-6, Empire did not provide anywhere near the level of detail that Public Counsel requested. With very few receipts and little or no detail, Ms. Conner relied on and audited the officer expense data Empire provided.

9. Allowance for Funds Used During Construction[71]

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

Public Counsel's position has not changed from its initial brief. The Commission should order Empire to apply a cost of short-term debt to 100% of the construction work in progress ("CWIP") balances to determine the amount of allowance for funds used during construction ("AFUDC") to allow in rate base.

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?*[72]

Public Counsel's position has not changed from its initial brief. Yes. 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—violating the Commission's affiliate transactions rule 20 CSR 4240-20.015, and was contrary to the affiliated services agreement cost allocation manual for transactions between Empire and LUCo.[73]

[71] Public Counsel's witness on this issue is David Murray.
[72] Public Counsel included this issue in the issues that Public Counsel provided to Staff, and the other parties, on Friday, April 3, 2020, to include in the list of issues, but Staff omitted it in the joint issues list that it filed on April 8, 2020.
[73] Ex. 220NP, Public Counsel witness Robert Schallenberg, direct testimony, Sch. 16 (LUCo ASA); Ex. 221 (APUC CAM).

10. Cash Working Capital[74]

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

Public Counsel's position has not changed from its initial brief. 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 Empire's lack of income tax liability. This will reduce Empire's CWC by $14,002,453

~~*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?*~~

CASH WORKING CAPITAL REPLY ARGUMENT

In its responsive brief Empire, based on testimony of Sheri Richard, claims it made quarterly tax payments totaling $8.9 million for tax year 2018. Ex. 281HC refutes that claim. Adding lines 3 (total tax) and 5 (overpayment) of page one of Liberty Utilities (America) Co & Subs Form 8879-C (p. 3 of 778 of Ex. 281HC) reveals that the payments must not have totaled more than $ *** __ *** million. Further review of Ex. 281HC indicates that Liberty Utilities (America) Co & Subs *** _____ *** Global Low Tax Intangible Income ("GILTI") tax, but did *** ___ *** Base-Erosion Anti-12 Abuse Tax ("BEAT").[75] GILTI and BEAT are both

[74] Public Counsel's witness on this issue is John Riley.
[75] *** _____ ***

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explained in a University of Florida Law Faculty Publication by Mindy Herzfeld.[76] There she describes that GILTI is designed to tax profits earned outside the U.S. that are over a determined amount, and BEAT is designed to tax deductible payments to related parties located outside the U.S. In any event, Liberty Utilities (America) Co & Subs overpaid their federal income tax liability for 2018 of $ ***_____ *** by about $ ***_____ ***, so no more than $ ***_____ ***, and some amount substantially less, could properly be attributed to Empire.[77] In other words, Empire's federal income tax liability cannot be more than that of Liberty Utilities (America) Co & Subs, which was $ ***_____ *** in 2018, and $ ***_____ *** in 2017.[78]

Regardless of the foregoing, because cash working capital is about cash flows, the hypothetical income tax expense included in Empire's cost of service for setting its prospective rates should not be included in the calculation of Empire's cash working capital for purposes of setting Empire's rates, nor should any more than the part of Liberty Utilities (America) Co & Subs actual federal income tax liability attributable to Empire be included in it.

11. Accumulated Deferred Income Tax[79]

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

Public Counsel's position has not changed from its initial brief. No. Empire's proposed accumulated deferred income tax ("ADIT") reduction of $2,621,928 by an accounting 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 specific NOL

[76] https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1892&context=facultypub.
[77] Statement 272 (p. 750 of 778 of Ex. 281HC) shows two entities and two groups of entities for whom the BEAT tax is calculated for the federal income tax return of Liberty Utilities (America) Co & Subs as shown by Part I of Form 8991 on p. 164 of 778 of Ex. 281HC.
[78] Ex. 280HC, p. 3 of 1108; p. 1, line 3 of Form 8879-C.
[79] Public Counsel's witness on this issue is John Riley.

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[80]

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?

As Public Counsel advocated in its initial brief, 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. 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[81]

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

[80] Public Counsel's witness on this issue is John Riley.
[81] Public Counsel's witnesses on these issues are John Robinett and Geoff Marke.

Public Counsel's position has not changed from its initial brief. It is not lawful to require Empire's customers to pay for Asbury costs through new rate.

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

Public Counsel's position has not changed from its initial brief—"No."

c. If it is unlawful and/or unreasonable to include the costs of the retired Asbury plant in rates, what amount should be removed from Empire's cost of service?

Public Counsel's position has not changed from its initial brief. The Commission should remove, at a minimum, the depreciation expense and operations and maintenance (O&M) expense from Empire's cost of service and rate base. Both categories amount to $11,179,375 for depreciation expense based on Staff's true up accounting schedules,[82] and between **_____ _____ _** for O&M expense.[83] The Asbury station should be removed from plant-in-service and accumulated depreciation reserves, and set to zero.

ASBURY REPLY ARGUMENT

Rather than restating its arguments regarding Asbury presented in its initial and responsive briefs in response to Empire's and Staff's responsive briefs, Public Counsel is presenting a different perspective on evidence in this case than it did before. The facts, all sourced from Empire, are not the dispute, the extent to which the Commission may consider them and their significance are both hotly contested.

[82] Ex. 124, Staff True Up Accounting Schedules, ER-2019-0374 Schedule 05 p. 1 ln 8-15 (Mar. 27, 2020).
[83] Ex. 219C, Public Counsel witness John Robinett, surrebuttal/true-up direct testimony, p. 4.

In Staff witness Charles T. Poston's supplemental testimony that Staff filed on May 6, 2020,[84] he includes information from Empire regarding events relating to Asbury and when they occurred.[85] Schedule CTP sup-3 attached to that testimony is a February 20, 2020, Empire internal memorandum Empire has designated confidential that gives a timeline of Empire's efforts to procure fuel for Asbury after Empire consumed all of its usable coal inventory at the Asbury site on December 12, 2019.[86]

Schedule CTP sup-3 and exhibit 275C, as well as other evidence in the case, show that Empire had no coal inventory at Asbury as of the morning of December 12, 2019, and continuing thereafter. Empire reduced its coal inventory at Asbury to zero fifty days before the end of the true-up period in this case. The evidence—see e.g. Ex. 263 Sch. CTP sup-3—shows that Empire not only did not obtain more coal for Asbury, it did not intend to obtain any more than a transitory supply that it could economically burn by March 1, 2020. For purposes of setting rates in this case Empire's Asbury fuel inventory burn days must be zero.

Further, since Empire's fuel inventory burn days at Asbury is zero, Asbury cannot generate electricity. Without generating electricity Asbury cannot be used for providing electricity service to Empire's customers, and it would be unlawful and unreasonable for the Commission to treat Asbury as if it were an operating generating unit for purposes of setting prospective rates in this case; therefore, Empire's cost of service in this case, as to Asbury, must not include Asbury as an

[84] Ex. 163C.

[85] Empire provided the memorandum that is Schedule CTP sup-3 to Public Counsel on April 11, 2020, in response to OPC data request 8523 Public Counsel issued to Empire on March 26, 2020: "Please refer to the Monthly Fuel Reports submitted by Empire per 20 CSR 4240 3.190, and provide a detailed description of all the efforts that Empire made to purchase "economic coal" for Asbury for the period December 13, 2019, through February 29, 2020." See Ex. 299-18C, Public Counsel witness John Robinett, reply to testimony responding to commission questions, p. 6: "Public Counsel received Empire's response on April 11, 2020, after direct, rebuttal, and surrebuttal/true-up direct testimony were filed, and just 3 days prior to the original hearing was to start."

[86] The memorandum has the date of December 11, 2019, for when Asbury ran out of burnable coal inventory, but the Asbury Shift Supervisor Log shows the date to be December 12, 2019. See Ex. 275C. Of the two, Public Counsel views the log of personnel on site when Asbury finally shut down to be more accurate.

available generating unit in the fuel runs used to determine Empire's future fuel costs, Empire's historical operating and maintenance costs for Asbury, or recovery of Empire's investment in Asbury.

14. Fuel Inventories[87]

a. What is the appropriate number of burn days to use for Asbury fuel inventory?

Public Counsel's position has not changed from its initial brief. Zero. By December 12, 2019, Empire had no usable coal inventory remaining at Asbury,[88] and Empire had no intention of generating electricity from its 200 MW coal-fired generator at Asbury after that date, submitting Asbury into the SPP market as being in outage for lack of fuel[89] until it officially retired Asbury on March 1, 2020.[90]

FUEL INVENTORIES REPLY ARGUMENT

See Public Counsel's reply argument immediately above for Asbury. As Public Counsel points out there, as it did in some detail in its responsive brief, not only did Empire run out of coal inventory for Asbury on December 12, 2019, it never intended to replenish that inventory to run Asbury after March 1, 2020, and never did replenish it at all.

~~**15. Energy Efficiency.**~~

[87] Public Counsel's witness on this issue is Robert Schallenberg.
[88] Ex. 219C, Public Counsel witness John Robinett, surrebuttal/true-up direct testimony, Schs. JAR-S-1C and JAR-S-2C; and Exs. 261C, February 2020 Fuel Report submitted by Empire on 03-31-2020 BEGR-2020-1067, and 262C, Electric Net Fuel and Purchased Power Report submitted by Empire on 03-31-2020 BFMR-2020-1070.
[89] Ex. 263, Empire response to MPSC DR 333.
[90] Ex. 20, Empire witness Aaron Doll, rebuttal testimony, p. 2.

16. Operation and Maintenance Normalization[91]

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?*~~

Public Counsel's position has not changed from its initial brief. No amount should be included for Asbury operation and maintenance expense because Asbury is not operating or being maintained, and it has not operated since December 12, 2019.

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

18. Affiliate Transactions[92]

Public Counsel's position has not changed from its initial brief. As Public Counsel briefed there, the Missouri Supreme Court's holding in *Office of the Public Counsel v. Mo.PSC*, 409 S.W.3d 371 (Mo. banc 2013), is binding on the Commission; therefore, because there is no evidence that Empire's $100 million annually of transactions with its affiliates were prudent, the Commission cannot include them in Empire's cost-of-service that it uses for setting rates in this case. Empire's reliance on the Commission-created presumption of prudence in its initial brief is misplaced and to no avail.

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

[91] Public Counsel's witness on this issue is John Robinett to the extent it involves Asbury expenses.
[92] Public Counsel's witness on this issue is Robert Schallenberg.

Public Counsel's position has not changed from that it argued in its initial brief. Empire's June 1, 2018, refinancing of its $90 million first mortgage bonds by executing a 15-year $90 million unsecured promissory note with it affiliate LUCo is imprudent, but Public Counsel has not seen sufficient evidence to opine as to the prudency of Empire's other affiliate transactions.

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

Public Counsel's position has not changed from its initial brief; they do not.

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

Public Counsel's position has not changed from its initial brief. None, but based on Empire's 2018 and 2019 affiliate transactions reports,[93] Empire has about $100 million of transactions with its affiliates annually.

AFFILIATE TRANSACTIONS REPLY ARGUMENT

Affiliate transactions (Issue 18, in particular, but also the other issues where affiliate transactions are implicated, for which Public Counsel has identified Issues 3, 38, 40, and 43)

Both Staff's and Empire's positions in their initial and response briefs are predicated on their views that Empire's transactions with its affiliates are presumed to be prudent, unless and until someone shows that they are not. Although Public Counsel's assertion that Empire has $100 million annually in affiliate transactions is based on Empire's own representations in its 2018 and 2019 affiliate transactions reports—Ex. 220C, Public Counsel witness Schallenberg, direct

[93] Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, Sch. RES-D-6 C (Empire's 2018 affiliate transactions report); Ex. 229 (Empire's 2019 affiliate transactions report).

testimony, Sch. RES-D-6C; and Ex. 229C, Empire's 2019 Affiliate Transactions Report—Empire claims in its briefs that it cannot respond because Public Counsel has not identified specific transactions.

While, as Public Counsel has shown in its initial and response briefs, it does not have the burden of identifying discrete affiliate transactions or showing that they are imprudent, Public Counsel has shown, as stated in its earlier briefs and above, that Empire has identified in 2018 and 2019 that it engaged in approximately $100 million of transactions with its affiliates in each of those years[94] and, as to Empire's transactions with its affiliate LUCo surrounding Empire's refinancing of its first mortgage bonds in 2018, it has demonstrated, as even Staff admits in its responsive brief,[95] Empire's retail customers should not bear the differential in cost of the 15-year promissory note over the terms by which LUCo funded that note, or for Empire's payment LUCo of an origination fee for that refinancing which LUCo did not incur.[96]

Empire's transactions with LUCo in refinancing its $90 million of first mortgage bonds is an example of affiliate abuse. There, the benefits of using short-term borrowing were diverted from Empire, and its customers, to Empire's affiliate LUCo. By doing so, LUCo intended that APUC's shareholders not only to reap the benefit of the differential between what LUCo paid and pays for the funds it used to fund the long-term note with Empire and what it receives from Empire for that note. LUo also intended that they reap even more than all of the benefits of the difference between the lower cost short-term debt available to Empire through commercial paper and the interest rate of LUCo's line-of-credit.[97]

[94] Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, Sch. RES-D-6C, p. 9 (2018), and Ex. 229C, Empire's 2019 Affiliate Transactions Report, p. 2.
[95] Staff's responsive brief, pp. 48-53.
[96] See Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, pp. 10-17.
[97] Case No. AO-2018-0179, *Report and Order*, ¶ 16, findings of fact, and Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, pp. 10-17.

Empire knew that it was not engaging in competitive bidding for its affiliate transactions from the first day Algonquin acquired it.[98] On January 1, 2017, Empire implemented its shared services model,[99] and it executed four contacts dated January 1, 2017, with its new Algonquin affiliates, predicated on those affiliates providing goods and services to Empire and Empire accepting them.[100] At that time Empire did not need any goods or services from those affiliates[101]; it had been operating for over a century without them.[102]

Staff lists in its brief economies of scale as bases for why Empire's transactions with its affiliates are prudent.[103] Public Counsel does not dispute that economies of scale can be realized, but Staff's argument misses Public Counsel's point. No one has shown that Empire has realized economy-of-scale benefits through transactions with its affiliates that it could not have realized otherwise—for example, by sourcing from independent third-party providers those services it is obtaining from its affiliates. Both this Commission and the Missouri Supreme Court have recognized that the common control of affiliated buyers and sellers impairs their abilities to act independently in their own self-interests when they transact with each other, and that these transactions between affiliates need controls to address that lack of self-interest, not encouragement that such transactions occur.[104]

[98] See Ex. 299-3, Empire response to OPC DR 1041, and Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, Sch. RES-D-5 (Empire's response to OPC data request 1075).
[99] Ex. 290, Empire response to OPC DR 1029.
[100] Ex 299-3, Empire response to OPC DR 1041.
[101] Ex. 290, Empire response to OPC DR 1029, and Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, pp. 4-5.
[102] Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, pp. 4-5, and Ex. 25, Empire witness Jill Schwartz, rebuttal testimony, p. 5.
[103] Staff's responsive brief, pp. 46-47.
[104] Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, Sch. RES-D-4 for Commission opinions, especially for the Commission's rejection of the economics of scale argument in ¶ 12 on pp 1-2 that Staff is making here.

It is Empire's burden to show that its transactions with its affiliates are prudent, and testimony that some of Empire's costs have declined since Empire began using shared services from its affiliates is insufficient. Such testimony is really no different than Mr. Timpe's testimony that Empire's long-term financing costs are lower because it refinanced its first mortgage bonds at a better rate and cost than had it done so with a third party, because of how it refinanced them with LUCo.[105] Even Staff finally agrees that is not the case.[106]

Further, Staff witness Mark Oligschlaeger's view of three primary categories of affiliate transactions[107] flies in the face of common sense, and is inherently inconsistent. He testifies,

> Q. Should all three types of affiliate transactions present the same level of regulatory concern?
>
> A. No. Generally speaking, regulated – nonregulated transactions present more serious regulatory concerns than either regulated – regulated or regulated – service company transactions.

In Empire's case its service company affiliate—Liberty Utilities Service Corp.—is an unregulated affiliate. Mr. Oligschlaeger's logic that because the nonregulated affiliate is a service company it reduces the concern from that of other transactions between regulated and unregulated entities is irrational. The concern about transactions between affiliates remains the same regardless of whether both affiliates are regulated or not—they are not arms-length.

Mr. Oligschlaeger's three primary categories of affiliate transactions are also not found in any of the Commission's affiliate transactions rules, and is an indication that Staff is not trying to

[105] Ex. 43C, Empire witness Mark Timpe, rebuttal testimony.
[106] Staff responsive brief, pp. 48-53.
[107] Ex. 114, Staff witness Mark Oligschlaeger, rebuttal testimony, p. 5.

enforce those rules.[108] In his testimony Mr. Oligschlaeger admits Staff is not enforcing the Commission's affiliate transactions rules as it waits in anticipation of the Commission to change them and to approve the cost allocation manuals to which Staff, and Empire and its affiliates agree.[109]

While there may be evidence that some of Empire's costs have declined since affiliates began providing services or goods associated with those costs, that, in and of itself, is insufficient to establish that those affiliate costs are prudent. There is evidence that some of Empire's costs in areas such as interest expense, financing fees, and credit rating agency costs have increased.[110]

The affiliate transactions issues in this case is the product of years of non-compliance without any effective enforcement. This case is an opportunity for the Commission to reverse that circumstance.

~~**19. Riverton 12 O&M Tracker**~~
~~**20. Software Maintenance Expense**~~
~~**21. Advertising Expense**~~
22. Customer Service[111]

a. Is Empire providing satisfactory customer service?

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

Public Counsel's position has not changed from its initial brief. Empire's customer service in unacceptable, and the Commission should find it so unacceptable that it explicitly reduces the return on equity the Commission would otherwise allow Empire by 60 basis-points.

~~*b. Is Empire providing reliable service?*~~

[108] Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, Sch. RES-D-2
[109] Ex. 114, Staff witness Mark Oligschlaeger, rebuttal testimony, pp. 10-11.
[110] Ex. 299-1, Empire response to OPC DR 1039, and Ex. 299-2, Empire response to OPC DR 1040.
[111] Public Counsel's witness on this issue is Geoff Marke.

~~*i. If not, what should the Commission do?*~~

CUSTOMER SERVICE REPLY ARGUMENT

After three rounds of testimony and responses to Commission questions, in the very last round of testimony, through its witness Robin Kliethermes (Ex. 165, supplemental rebuttal testimony), Staff dumps into the record that Empire verbally has provided to Staff corrections to Empire's responses to data requests regarding the extent of its estimated billings. The duration and extent of Empire's estimated billings over 2017 to 2019 is one of the bases for Public Counsel's recommendation that the Commission explicitly reduce the return-on-equity it uses for determining Empire's rates in this case by 60 basis points. As Public Counsel related in its initial brief, at pages 68 to 72, Public Counsel also relies on customer testimony at the local public hearings and information from JD Power, S&P Global Market Intelligence, and EIA which show that when compared to other utilities Empire's customers' bills rank in the upper quartile, but the service they receive is in the bottom quartile. Public Counsel continues to recommend the Commission make an explicit 60 basis-point reduction to the return-on-equity it otherwise would use for determining Empire's rates in this case.

Although Public Counsel has pressed the extent and duration of Empire's estimated billings in this case, the first Public Counsel learned of Empire's apparently backtracking on its data request responses about estimated billings was on May 12, 2020, when Staff filed Ex. 165, Ms. Kliethermes supplemental rebuttal testimony. Ms. Richard's supplemental testimony (Ex. 1017) on estimated billing levels shows that, to the extent Empire's original data request answers on its estimated billings was wrong, Empire was sufficiently aware of the issue before it filed Ms.

Richard's testimony on May 6, 2020, that, according to Staff,[112] Ms. Richard testified inconsistently with those answers. This is but another example of Empire's lack of transparency in general, and the untrustworthiness of its reported data.

Like its estimated billing data revisions, with regard to Asbury, Empire has been less than forthcoming. It was not directly from Empire or in this case that Public Counsel first learned that Empire shut down Asbury on December 12, 2019, because it no longer had fuel for Asbury. Public Counsel learned no earlier than January 29, 2020, when Empire shut Asbury down from Empire's January 29, 2020, submissions for Empire's December 2019 monthly FAC and fuel reporting to the Commission that Empire made in EFIS.[113]

~~**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[114]

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

Public Counsel's position has not changed from its initial brief. See Public Counsel's positions on Issue 13 (Asbury) in its initial brief.

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

[112] Ex. 165, Staff witness Robin Kliethermes, supplemental rebuttal testimony, p. 2.
[113] See Ex. 219C, Public Counsel witness John Robinett, surrebuttal/direct true-up testimony, Schs. JAR-S-1C and JAR-S-2C.
[114] Public Counsel's witness on this issue is John Robinett, but only as to Asbury.

~~*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**~~

33. Retail Revenue[115]

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?*

Public Counsel's position has not changed from its initial brief. See Public Counsel's positions in its Initial Brief on Issue 13 (Asbury) for all subparts.

~~**34. Other Revenue**~~
35. Tax Cut and Job Acts Revenue[116]

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?*

Public Counsel's position has not changed from its initial brief.

[115] Public Counsel's witnesses on this issue are Geoff Marke and John Robinett, but only as to Asbury impacts.
[116] Public Counsel's witness on this issue is John Riley.

~~**36. Property Insurance**~~
~~**37. Injuries and Damages**~~
38. Payroll and Overtime[117]

a. What is the appropriate test year amount of payroll expense?

b. What is the appropriate test year amount for overtime expense?

Public Counsel's position has not changed from its initial brief. Both should be adjusted to disallow affiliate transactions.

~~**39. Retention Bonuses**~~
40. Employee Benefits[118]

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

Public Counsel's position has not changed from its initial brief. It should be adjusted to disallow affiliate transactions.

41. Property Taxes[119]

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

Public Counsel's position has not changed from its initial brief. See Public Counsel's positions in its initial brief on Issue 13 (Asbury)—property taxes for Asbury should not be included.

[117] Public Counsel's witness on this issue is Robert Schallenberg.
[118] Public Counsel's witness on this issue is Robert Schallenberg.
[119] Public Counsel's witnesses on this issue are John Robinett and Robert Schallenberg.

~~*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[120]

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

Public Counsel's position has not changed from its initial brief. It should not include affiliate transactions.

44. Common Property Removed from Plant and Accumulated Depreciation[121]

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

Public Counsel's position has not changed from its initial brief. The impacts of Asbury should be excluded.

~~**45. Retirement**~~

46. Case No. EM-2016-0213 Commission-ordered conditions[122]

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

Public Counsel's position has not changed from its Initial Brief; Empire has not complied with this condition.

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

[120] Public Counsel's witness on this issue is Robert Schallenberg.
[121] To the extent it involves Asbury, Public Counsel's witness on this issue is John Robinett.
[122] Public Counsel's witness on this issue is David Murray.

Public Counsel's position has not changed from its initial brief. 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?

Public Counsel's position has not changed from its initial brief; Empire has not complied with this condition, although Empire may have technically complied with the letter of this condition, it has not complied with the spirit of the condition.

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

Public Counsel's position has not changed from its initial brief. 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?

Public Counsel's position has not changed from its initial brief; Empire has not complied with this condition.

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

Public Counsel's position has not changed from its initial brief. 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?

Public Counsel's position has not changed from that it argued in its initial brief; Empire has not complied with this condition.

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

Public Counsel's position has not changed from its initial brief. 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.

CONDITION A.5. REPLY ARGUMENT

Summarized, Case No. EM-2013-0213 merger condition A5 is:

For ratemaking purposes, if Empire's per books capital structure varies from the entity(ies) upon which Empire relies for its financings, then Empire is required to adduce evidence which shows that Empire's per books capital structure is more economical than that of the entity(ies) upon which Empire relies for its financings.

By keeping LUCo's $395 million of debt off of its balance sheet, when LUCo is Empire's primary source of funds for its financial needs and it is LUCo who issues third-party debt through Liberty Utilities Finance GP1, Empire and its affiliates have made it appear that Empire and LUCo

have nearly identical capital structures. While Empire and its affiliates may have manipulated their per books common equity ratios to comply with the letter of the Commission-ordered condition, at a minimum, they have violated the spirit of that condition.

CONCLUSION

Because there is no evidence in this case that any of Empire's transactions with its affiliates were prudent—a showing that Empire had the burden to make—the Commission should not include $100 million of affiliate transactions costs in Empire's cost-of-service that it uses for setting rates in this case. Because Empire burned the last of its fuel inventory at Asbury forcing it to shut down for the final time on December 12, 2019, with the intention of not running Asbury after March 1, 2020, did not procure any fuel for Asbury after it shut Asbury down, Empire's fuel inventory at Asbury is zero. Asbury cannot run without fuel, with no fuel inventory it cannot operate to generate electricity; therefore, the Commission cannot include Empire's costs of running Asbury and investment in Asbury as if Asbury is still running for determining Empire's cost-of-service for setting rates in this case, an impact of $32.9 to $43.5 million, and it cannot include them in Empire's fuel base for purposes of its FAC base factor. Empire also needs neither a WNR nor SRLE, but the FAC incentive mechanism should be set at an 85/15 sharing ratio. Public Counsel's evidence of rate of return more closely aligns with how analysts actually evaluate investing in equity and debt supported by Empire's utility operations and, therefore, the Commission should adopt Public Counsel's recommended rate of return of 6.77% based on a return-on-equity of 9.25%, a cost of long-term debt of 4.65%, and a capital structure of 46% common equity and 54% long-term debt.

For all the foregoing reasons, the Commission should determine all of the Public Counsel's issues in favor of Public Counsel, and design new rates for Empire to collect about $160 million less annually than Empire's current rates are designed to collect.

Respectfully,

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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 18th day of May 2020.

/s/ Nathan Williams

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