

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

In the Matter of The Empire District )  
Electric Company of Joplin, Missouri for )  
Authority to File Tariffs Increasing Rates ) Case No. ER-2012-0345  
for Electric Service Provided to )  
Customers in the Missouri Service Area )  
of the Company.

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**STAFF'S POST-HEARING BRIEF**

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**Submitted By:**

**Sarah Kliethermes  
Senior Counsel  
Missouri Bar No. 60024**

**Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
(573) 751-6726 (Telephone)  
(573) 751-9285 (Fax)**

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Electric Company of Joplin, Missouri        )  
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Rates for Electric Service Provided to       )  
Customers in the Missouri Service            )  
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**File No. ER-2012-0345**

**STAFF’S INTIAL POST-HEARING BRIEF**

**COMES NOW** the Staff (“Staff”) of the Missouri Public Service Commission (“Commission”) and for its *Initial Post-Hearing Brief* states as follows:

**A. Summary and Introduction**

In Empire’s opening, the Commission was presented with a theory that the act of suspending Empire’s emergency interim rate schedules somehow transformed the applicable legal standard for emergency interim rates into a truncation of the “just and reasonable” standard.<sup>1</sup> As Empire would have it, under this standard the Commission would set emergency interim rates that are “just and reasonable”<sup>2</sup> but without consideration of all relevant factors. In fact, as Empire would have it, the Commission would not even fully consider the issues Empire has chosen to place before it.

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<sup>1</sup> Transcript V 2, P 25 L 20 – P 26 L 6.

<sup>2</sup> It would seem Empire may be basing its analysis in this case on the *Concurrence of Commissioner Jeff Davis to the “Order Further Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing,” and Dissent Regarding Procedure and Standard*, filed October 19, 2009 in Case No. ER-2010-0036. While in that concurrence/dissent Commissioner Davis did state his belief that the act of tariff suspension transitioned the applicable standard for interim rates from “financial emergency or near emergency,” to “just and reasonable,” two things are conspicuously absent from that concurrence/dissent. The first, is discussion of what factors Commissioner Davis would have found to be relevant, as application of the “just and reasonable” standard requires consideration of “all relevant factors.” The second is discussion from Commissioner Davis’ of what would constitute justness and reasonableness in light of the extraordinary relief requested. Regardless of whether the concurrence/dissent had included these items, the interpretation advanced by Commissioner Davis, and resurrected here by Empire, failed to sway the majority of the Commission.

On September 24, 2009, the Commission entered its *Order Suspending Interim Rate Tariff* in File No. ER-2010-0036, concerning Union Electric f/d/b/a AmerenUE's ("Ameren Missouri") then-pending request for an interim rate increase. In denying Ameren Missouri's interim rate request in its *Report and Order Regarding Interim Rates*, issued January 23, 2010, in Case No. ER-2010-0036, the Commission stated:

A utility does not need to be facing a dire emergency to justify an interim rate increase. The Commission would want to act to remedy the problem long before such a situation would arise. However, **the Commission will not act to short circuit the rate case review process by granting an interim rate increase unless the utility is facing extraordinary circumstances and there is a compelling reason to implement an interim rate increase.** [Emphasis added].

As addressed by the courts of this state, the applicable legal standard is that interim rates are allowable only:

where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity.<sup>3</sup>

Most recently, as set out above, the Commission has stated it would consider emergency interim rate relief where a utility "is facing extraordinary circumstances and there is a compelling reason to implement an interim rate increase."<sup>4</sup> In this instance, there is no showing – or even allegation - by Empire that it is *currently* facing extraordinary circumstances or that there is any compelling reason to implement an emergency interim rate increase.

As discussed below, the applicable question, regardless of the standard applied, is the following: "Is Empire facing circumstances that require an emergency interim

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<sup>3</sup> *State ex rel. Laclede Gas Co. v. Pub. Serv. Commission*, 535 S.W.2d 561, 568 - 569 (Mo. App. 1976).

<sup>4</sup> *Order Suspending Interim Rate Tariff* in File No. ER-2010-0036.

increase of rates in order to continue providing safe and adequate service to its customers?” Thankfully, the answer is “No.”

## **B. Legal Standard**

### **B.1. Staff position pursuant to Commission guidance on applicable standard.**

As articulated in the Commission’s *Order Further Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing*, entered October 7, 2009, in File No. ER-2010-0036,

[P]revious cases have clearly established the Commission’s authority to grant [interim rate increase] requests. In a 1976 case involving Laclede Gas Company, the Missouri Court of Appeals held “the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.”<sup>5</sup>

In that case, in denying Laclede’s request for an interim rate increase, the Commission indicated it would allow such requests only

where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility’s ability to render adequate service or render it unable to maintain its financial integrity.<sup>6</sup>

That standard has come to be known as the “emergency” standard and the Commission’s use of that standard was upheld by the court of appeals in the Laclede decision. The *Laclede* decision recognizes that the Commission acted within its discretion when it applied an “emergency” standard to deny Laclede’s request for an interim rate increase. That decision does not, however, establish the “emergency” standard as the only standard that the Commission may lawfully apply when exercising its discretion. In fact, the court explicitly recognized that in some future case an applicant could meet a standard defined by the Commission without any emergency.<sup>7</sup> Indeed, in other cases, the Commission has found that it has authority to grant interim rate increases on the basis of something other than an “emergency” standard. For example, in a 2008 order, the

<sup>5</sup> *State ex rel. Laclede Gas Co. v. Pub. Serv. Commission*, 535 S.W.2d 561, 567 (Mo. App. 1976).

<sup>6</sup> *State ex rel. Laclede Gas Co. v. Pub. Serv. Commission*, 535 S.W.2d 561, 568 - 569 (Mo. App. 1976).

<sup>7</sup> *State ex rel. Laclede Gas Co. v. Pub. Serv. Commission*, 535 S.W.2d 561, 574 (Mo. App. 1976).

Commission found it had the authority to grant an interim rate increase on a nonemergency basis where particular circumstances necessitate such relief on the basis of good cause shown by the requesting utility.<sup>8</sup>

**Although the Commission has claimed authority to grant interim rate increases on something less than an emergency basis, in practice, the “good cause shown” standard looks a lot like the “emergency” standard.** A good example is found in a 1997 case. In an order rejecting an interim rate increase tariff proposed by The Empire District Electric Company, the Commission concluded that it “may authorize the implementation of interim rates upon a showing of good cause, and such good cause may be less than an emergency or near-emergency.”<sup>9</sup> Despite that conclusion, the Commission rejected Empire’s request for an interim rate increase, finding:

There is no showing by the Company that its financial integrity will be threatened or that its ability to render safe and adequate service will be jeopardized if this request is not granted. Furthermore, the Company has shown no other exigent circumstances that would merit interim relief.

**Thus, the Commission applied a good cause standard, but still required the company to demonstrate an emergency or near emergency before it would be allowed an interim rate increase.**<sup>10</sup> [Emphasis added].

Ultimately, in denying Ameren Missouri’s interim rate request in its *Report and Order Regarding Interim Rates*, issued January 23, 2010, in Case No. ER-2010-0036, the Commission stated:

A utility does not need to be facing a dire emergency to justify an interim rate increase. The Commission would want to act to remedy the problem long before such a situation would arise. However, **the Commission will not act to short circuit the rate case review process by granting an interim rate increase unless the utility is facing extraordinary circumstances and there is a compelling reason to implement an interim rate increase.** [Emphasis added].

<sup>8</sup> *In the Matter of the Joint Application of Stoddard County Sewer Company, R.D. Sewer Co., LLC and the Staff of the Missouri Public Service Commission for an Order Authorizing Stoddard County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co., LLC and for an Interim Rate Increase*, Report and Order, Case No. SO-2008-0289, Page 117 (October 23, 2008).

<sup>9</sup> *In the Matter of The Empire District Electric Company’s Tariff Revision Designed to Increase Rates, on an Interim Basis and Subject to Refund, for Electric Service Provided to Customers in the Missouri Service Area of the Company*, Report and Order, 6 Mo P.S.C. 3d 17, 21 (1997).

<sup>10</sup> *Order Suspending Interim Rate Tariff* in File No. ER-2010-0036.

It is Staff's position that the award of interim rate relief is discretionary and the appropriate standard to apply to the exercise of that discretion is that it may only be exercised where a showing has been made that the rate of return being earned is so unreasonably low that it establishes a deteriorating financial condition which would impair the utility's ability to render adequate service or to maintain its financial integrity.<sup>11</sup>

**B.2. A rate cannot be “just and reasonable” unless “all relevant factors” have been considered.**

Since 1957 the Commission's setting of “just and reasonable” rates has been subject to the admonition of the Missouri Supreme Court that a rate cannot be determined to be “just and reasonable,” without consideration of “all relevant factors.” *In State ex rel Missouri Water Company v. Missouri Public Service Commission et al.*, 22 P.U.R.3d 254, 308 S.W.2d 704, the court stated:

The statute (§393.270, par. 4) says that the commission may consider all facts which in its judgment ‘have any bearing upon a proper determination of the question [of the prices to be charged for water], with due regard, among other things, to a reasonable average return upon capital actually expended, ‘ etc. ‘[D]ue regard’ to one factor, ‘among other things,’ simply requires consideration of that factor. It is not preclusive of other relevant factors. Indeed, the phrase ‘among other things’ clearly denotes that ‘proper determination’ of such charges is to be based upon *all* relevant factors. See *New York Teleph. Co. v. New York Pub. Service Commission* (1956) 309 NY 569, 12 PUR3d 399, 132 NE2d 847, 850.

Consequently, we must and do hold that in determining the price to be charged for (in this instance) water (§393.270, par. 4) the fair ‘value of the property’ of the water company which the commission is empowered to ascertain under §393.230, par. 1, is a relevant factor for consideration in the establishment of just and reasonable rate schedules and must be considered in its proper relationship to all other facts that have a material bearing upon the establishment of ‘fair and just’ rates as contemplated by our statutes and decisions. *Missouri ex rel. City of St. Joseph v. Missouri*

<sup>11</sup> *State ex rel. Laclede Gas Co. v. Pub. Serv. Commission*, 535 S.W.2d 561, 568 - 569 (Mo. App. 1976).

*Pub. Service Commission* (1930) 325 Mo 209, PUR1930E 337, 30 SW2d 8, 10; *Missouri ex rel. City of St. Louis v. Missouri Pub. Service Commission* (1930) 326 Mo 751, PUR1931B 448, 34 SW2d 507; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945) 324 US 581, 58 PUR NS 65, 89 L ed 1206, 65 S Ct 829.

As articulated in the oft-cited opinion in *State ex rel. Utility Consumers' Council of Missouri, Inc. et al v. Public Service Commission of Missouri et al*, (UCCM):

Even under the file and suspend method, by which a utility's rates may be increased without Requirement of a public hearing, the commission must of course consider all relevant factors including all operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended. See *State ex rel. Missouri Water Co. v. Public Service Comm'n*, 308 S.W.2d 704, 718-19, 720 (Mo.1957).<sup>12</sup>

While Empire, now, urges the Commission to use a "just and reasonable" standard to evaluate its emergency interim rate increase request, as discussed below, Empire did not present as part of the evidence supporting its request for an emergency interim rate increase even a *prima facie* case of its positions on other relevant factors, much less provide Staff and other parties with an opportunity to rebut and controvert that *prima facie* case. Absent consideration of all relevant factors, Empire's proffered legal standard is a request for unjustified single issue ratemaking.

As discussed below, Empire's current situation does not warrant an emergency interim-subject-to-refund rate increase under any previously discussed standard.<sup>13</sup> Further, while Staff urges the Commission to reject Empire's requested truncation of the just and reasonable standard, even under that standard, Empire is not entitled to relief.

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<sup>12</sup> *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission* 585 S.W.2d 41, 49 (Mo., 1979)

<sup>13</sup> Staff Exhibit 7, P 9 L 21-27.



## **C. Discussion**

### **C.1. Issue 1: Empire is not facing a financial emergency or near emergency.**

Empire is financially sound.<sup>14</sup> Further, Empire's revenues have not decreased significantly as a result of the tornado.<sup>15</sup> Finally, Empire's earnings are protected against its tornado-related investments and expenses by the Accounting Authority Order ("AAO") the Commission issued in File No. EU-2011-0387. To the extent Empire raises concerns with its financial integrity, revenues, or earnings, those doubts relate to events utterly unrelated to the May 22, 2011, tornado that devastated its Joplin-area service territory.

Staff's discussion of Empire's post-tornado revenues and the earnings protections of the AAO are contained in the section that follows, "Issue 2."

At hearing, Empire's Vice President and Chief Operating Officer, Kelly S. Walters, stated, "I would not say we're in an emergency financial situation right now."<sup>16</sup> Also, when asked about Empire's ability to provide safe and adequate service without receipt of an emergency rate increase, Ms. Walters stated that, "[w]ith what I know today, I believe we will provide safe and reliable service."<sup>17</sup> Thus, Empire is not "facing extraordinary circumstances" and there is no "compelling reason to implement an interim rate increase."<sup>18</sup>

At hearing, Empire's President and CEO, Brad P. Beecher testified that before the tornado struck Joplin on May 22, 2011, Empire's retained earnings were

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<sup>14</sup> Staff Exhibit 1, page 10.

<sup>15</sup> Staff Exhibit 8, P 1; Staff Exhibit 4, P 3 L 1-8.

<sup>16</sup> Transcript V 2, P 110 L 7 – 13.

<sup>17</sup> Transcript V 2, P 107 L 4 – 9.

<sup>18</sup> See *Order Suspending Interim Rate Tariff* in File No. ER-2010-0036.

*negative* \$9 million.<sup>19</sup> Further, as discussed in the Interim Rebuttal Testimony of Staff's expert Shana Atkinson, Empire's dividend troubles long predate the Joplin tornado. Prior to the Joplin tornado, Empire's retained earnings were very low or even negative<sup>20</sup> because it has for many years been paying out dividends per share ("DPS") that were not supported by its earnings per share ("EPS").<sup>21</sup> The relatively lower DPS that occurred when Empire reinstated its dividend is better supported by its EPS than its DPS before the suspension.<sup>22</sup> Finally, neither Moody's nor Standard and Poor's downgraded Empire's credit rating because of the tornado.<sup>23</sup>

Empire is not facing a financial emergency or near emergency, nor even extraordinary circumstances that would warrant an emergency interim rate increase.<sup>24</sup> Instead, Empire had been paying out dividends in excess of its earnings for 12 of the last 18 years.<sup>25</sup> Those past decisions were not caused by the May 22, 2011, Joplin tornado. Even in spite of those years of excessive dividend payouts, Empire is financially sound and does not require an emergency interim rate increase to continue to provide safe and adequate service.

**C.2. Issue 2: Empire's tornado recovery costs and post-tornado cost of service do not warrant an interim rate increase.**

Empire has not experienced an unusual decrease in revenues since the Joplin tornado. There is an apparent net decline in the capital investment Empire has dedicated to public service since the last rate case, in spite of plant additions made for tornado recovery. Finally, Empire's earnings are sufficiently protected against the

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<sup>19</sup> Transcript V 2, P 91 L 16 – 20.

<sup>20</sup> Transcript V 2, P 91 L 16 – 20.

<sup>21</sup> Staff Exhibit 3, P 2 L 7 – 9.

<sup>22</sup> Staff Exhibit 3, P 2 L 11-13.

<sup>23</sup> Staff Exhibit 3, P 2 L 13-14.

<sup>24</sup> Staff Exhibit 7, P 9 L 21-27.

<sup>25</sup> Transcript V 2, P 126 L 13 – 20; Staff Exhibit 3, P 3 L 16.

expenses and capital costs Empire expended on tornado recovery by the special accounting authority the Commission granted to Empire in File No. EU-2011-0387. There is no compelling reason for the Commission to short circuit the rate case review process by granting an interim rate increase.<sup>26</sup>

### **C.2.i. Empire's Revenues**

While it does appear that Empire collected fewer revenues than expected in the months of January – April 2012,<sup>27</sup> as described by Staff's expert Shawn Lange, it is clear that the majority of those decreased sales are attributable to the weather, as opposed to the effects of the tornado.<sup>28</sup> Further, for the months of May and June, 2012, Empire experienced greater than expected revenues.<sup>29</sup> Empire's additional revenues from the warmer summer temperatures more than offset its loss in revenues due to the warmer winter temperatures; netting the two shows that for June 2011 – July 2012, Empire received approximately \$1.6 million in excess of any revenue shortfall it experienced due to the warm winter.<sup>30</sup>

While Empire initially claimed it was asking the Commission to examine the single issue of its revenues, the above-analysis reveals that instead Empire is requesting that the Commission perform an even more limited review – namely, that the Commission consider only those circumstances in which Empire has experienced decreased revenues, while ignoring all together those circumstances where Empire has experienced increased revenues since the Joplin tornado. Further, it seems Empire

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<sup>26</sup> See *Order Suspending Interim Rate Tariff* in File No. ER-2010-0036.

<sup>27</sup> Staff Exhibit 8, P 1; Staff Exhibit 4, P 3 L 1-8.

<sup>28</sup> Staff Exhibit 1, P 12; Staff Exhibit 8, P 2; Staff Exhibit 4, P 5 L 1-13.

<sup>29</sup> Staff Exhibit 8, P 1; Staff Exhibit 4, P 3 L 1-8.

<sup>30</sup> See Staff Exhibit 8, P 1 - 2; Staff Exhibit 4, P 5 L 1-10. The \$1.8 million figure in Exhibit 4 was the net amount based on data through June. The updated numbers provided in Exhibit 8 net to \$1.6 million.

requests that the Commission completely ignore the cause of changes in revenues, which appear to be largely attributable to seasonal variations in temperature experienced to greater or lesser degrees by most utilities in any given year, as opposed to the Joplin tornado.

### **C.2.ii. Accounting Authority and Empire's Net Investment**

Empire's quantification of its emergency interim rate request ignores the effect of accumulated deferred income taxes (ADIT) as an offset to its request. Also, Empire's quantification ignores the fact that it currently has less net investment in service now than it did at the time of its last rate case. Finally, Empire's request fails to acknowledge the earnings protections it was afforded by the accounting authority granted by the Commission, recommended by Staff, and stipulated by other parties, in File No. EU-2011-0387.

Empire has been afforded earnings protection for the tornado-related capital costs it has incurred since May 2011 through the AAO granted to it by the Commission in File No. EU-2011-0387.<sup>31</sup> Because of this protection, there is simply no credible reason why Empire is deserving of accelerated rate recovery of these capital costs through the extraordinary mechanism of an interim rate increase.<sup>32</sup> Empire simply will not suffer any tangible financial harm if its rate recovery of tornado-related capital costs is delayed until the normal completion of its current rate case process.<sup>33</sup>

Empire has omitted the reduction in revenue requirement associated with the deferred taxes that are directly related to its tornado-related capital additions from its

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<sup>31</sup> Staff Exhibit 1, P 14.

<sup>32</sup> Staff Exhibit 1, P 14.

<sup>33</sup> Staff Exhibit 1, P 14.

quantification of the interim rate increase.<sup>34</sup> When a capital addition is placed in-service, the cost of the addition is placed into a plant-in-service account, depreciation accrued upon that asset is booked to the utility's depreciation reserve account, and deferred taxes (associated with the accelerated depreciation the utility is allowed to claim for tax purposes on the capital addition) are booked by the utility to the accumulated deferred income tax (ADIT) reserve.<sup>35</sup> Plant-in-service is an increase to rate base, while the depreciation reserve and ADIT reserve are offsets (subtractions) to rate base.<sup>36</sup> Therefore, Empire's quantification which does not reflect ADIT overstates the revenue requirement associated with the rate base impact of Empire's tornado-related capital additions and, hence, overstates its alleged need for interim rate relief.<sup>37</sup>

Finally, while Empire focuses its testimony and the Commission's attention on the issue of its capital *additions* that it placed in service in the Joplin area to restore service after the May 22, 2011 tornado, it ignores the capital *decreases* it has also experienced in that timeframe. Staff expert Mark Oligschlaeger performed an analysis which indicates that Empire currently has fewer dollars invested in rate base than it did at the time of its last rate case, even after tornado-related capital additions are taken into account.

Mr. Oligschlaeger reviewed Empire's balance sheets by quarter from year-end 2010 through June 2012 and examined the amounts given for electric plant-in-service,

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<sup>34</sup> Staff Exhibit 7, P 14 L 1-12.

<sup>35</sup> Staff Exhibit 7, P 14 L 1-12.

<sup>36</sup> Staff Exhibit 7, P 14 L 1-12.

<sup>37</sup> Staff Exhibit 7, P 14 L 1-12.

depreciation reserve, and deferred tax reserve for each quarter.<sup>38</sup> These three items are almost always the largest components of electric utility rate base. Netting Empire's ongoing balances for depreciation reserve and deferred tax reserve against the Company's plant-in-service balances serves as a reasonable surrogate for determining Empire's rate base growth trend.<sup>39</sup> This measurement shows a slightly declining rate base for Empire from year-end 2010 to mid-year 2012, even after tornado-related capital additions are taken into account.<sup>40</sup> In other words, although Empire's tornado-related capital additions increased rate base when considered in isolation, this increase was more than offset by changes in other rate base items, such as growth in the depreciation reserve and ADIT reserve.<sup>41</sup> It would be particularly inappropriate to award interim rate relief on the basis of capital additions if Empire experienced a net reduction of capital in rate base, which appears to be the case here.<sup>42</sup>

**C.3. Issue 3: Empire's interpretation of the "just and reasonable" standard results in single-issue ratemaking, and could be satisfied by virtually every utility every time a general rate increase is sought.**

Although Staff maintains that the appropriate standard for interim rate relief is whether Empire's ability to provide safe and adequate service is jeopardized, Staff shows that Empire fails under a just and reasonable under all relevant factors analysis of its case.

**C.3.i. Empire's Case Fails to Consider All Relevant Factors, and Does Not Consider Any Factor Fully.**

Empire has presented testimony dealing with only two issues:

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<sup>38</sup> Staff Exhibit 7, P 17 L 6-23.

<sup>39</sup> Staff Exhibit 7, P 17 L 6-23.

<sup>40</sup> Staff Exhibit 7, P 17 L 6-23.

<sup>41</sup> Staff Exhibit 7, P 17 L 6-23.

<sup>42</sup> Staff Exhibit 7, P 17 L 6-23.

- Lower-than-expected revenues experienced during the 2011-2012 winter months.
- Capital invested and expenses incurred to restore service following the Joplin tornado.

Even as it regards these two issues, Empire's request necessarily requires the Commission to ignore evidence relating to:

- Net higher-than-expected revenues experienced since June 2012 in the amount of \$1.6 million.
- Net reduction of capital invested by Empire.

As discussed above, although Empire requests the Commission consider the lower-than-expected revenues Empire experienced this past winter, Empire expects the Commission to ignore the higher-than-expected revenues Empire enjoyed after the Joplin tornado, and in several months of this summer. In fact, for the period June 2011 – June 2012, Empire experienced \$1.8 million greater revenues than expected in a "normal" year.<sup>43</sup> Similarly, although Empire did invest in its system to restore service in the aftermath of the Joplin tornado, through its request, Empire necessarily requests the Commission ignore the depreciation expense it has received since its last rate case, as well as the effect of the ADIT reserve.<sup>44</sup>

In short, despite its proffered request for "just and reasonable" rates, the rates Empire requests are patently *unreasonable* on the evidence presented. Although the parties have not had the time nor the process to investigate the factors presented in Empire's *general* rate case request, the Commission cannot award just and reasonable rates without consideration of those factors. The Commission should not accept

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<sup>43</sup> Staff Exhibit 4, P 5 L 1-10.

<sup>44</sup> Staff Exhibit 7, P 17 L 6-23.

Empire's justification to engage in single issue ratemaking by utilizing a "just and reasonable" standard on consideration of less than all relevant factors.

**C.3.ii. Empire's Request Compared to Ameren Missouri's Recently Rejected Request.**

In its request in Case No. ER-2010-0036, Ameren Missouri did not allege a financial emergency or near emergency, Ameren Missouri stated it simply sought an interim rate increase to reduce its exposure to regulatory lag, while in its *Motion*, Empire states that it seeks an interim rate request because "Empire has faced and is continuing to face extraordinary circumstances, and there are compelling reasons for this Commission to allow Empire's interim rate surcharge to take effect on August 5, 2012, the requested effective date." Empire witness Brad P. Beecher states that it has been over a year since the Joplin tornado, that it is time for Empire to begin to recover financially, and that, absent interim relief, it will take over two years for Empire to begin to recover from the tornado from a financial standpoint.<sup>45</sup>

Upon examination of the calculation of the respective interim rate quantifications, the Commission will discover that the alleged basis for \$4.5 million of Empire's \$6.2 million interim request is identical to Ameren Missouri's request that the Commission ultimately rejected.<sup>46</sup> Thus, although distinguishable in that

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<sup>45</sup> Empire *Motion*, p. 4; Prefiled Direct Testimony of Brad Beecher, p. 12.

<sup>46</sup> Ameren Missouri's request was calculated as follows:

The amount of the interim rate increase equates to the return, depreciation, and taxes on rate base additions that the Company has *actually placed in service* through May 31, 2009. Thus, the approximately \$37.3 million interim rate increase request is supported by actual investments in "steel in the ground" since the close of the true-up period in the Company's last rate case. These assets have been fully paid for by AmerenUE and are, at this moment, being used to provide electric service to AmerenUE's customers. Indeed, the majority of this steel in the ground arose from capital expenditures that relate directly to improving and maintaining the reliability of the Company's electric delivery system. (See Ameren Missouri *Suggestions in Support of Interim Rate Tariff (IRT)*, in Case No. ER-2012-0036, pages 4-5.)



Ameren Missouri's investments were made in the regular course of business, while Empire's investments were occasioned by a catastrophic natural disaster, this portion of Empire's request is, in fact, the same.

In another respect, however, this portion of Empire's request has even less merit than Ameren Missouri's. Pursuant to the *Order Approving and Incorporating Nonunanimous Stipulation and Agreement*, in File No. EU-2011-0387, regarding Empire's AAO request, Empire's earnings are protected against the depreciation and carrying charges associated with the tornado-related capital expenditures. Ameren Missouri's earnings were not protected against the depreciation and cost of capital associated with its investment considered in Case No. ER-2010-0036. Also by the parties' agreement, Empire's earnings are further protected against the incremental operations and maintenance expenses associated with the tornado, which Empire was allowed to defer for later potential recovery.

Missouri's courts have consistently held that investor-owned utilities, such as Empire, have no right to a return, much less a particular level of return. It is very well established that the law does not require that rates yield any particular return.<sup>47</sup>

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Empire states that its quantification of \$4.7 million of its interim rate increase request is attributable to the same calculation the Commission rejected when Ameren Missouri requested it:

Empire has invested over \$27.6 million to replace the electric infrastructure destroyed by the tornado. We estimate the annual cost to Empire to carry this investment at approximately \$4.5 million. **This includes rate of return, associated income taxes and depreciation.** In addition, to this annual carrying cost we have added the amortization of the storm costs deferred pursuant to the Accounting Authority Order ("AAO") authorized by the Commission in Case No. EU-2011-0387. This annual AAO amortization is almost \$198,000. In total the ongoing revenue requirement associated with the direct investment in replacement facilities is \$4.7 million. [emphasis added]

<sup>47</sup> *State ex rel. Capital City Water Co. v. Public Service Commission of Missouri* 252 S.W. 446, 456 (Mo. 1922); *State ex rel. Missouri Gas Energy v. Public Service Com'n* 186 S.W.3d 376, 383 (Mo.App. W.D.,2005); *State ex rel. Missouri Office of Public Counsel v. Public Service Com'n of State* 293 S.W.3d 63, 80-81 (Mo.App. S.D.,2009); *Straube v. Bowling Green Gas Co.* 360 Mo. 132, 141-142, 227 S.W.2d

As stated in a 2006 Missouri Gas Energy appeal of a rate case before the Missouri Western District Court of Appeals, there is no statute, rule, or case supporting that utilities have a property right to a defined level of revenue.<sup>48</sup>

Missouri courts have held that “it is a well-accepted principle of regulation that common stockholders contribute what is known as ‘risk capital’ to the utility company for which they receive a compensatory rate of return. Among the uncertainties that common stockholders accept in return for this added compensation is the danger of earnings shortfall, for whatever reason.”<sup>49</sup> Further, “risks are part of the utility business and that even the risk of economic catastrophe may be properly assigned to owners of the utility rather than to its customers.”<sup>50</sup> This is proper, because if a stockholder could be assured a return of his/her investment under all circumstances, it would make the investment practically risk-free.<sup>51</sup> Thus, it is not appropriate to guarantee a defined level of profit, which would obviate the need for a risk-based return on equity.

**C.4. Issue 4: Consideration of the factors Empire has presented would result in an interim rate *decrease*.**

As presented above in Staff’s discussion of “Issue 2,” Empire has experienced approximately \$1.6 million more-than-expected revenues since the Joplin tornado,<sup>52</sup> and Empire has experienced an apparent net decline in the dollars of capital investment

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666, 670-671 (Mo.1950); *Reinhold v. Fee Fee Trunk Sewer, Inc.* 664 S.W.2d 599, 603-604 (Mo.App. E.D. 1984); *Lightfoot v. City of Springfield* 361 Mo. 659, 669, 236 S.W.2d 348, 352 (Mo.1951); *State ex rel. Missouri Gas Energy v. Public Service Com'n* 210 S.W.3d 330, 334-335 (Mo.App. W.D.,2006).

<sup>48</sup> *State ex rel. Missouri Gas Energy v. Public Service Com'n* 210 S.W.3d 330, 334-335 (Mo.App. W.D.,2006).

<sup>49</sup> *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.* 765 S.W.2d 618, 622 -623 (Mo.App. W.D. 1988).

<sup>50</sup> *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.* 765 S.W.2d 618, 626 (Mo.App. W.D. 1988).

<sup>51</sup> *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.* 765 S.W.2d 618, 622 -623 (Mo.App. W.D. 1988).

<sup>52</sup> See Staff Exhibit 8, P 1 - 2; Staff Exhibit 4, P 5 L 1-10. The \$1.8 million figure in Exhibit 4 was the net amount based on data through June. The updated numbers provided in Exhibit 8 net to \$1.6 million.

Empire has dedicated to public service since the last rate case, in spite of its plant additions made for tornado recovery.<sup>53</sup> Particularly in light of the earnings protections of the special accounting authority the Commission granted in File No. EU-2011-0387, there is no compelling reason for the Commission to short circuit the rate case review process by granting an interim rate increase.<sup>54</sup>

#### **D. Conclusion**

Empire's Vice President and Chief Operating Officer, Kelly S. Walters, stated, "I would not say we're in an emergency financial situation right now."<sup>55</sup> Also, when asked about Empire's ability to provide safe and adequate service without receipt of an emergency rate increase, Ms. Walters stated that, "[w]ith what I know today, I believe we will provide safe and reliable service."<sup>56</sup> Thus, Empire is not "facing extraordinary circumstances" and there is no "compelling reason to implement an interim rate increase."<sup>57</sup>

Empire's current situation does not warrant an emergency interim-subject-to-refund rate increase under any standard previously considered by this Commission. Further, while Staff urges the Commission to reject Empire's requested truncation of the just and reasonable standard, even under that standard, Empire is not entitled to relief. Empire is financially sound.<sup>58</sup> Empire's revenues have not decreased significantly as a result of the tornado.<sup>59</sup> Empire's net investment has

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<sup>53</sup> Staff Exhibit 7, P 17 L 6-23.

<sup>54</sup> See *Order Suspending Interim Rate Tariff* in File No. ER-2010-0036.

<sup>55</sup> Transcript V 2, P 110 L 7 – 13.

<sup>56</sup> Transcript V 2, P 107 L 4 – 9.

<sup>57</sup> See *Order Suspending Interim Rate Tariff* in File No. ER-2010-0036.

<sup>58</sup> Staff Exhibit 1, page 10.

<sup>59</sup> Staff Exhibit 1, P 12; Staff Exhibit 8, P 2; Staff Exhibit 4, P 5 L 1-13.

decreased.<sup>60</sup> Finally, Empire's earnings are protected against its tornado-related investments and expenses by the Accounting Authority Order (AAO) the Commission granted in File No. EU-2011-0387.<sup>61</sup>

The weather-related revenue decreases that Empire experienced during the mild winter are offset by the weather-related revenue increases Empire enjoyed during the early summer months that were hotter than normal. Empire's chronic excessive dividend payouts are a problem of its own making, and are unrelated to the devastation experienced by so many of its customers a little over a year ago. This Commission should not reward Empire's dividend policy with extraordinary relief, nor should it punish Empire's ratepayers for last year's mild winter. Empire is not facing circumstances that require an emergency interim increase of rates in order to continue providing safe and adequate service to its customers.

Respectfully submitted,

**/s/ Sarah Kliethermes**

Sarah L. Kliethermes MBE 60024  
Attorney for the Staff of the  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102  
Phone: (573) 751-6726  
Fax: (573) 751-2690  
E-mail: sarah.kliethermes@psc.mo.gov

### **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 20<sup>th</sup> day of September, 2012.

**/s/ Sarah Kliethermes**

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<sup>60</sup> Staff Exhibit 7, P 17 L 6-23.

<sup>61</sup> Staff Exhibit 1, P 14.