

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

In the Matter of the Petition of The Empire District)
Electric Company d/b/a Liberty to Obtain a)
Financing Order that Authorizes the Issuance of) Case No. EO-2022-0040
Securitized Utility Tariff Bonds for)
Qualified Extraordinary Costs)

In the Matter of the Petition of The Empire District)
Electric Company d/b/a Liberty to Obtain a)
Financing Order that Authorizes the Issuance of) Case No. EO-2022-0193
Securitized Utility Tariff Bonds for Energy)
Transition Costs Related to the Asbury Plant)

**FURTHER SUGGESTIONS IN OPPOSITION
TO OPC MOTION FOR CLARIFICATION**

COMES NOW The Empire District Electric Company d/b/a Liberty, and in opposition to the Motion for Clarification filed herein by the Office of the Public Counsel (“OPC”), Liberty respectfully states as follows:

1. OPC’s most recent filing raises a new argument not contained in its motion for clarification: that despite the pendency of an appeal, the Commission has jurisdiction to change the ordering clauses of the Financing Order under the “nunc pro tunc” doctrine. Liberty has not previously had an opportunity to respond to this argument and, accordingly, Liberty respectfully files these Further Suggestions in Opposition to OPC Motion for Clarification.
2. OPC’s assertion that the nunc pro tunc doctrine applies here lacks merit, for multiple reasons. First, that assertion rests on a fundamentally false premise. The basis for OPC’s statement that the 5.16% rate is an error is OPC’s contention that there is some inherent contradiction between the 4.65% rate identified on pages 37 and 72 of the Financing Order and the 5.16% rate identified on page 122. Motion, pp. 1-2. But no such contradiction

exists. The 4.65% rate to which OPC points and the 5.16% rate are *about two different things*.

3. There is nothing inherently contradictory about the Commission choosing one rate for one period of time and a different rate for a different period of time. Indeed, it was perfectly reasonable for the Commission to conclude that the specific considerations that drove the Commission's decision to choose the 4.65% rate in calculating the securitized utility tariff costs no longer apply once the Financing Order issues, and thus to conclude that the period between the Financing Order and bond issuance should be treated in a more neutral fashion.
4. Second, assuming there is a contradiction between the different rates, the narrow nunc pro tunc doctrine does not apply here. That doctrine applies only where the decisionmaker formally made a decision "discernible from the record" but then made a "clerical error" in an order or judgment that incorrectly recorded that existing decision. *Pirtle v. Cook*, 956 S.W.2d 235, 243-244 (Mo. banc 1997). Thus, an order qualifies as an "order nunc pro tunc" only where "the original judgment entry did not accurately reflect the [decisionmaker's] actual judgment" and "the subsequent order merely caused the record to conform to the true judicial [or administrative] determination of the parties' rights." *Id.*; see, e.g., *DeKalb County v. Hixon*, 44 Mo. 341, 342 (Mo. 1869).¹ In contrast, a nunc pro tunc order "may not be used to order that which was *not* actually done, or to change or modify the action which was taken," *In re Marriage of McIntosh*, 126 S.W.3d 407, 411-412 (Mo. App. S.D. 2004), so as to "effect a substantive change to the party's rights," *McGuire v. Kenoma*,

¹ That is the reason why a nunc pro tunc order is an exception to the bar on an assertion of jurisdiction while an appeal is pending; such an order "does not constitute a new judgment" but rather "relates back to an original judgment." *In re Marriage of McIntosh*, 126 S.W.3d at 412; see *id.* (explaining that nunc pro tunc means "now for then"); *Pirtle*, 956 S.W.2d at 240-241.

LLC, 447 S.W.3d 659, 663-664 (Mo. banc 2014); *see, e.g., id.* (“Nunc pro tunc cannot be used to add anything to the judgment that is not in some way already reflected in the record, even if a judge should have included or intended to include the omission or has a laudatory motive in wanting to amend the judgment.”); *Pirtle*, 956 S.W.2d at 240 (nunc pro tunc order “may not be used to alter or amend the rendered judgment”); *McGuire*, 447 S.W.3d at 665 (“exercise of” decisionmaker’s “discretion” not appropriate for a nunc pro tunc order). And because the “relief that may be afforded by a *nunc pro tunc* judgment” is “narrowly prescribed” and “strictly confined,” *Missouri v. Nelson*, 505 S.W.3d 869, 871 (Mo. App. W.D. 2016), the party asserting that the nunc pro tunc doctrine applies bears a heavy burden to show that nunc pro tunc relief is permissible, *see McGuire*, 447 S.W.3d at 665; *see also Pirtle*, 956 S.W.2d at 243.

5. OPC cannot possibly meet that burden here. OPC does not point to *anything* in the record suggesting that prior to issuance of the Financing Order, or even in a portion of the Financing Order other than the ordering clauses, the Commission made a decision about what rate should be applied between the date of the Financing Order and the date when securitized utility tariff bonds actually issue. Accordingly, the record fails to “indicate that the intended judgment is different from the one actually entered.” *In re Marriage of McIntosh*, 126 S.W.3d at 411-412. “Without evidence in the record to indicate that” a different decision “was actually made,” the use of the 5.16% rate can at most be “mere error,” which is not “correctable . . . by nunc pro tunc.” *McGuire*, 446 S.W.3d at 667; *see Pirtle*, 956 S.W.2d at 241-242.
6. What OPC is actually seeking is a substantive change to the Financing Order, which the Commission does not currently have jurisdiction to make. OPC seeks *exactly* the kind of

substantive amendment of the Financing Order that falls outside the limited scope of the nunc pro tunc doctrine.

WHEREFORE, Liberty respectfully submits its Further Suggestions in Opposition to OPC's Motion for Clarification and requests such relief as is just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above document was filed in EFIS on this 7th day of March, 2023, and sent by electronic transmission to all counsel of record.

/s/ Diana C. Carter