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 for Electric Service Provided to Customers in the Missouri Service Area of the Company	)))))	Case No. ER – 2012 – 0345

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT
IN THE REPORT AND ORDER REGARDING INTERIM RATES

> **"Constitutional constraints do not permit the adoption of rate-making procedures upon the basis of "heads the customers-win – tails the utility loses."**[1]

Introduction

I respectfully dissent. My conclusions, based on the majority's findings of fact, as modified by additional relevant findings of fact, would have been that the Empire District Electric Company ("Empire") is entitled to the rate increase sought because it is just and reasonable under the standards articulated in *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923), *Hope Natural Gas Company v. Federal Power Commission,* 320 U.S. 591 (1943), and *State ex rel. Washington University et al. v. Public Service Commission,* 308 Mo. 328, 344; 272 S.W. 971 (Mo. banc 1925).

The only relevant question before this Commission is whether Empire's tariff, denominated an "interim" tariff by Empire, and designed to generate approximately $6.2 million on an annual basis subject to refund, should no longer be suspended and be approved.

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[1] Joint Brief of Amicus Curie, *State ex rel. Laclede Gas Company v. Missouri Public Service Commission*, Missouri Court of Appeals, Kansas City District, No. 27,958, July 1975 (emphasis added).

The law does not provide for any standard other that the "just and reasonable" standard once a tariff has been filed <u>and</u> suspended.[2] The majority's *Report and Order* determines that in order for Empire to "prevail it must present sufficient evidence of extraordinary circumstances and compelling reasons to grant the rate increase." *Report and Order*, ER-2012-0345, p. 11. That standard is not the just and reasonable standard that this Commission uses in all rate increase proceedings where tariffs are filed and suspended. While the Order pays lip service to a "just and reasonable" rate, the analysis leaves no doubt that neither *Hope*, *Bluefield* or *State ex rel. Washington University* were considered in the Commission's conclusions—in fact, none of those cases are even mentioned or cited. Instead, the majority conjures up a new standard for "just and reasonable" rates in Missouri.

I. Procedure

On July 6, 2012, Empire filed with the Commission the following tariff sheets; YE-2013-0020 (permanent rate tariff) and YE-2013-0021 (interim rate tariff).[3,4] Both tariff sheets bear an effective date of August 5, 2012. The *Report and Order* essentially set forth the procedural history of this matter. However, I note that the majority includes information as "procedure"

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[2] In *Staff's Post-Hearing Reply Brief's* opening paragraph, Staff suggests that the Commission has abandoned the use of the "just and reasonable" standard for rates when a rate is suspended, and the rate is "interim." Since all rates are interim by their very nature, Staff suggests that the Commission can pick and choose a standard even when a standard is clearly dictated by statute. Additionally, Staff attempts to bolster an argument that "discretionary" treatment of an "interim" rate is appropriate by suggesting that former Commissioner Jeff Davis' dissenting view in ER-2010-0036 supports Staff's argument; it does not. To the contrary, Commissioner Davis' statements support the law. Commissioner Davis' view was simply that once a tariff is suspended, that "just and reasonable" rates are demanded by the law.

[3] All references to Empire's "interim tariff" and "permanent tariff" as discussed herein are merely descriptive terms used to describe the length the rate will operate by the tariff's language, and was added by Empire to its filing, yet does not make it distinguishable from any other tariff filings, under Missouri law. *See*, Tariff Sheets YE-2013-0020 and YE-2013-0021; § 393.150.1 – 2.

[4] For purposes of this dissent, I refer to the interim tariff simply as "the tariff" or "rate."

with regard to Empire's rate increase request in YE-2013-0020 as a part of the procedural history of YE-2013-0021. To the extent the majority seeks to meld together these two separate rate increase filings, I disagree with the procedural history's representation that these two filings are not unique, separate and different. Tariff YE-2013-0021, is its own filing, its own tariff, and is unique; the only tariff at issue here, in this contested proceeding, is YE-2013-0021.

The Commission suspended the tariff (YE-2013-0021) on July 23, 2012, and the Commission held an evidentiary hearing, in a contested case proceeding, on September 10, 2012. **Absent from the majorities procedural history** is the **motion** filed by Empire on July 6, 2012, regarding tariff sheet YE-2013-0021 asking the Commission provide "expeditious rate treatment and to implement rates without the benefit of a full and complete hearing, or, under limited circumstances and upon "good cause" shown, without the necessity of providing thirty days notice." *Empire's Motion Requesting That the Commission Exercise its Discretion and Allow Empire's Interim Rate Filing to Take Effect Without Suspension and by Operation of Law*, ¶2, 3. The Commission took no action on this motion, but instead suspended the rate filing made by Empire, scheduled and held a hearing. Except as I have noted, the *Report and Order*'s procedural history otherwise is sufficient, albeit including irrelevant and extraneous information.

II. Findings of Fact

I have in many cases been critical of the Commission's "findings of fact" for either omitting necessary facts, including conclusions as facts, or stating a party position as a fact. The findings of fact adopted in this case are seriously lop-sided in that many relevant facts presented by Empire have been omitted, as well as facts that are relevant for purposes of making a determination that a rate is just and reasonable under § 393.150.2 RSMo., and also facts relevant

to the suspended tariff (YE-2013-0021) and the determination which is required by law.[5] Here, I adopt the Commission's findings of fact, but question the relevance of many of them included in the *Report and Order* for application to the law. I would find the following additional facts *relevant* for purposes of a decision on the matter before the Commission:

1. Immediately following the tornado, Empire lost 8,000 customers. Empire Ex. 2, Kelly S. Walters Direct, pp. 10-11.

2. The Commission's authorized return on equity ("ROE") for Empire in 2009 was 10.8%. Empire Ex. 4, Robert W. Sager Direct, p. 4.

3. Empire is currently experiencing a $30.7 million revenue deficiency. Tariff YE-2013-0021.

4. During the past ten years where the Commission has made findings concerning Empire's common equity rate of return, the Commission authorized ROEs for Empire of 11% in 2005, 10.9% in 2006, and 10.8% in 2009. Empire Ex. 4, Robert W. Sager Direct, p. 4, lns 5 – 6.

5. Taking all elements of Empire's cost of service into account; Empire's earned rate of return was 7.9% in 2011 and 7.8 percent as of June 30, 2012. Trans., Vol. 2., p. 113, lns. 18 – 25; Empire Ex. 4, Robert W. Sager Direct, Sch. RWS-1, Empire Ex. 3 Kelley S. Walters Surrebuttal, p. 7.

6. Empire's highest earned common equity return over the last ten years was only 8.4%, occurring in 2006. Empire Ex. 4, Robert W. Sager Direct, Sch. RWS-1.

7. Empire's opportunity to earn a fair rate of return has been impaired since May 22, 2011, when a tornado struck Joplin, Missouri. Empire Ex. 3. Kelly S. Walters Interim Surr., p. 7.

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[5] All references herein are to the Revised Statutes of Missouri (2000) unless otherwise noted.

8. The decreased customer levels as well as deferred costs related to the tornado have not been reflected in Empire's rates, will continue to exist and grow, respectively, until they are reflected in rates. Empire Ex. 3, Kelly S. Walters Interim Surr., p. 7.

9. Empire's electric sales were adversely impacted as a result of the tornado. Empire Ex. 3, Kelly S. Walters Interim Surr., p. 11.

10. The terms of tariff INT provide that the rate, and money collected would be subject to a ratepayer refund with interest pending the Commission's final determination in the "permanent" case. Empire Ex. 5, W. Scott Keith Direct, Sch. WSK-4.

III. Background

A. Rate Setting Procedure

The world of utility regulation is specialized and the laws that frame it are not new but are in many respects beyond the expertise of most legal practitioners. Regulatory law's nuisances and foundation can often be misunderstood, and in turn, misapplied. It is a hybrid of administrative law. In this matter, seminal Missouri legal cases regarding "interim rates" have been plagued by years of cut and paste legal writing, which in turn has led to misapplications of what was thought to be law but is not. The "holding" of a case is the law; everything else is merely dicta. What can be relied upon **is what the Court held**, which is why it is incumbent on practitioners to read the cases upon which they rely, and understand the very important distinction between the holding of the court as from the language of the underlying agency's order. The orders of the Public Service Commission, while exemplifying the "force and effect of law," do not have precedential value. Implying that the holding of a court affirming a Commission order thereby transmutes the Commission's findings of fact and conclusions of law into a broad sweeping affirmation of the entire Commission order is a leap that caused many to

stumble in their analysis of Missouri's rate framework. Here, thoughtful review of underlying cases, as well as later cases which cite to these seminal cases on interim rates is paramount to good legal practice. The haphazard misapplication of previous Commission orders to the current Commission *Report and Order* does not create legal precedence, or a standard - instead, it has served to abrogate a well-defined statutory standard and instead creates a standard by rule without any adherence to the procedures announced in Chapter 536 RSMo.

Magically transforming statements of dicta into "law" is always dangerous, but in this case the transformation results in an entire category of legal misunderstanding regarding "interim" rates in Missouri, and the standard which applies to their implementation. Often in regulatory matters, policy and law collide – which may tempt an activist in his or her application of the law. One that looks at a result, predicts future action, and prescribes limitations without authority, might be tempted to look at a rate that will only operate for a short period of time as meriting unique or special treatment; treatment different from a rate that may operate for a longer period of time. There is no statutory rationale for such concern as the legislature contemplated these concerns, and built in all of the necessary safeguards into existing law.[6]

The majorities Gordian knot of concerns can be resolved by looking at the statutory framework for rate making in Missouri, the regulatory compact, the basis for regulation and the steadfast limits of regulation afforded by the U.S. and Missouri Constitutions and finally allow for the course here to be set straight again.

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[6] A rate that operates for a short period of *time* versus a long period of time is distinguishable from the due process requirements of *time* related to the commission process for acting upon a suspended tariff. These two concepts of *time* are often mistakenly intertwined.

B. Rate Making

To the casual observer, it may seem that the Commission controls the setting of rates for electricity. However, this Commission, absent the procedures for a complaint,[7] does not in any way control the initiation of a rate change. While the distinction may seem trivial, it is a distinction with a very important difference. Control of rate setting is not in the hands of the Commission but the utility. A tariff filing setting out an increase in rates is not a request for a rate – it is notice of a new rate. And, that rate increase may include many layers and elements regarding how the rate will be applied, including the length of time the rate may operate if the utility so chooses. Even though a rate is subject to the Commission's consideration through its regulatory powers, the rate is not a suggested price, an application for a rate,[8] or a request for rate change. A utility makes a rate change, files the change which provides the Commission and

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[7] The Commission determines a rate where a complaint has been made that a rate is no longer just and reasonable. *See* § 393.270 *et seq*. *See also*, § 393.270.4. "In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although ***not set forth in the complaint and not within the allegations contained therein***, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies."(emphasis added) (Commission not limited to issues raised in complaint in making determination of price).

[8] § 386.266.2 RSMo. " …any electrical, gas, or water corporation may make an application to the commission to approve rate schedules authorizing periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred costs, whether capital or expense, to comply with any federal, state, or local environmental law, regulation, or rule."

§ 386.266.4 RSMo. "The commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section only after providing the opportunity for a full hearing in a *general rate proceeding*, including a general rate proceeding initiated by complaint." (noting a distinction between rate changes for specific purposes being made by an "application" as compared to § 393.150 and the "file and suspend" method of changing a rate)(the reference to a "general rate" proceeding is clearly a reference to both the "file and suspend" process of a rate change as well as the "complaint" method set forth in § 393.270 *et seq*.).

public with notice. *See* § 393.150.1 RSMo. The filing of the rate change is critical to invoking the protections of the U.S. and Missouri Constitutions for both the ratepayer, and the utility.

Under no circumstance is the Commission the manager of the utility or its business; it is a rate regulator. The Commission is a substitute for the free market for purposes of ensuring utility rates are "just and reasonable." And, while it may be tempting at times for a "rate regulator" to desire control over a utility by dictating when the utility changes its rates[9], how long the rate will operate is beyond the power of the commission. As overseer, the Commission may after hearing, determine a filed and suspended rate to not be just and reasonable, and then determine what rate is just and reasonable; this does not amount to the Commission initiating a rate change for the utility. This same principle applies when the length of time a rate will be effective is considered. The Commission is not the manager – the utility is.

Missouri utilities' rely upon Missouri statutes which set forth the "file" and "file and suspend" method of rate setting. This legal framework is codified in two distinct and separate sections of Chapter 393, sections 140 and 150. Section 140 is often regarded as the section of law providing the Commission's general powers with regard to rates and provides the process for a utility to "file" a rate and Section 150 is regarded as the "file and suspend" section of the law.

In this particular case, both sections are a part of the necessary analysis. Section 393.140(11) states that the Commission shall:

> (11) Have power to require every gas corporation, electrical corporation, water corporation, and sewer corporation to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities

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[9] *Id.* If no change in rate is sought by the utility and a complaint is not made, no review would be possible under section 393.150 or 393.140.

> granted or allowed by such gas corporation, electrical corporation, water corporation, or sewer corporation; but this subdivision shall not apply to state, municipal or federal contracts. **Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe.** No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time.

Emphasis added.[10] And, Section 393.150.1 – 2 states that:

> 1. Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or sewer corporation **any schedule stating a new rate or charge**, […] the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading

[10] A rate change may include a rate increase and a rate decrease. The provisions of section 393.140(11) contemplate mere *change* but there is no statutory reference in this section that distinguishes an increase from a decrease; rate *increases* are specifically singled out in section 393.150.2 RSMo.

> by the interested […], electrical corporation, […], but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the […], electrical corporation, […] affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective.
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> 2. If any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. <u>**At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the […], electrical corporation, […]**</u>, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Emphasis added. The "file and suspend" method of ratemaking relies on the utility—not the Commission—to make a filing. § 393.150.1 RSMo. The process and procedure which follows a tariff rate <u>increase</u> filing is rooted in both substantive and due process rights of the utility, and the regulator's role must not infringe upon either right.[11] The prescribing of rates is a legislative act

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[11] The Commission may use its discretionary power to determine whether suspension is appropriate. *See Dissenting Opinion of Commissioner Terry M. Jarrett*, ER-2010-0036. The discretionary power applied in the context of suspension, is not to however be confused with the Commission's general "discretionary" power as a state agency, nor does it confer a new power upon the Commission in determining whether a rate increase is just and reasonable.

and this Commission is a mere instrumentality of the State, exercising delegated powers. Pursuant to sections 140 and 150 of Chapter 393, the Commissioner is a regulator of rates within the powers of the law, and the Constitution of both the U.S. and Missouri. And, discretion afforded the commission does not rise to the level of the power to make policy; rather policy is set by the legislature.

C. There is Only One Type of "Rate" under Missouri Law; a Just and Reasonable Rate.

Missouri law makes only one distinction between different types of rates; those that are just and reasonable and those that are not. There are rates that are filed, and have become effective and those that are not effective. Nothing in Missouri law distinguishes a rate, for the purposes of rate making treatment, by the length of time in which the rate will operate.[12] As stated by my esteemed predecessor, Commissioner A. Robert Pierce, Jr.:

> The Commission can authorize rate relief whether it is called temporary, emergency, interim, or just plain old 'rate relief.' There are no 'emergency' criteria that are controlling. When broken down into its bare essentials, the Company's request [for interim rates] is just another rate case under our statutes.

In the matter of the Application of Union Electric Company for an Interim Electric Rate Increase, 18 Mo. P.S.C. 440, 451 (1974). The law sets one single standard for a rate seeking an increase, and that is that the rate must be "just and reasonable."[13] The length of time the rate operates is not distinguished under Missouri law. The legislature contemplated rates that go into effect in a short period of time (which is distinguishable from a rate that is effective for a short period of time) by instituting statutory procedures for a utility to file a rate increase and seek to have it operational in as few as thirty days. The notice and hearing provisions of § 393.140 and

[12] The legal fiction associated with the operation of time includes rates designated as "interim" or "permanent" rate.
[13] § 393.150.1 RSMo.

393.150 are what is distinguished in Missouri law and that is the application of due process principles to a rate, and *when* the rate increase may become effective. The law makes no preference for a rate of a short term or long term duration whatsoever.

Every aspect of a tariff is the manifestation of different conditions: price, eligibility for a price by rate class, the parameters of a pricing structure, and many other factors. Once a rate becomes effective, its lifespan is not limited in anyway by statute. But one thing is certain, and that is when a rate change is filed, and that new rate is found to be just and reasonable, the prior rate is no longer the filed rate for the utility. This principle of the "filed rate doctrine" makes clear that all rates are "interim" rates – subject to later change whenever a new rate is filed and approved.[14] Missouri law focuses not on the length of time a rate will operate, but rather, upon the amount of time for notice (and hearing) for the rate change and when the rate will be effective. Missouri law undeniably recognizes that a utility may place into effect a changed rate "after thirty days' notice to the commission and publication for thirty days as required by order of the commission." § 393.140(11) RSMo., unless the Commission orders otherwise. *Id.*

Section 393.140(11) states that "for good cause shown" the commission "may allow [rate] changes without requiring the thirty days' notice under such conditions as it may prescribe."[15] This power of the Commission in section 393.140(11) to act when "good cause shown" exists, is directed to a rate going into effect without the utility meeting notice requirements. The length of time the rate will operate is not addressed by this section, and

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[14] It is a "thoroughly settled rule that the legal rate is the ***filed rate,*** and it is the duty of the carrier to charge and collect the rate precisely as same is contained in the tariffs on file with the [regulatory agency] And this is so even though such rate be excessive, unreasonable, and unlawful. *Mobile & O.R. Co. v. Southern Sawmill Co.*, 212 Mo. App. 117, 251 S.W. 434, 436 (1923) (internal citations omitted)(noting that the tariffs in dispute are made by the 'carrier' and not any other party).

[15] A hypothetical example of when the Commission might exercise this authority is when the rate change represents a rate decrease. *Cf.* § 393.150.2 RSMo. (discussing a rate increase request).

nothing in this section suggests that a rate which is contemplated to operate for a diminished or enlarged time is treated differently – the only thing at issue in § 393.140(11) is notice. Section 393.140(11) speaks only of *change*, and nothing as to the length of time for such *change*. Section 393.140(11) is rooted in the expediency of the operation of a *changed* rate while also ensuring constitutional due process.

Where section 393.140(11) focuses on notice of a rate change, section 393.150 is directed to the procedural process for changing a rate, outlining that a rate once filed could become effective in as few as thirty days or in a long as eleven months. Neither section of law addresses the <u>length of time</u> a *changed* rate will operate. This is useful in understanding that every rate by its very nature is not "permanent" – it is subject to change – and thereby, "interim."

"Statutory construction is a matter of law." *Mo. Indus. Energy Consumers*, 331 S.W.3d at 683. The primary rule in construing a statute is to ascertain the intent of the legislature from the language used by considering the plain and ordinary meaning of the words used in the statute. *Id.* The purpose of the whole act must be considered, and it is presumed that the legislature intended every word, clause, sentence, and provision of the statute have effect and be given meaning. *Id.* at 683-84. Interpretation and construction of a statute by an agency charged with its administration is afforded great weight by Missouri courts. *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 318 (Mo. App. W.D. 2011); *Mo. Indus. Energy Consumers*, 331 S.W.3d at 684.

The plain language of both sections 393.140(11) and 393.150.1 – 2 RSMo. make no reference or distinction as to the length of time a rate operates. Nor does the statute single out a rate change which is filed contemporaneously with another future rate change as being held out for disparate treatment. Sections 393.140 and 150 do not make any limitation on the number of

tariffs that may be filed, to the contrary, these sections command the utility to file if there is a change and provides no provision for holding a change in abeyance.

The absence of express language addressing treatment of a rate increase that is intended to last for only a short period of time, in anticipation of a different but nearly contemporaneous rate increase change, does not change the law. The law is perfectly suited to address just such a scenario without modification. The plain language of the law creates no ambiguity. Because rate changes, whether they are increases or decreases, can be initiated by the utility at its discretion, means that rate changes may come in many different forms and with varying lengths of time. In every case, the law when followed works flawlessly to ensure that a rate increase only is effective when the rate is just and reasonable.

Since there is no statutory distinction between a "permanent" rate and an "interim" rate, it reasons that the law does not direct the Commission to ascertain what type of rate is before it as to length of time, but merely as to the "change" that is filed. To make such a distinction would be beyond the Commission's statutory power. Because arguably all rates in Missouri are "interim" and no statute distinguishes between the length of operation of a rate, it is reasonable to conclude that the application of the law to a rate *change* does not inherently have embedded in it consideration of the *changed* rates' length of operation. As such, when the rate change represents an increase, the utility bears the burden of demonstrating the rate is just and reasonable.

Understanding Missouri's regulatory framework and the law which supports it is necessary to understanding that no special burden of proof is required by a utility seeking a rate increase simply because the length of time the rate will operate is short, nor too long or subject to

change at a point in time in the future by a condition described in the tariff.[16] In this case, Empire's motion, filed on July 6, 2012, asked for the Commission to have allowed the rate to go into effect under section 393.140(11) RSMo. The Commission took no action on that motion. Instead, the Commission took action on the tariff and suspended it as allowed under section 393.150 RSMo. The benefits of section 393.140(11) ended once the suspension occurred, including any powers given to the Commission under section 393.140 (11) RSMo., such as "discretion" in setting the rate. Once the commission suspended the tariff, set a hearing and held a hearing, the Commission had no statutory "discretion" to exercise under 393.140(11) or 393.150. The only discretionary power it had was its inherent power as an administrative agency.

Using an inherent power to usurp an actual statutory power exceeds the Commission's authority. This Commission expressed concern that "interim" rate implementation is a Pandora's box of problems because of the short implementation timeframe not the shortened time of the rates operation, but these policy fears completely overlook the statutory recognition that rates may go into effect without suspension in as little as thirty days. Comingling these two concerns is beyond the law. Another Commission concern has been that approval of "interim" rates will lead to more and more rate increase changes in a short period of time. This is a red-herring as the law requires a "just and reasonable" rate when a rate increase is considered[17] so to suggest a preference for fewer rate increases even though such increases may provide "just and reasonable" rates simply says that confiscation of utility property in favor of ratepayers is the balance the majority seeks to achieve.

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[16] Where a condition is only reciting existing legal standards, a new "just and reasonable" rate, arguably a condition is no condition at all, since to be lawful all rates must be just and reasonable.

[17] § 393.150.1 RSMo.

And, yet another concern expressed by the Commission, the stakeholders and the Office of the Public Counsel, resonate in the Commission's inability to timely hold hearings which will allow for consideration of "all relevant factors"[18] to be considered by the Commission. First, "all relevant factors" are not those factors the parties deem "relevant" but those determined by the Commission to be relevant. Because the "file and suspend" provisions of the law allow for suspension up to eleven months it is obvious that the legislature understood that eleven months does not equate to a hearing where all relevant factors have been heard, nor is any length of time prescribed by statute which equates to the adequacy of any hearing and whether all relevant factors have been considered by the Commission. The law does not require that a hearing last any prescribed length of time, or that the time between suspension and completion of a hearing must last a prescribed length of time. Rather, the law recognizes due process considerations.

The time element is one addressed by the Missouri legislature where it said that in processing a rate increase proceeding the Commission act as speedily as possible on a rate that is filed § 393.150.2 RSMo., thus any policy concern about too frequent rate increases, length of time for hearings, length of time for suspension, and ample time for consideration of all "relevant factors" has legitimately been addressed in law.

D. What constitutes a "just and reasonable" rate in Missouri?

Sections 393.140(11) and 393.150, RSMo., set out this Commission's authority in regulating electric utilities' rates and charges for retail electric service in Missouri. In 1923, the United States Supreme Court in *Bluefield Water Works & Improvement Co. v. Public Service*

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[18] This matter is not a complaint, but a rate increase request. The "all relevant factors" language is recited in the complaint statute. Inclusion in this statutory section makes sense because in a complaint, the pleadings are brought against the utility, and if the Commission were bound to only the allegations contained in the pleadings, issues relevant to the final determination could be constrained by careful and crafty pleading.

Commission of West Virginia, 262 U.S. 679, held that the "equal protection clause" requires that a utility be permitted to earn a return:

> equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.

Id. at 692. In addition to announcing the foregoing rule against discriminatory denial of a proper rate of return, as a matter of equal protection, the *Bluefield* Court also spoke on the "due process" prohibition against confiscation applicable to both federal and state regulatory action:

> The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.

Id. at 690. The *Bluefield* Court concluded:

> Regulation does not insure that the business shall produce net revenues. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. **By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital**.

Id. at 690 (emphasis added). The United States Supreme Court later said in *Hope Natural Gas Company v. Federal Power Commission,* 320 U.S. 591, 603 (1943) that:

> The return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure

> confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

The *Hope* Court also stated:

> It is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. **These include service on the debt and dividends on the stock**. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise.

Id. at 602 – 03 (emphasis added). The Supreme Court of Missouri has affirmed these essential legal principles. In 1925, the Court stated:

> The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. **We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested.**
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> * * *
>
> These instrumentalities are a part of the very life blood of the state, its people, and a fair administration of the act is mandatory. **When we say "fair," we mean fair to the public, and fair to the investors.**

State ex rel. Washington University et al. v. Public Service Commission, 308 Mo. 328, 344 – 45, 272 S.W. 971, 973 (Mo. banc 1925) (emphasis added). The foregoing constitutionally-mandated guidelines and standards have been used by Missouri utility regulators for almost ninety years whenever a tariff seeking a rate increase has been filed and suspended.

IV. Analysis

A. The Commission's *Report and Order* is Unlawful

The majority created new law by setting new criteria for what constitutes a just and reasonable rate for tariff filings for rate increases which have been suspended and set for hearing.

This is evident in a multitude of ways, but primarily in that; (1) the *Order* fails to apply the facts to the *Hope*, *Bluefield* and *State ex rel. Washington University* standards for determining whether a rate is "just and reasonable" under section 393.150.2 RSMo., and (2) the *Order* specifically declares an arbitrary standard as a new component of the utilities burden of proof as to what constitutes a "just and reasonable" rate when a rate increase tariff is filed and suspended.

The *Report and Order* states that "[T]he overwhelming and undisputed evidence presented at the hearing shows that Empire is not experiencing **a financial emergency**, or **near emergency**, and is able to provide safe and adequate service to its customers, regardless of whether or not it receives an interim rate increase." *Report and Order*, ER-2012-0345, p. 13.[19] This directly contradicts the question for determination by the Commission at the September 10, 2012 hearing which was whether, as is articulated in section 393.150.2 RSMo., the utility has met its burden of demonstrating that the rates filed in tariff YE-2013-0021 are just and reasonable.

The majority has said that for a rate to be just and reasonable in this case, Empire must show a "financial emergency" or a "near emergency." The law says the burden of proof is on the utility to show the rate is just and reasonable. Nowhere in the law does it declare that any other showing is necessary, a "financial emergency" or "near emergency" included.[20] Nothing in the law declares the standard for classification of a rate as "interim." Distinguishing between an

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[19] Indeed, Empire never claimed that it was experiencing an emergency or near emergency. It has always maintained that whether it was experiencing an emergency or near emergency is irrelevant to whether its proposed rates are just and reasonable.

[20] While these standards have been articulated by the Commission in past Orders, it is not law that binds a future Commission, and has no precedential value. To the extent the Commission relies upon its own Report and Orders to establish a rule of general applicability, the procedures of the Administrative Procedures Act, Chapter 536 RSMo. must be followed to properly promulgate a rule.

"interim" rate and a "permanent" rate is not supported by the law, and does not provide grounds for elimination of the "just and reasonable" standard and application of a standard unrecognized in the law.[21]

B. The Majority's Misplaced Reliance on the *Laclede* Case

The majority's legal analysis relies mainly on *Laclede Gas Company v. Missouri Public Service Commission*, 535 S.W.2d 561 (Mo. App. K.C. Dist. 1976). *Laclede* is factually and procedurally distinguishable and does not control this case. Laclede filed with the Commission an Application for Partial Increase After Hearing ("Application"). The proceeding instituted by the Application was assigned a case number and was thereafter generally referred to as an "interim" rate case. A one-day hearing was held and by a vote of 3-2, the Commission issued an order denying the Application. The Commission used an "emergency conditions" test, which it used to ascertain whether emergency conditions existed which called for speedy relief.[22] The Commission's Report and Order in *Laclede* expresses the view that an interim increase should be granted 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." *Id.* at 568 – 69. The Court of Appeals affirmed based on the facts in that case. **The Court of Appeals did not incorporate the viewpoint of the Commission expressed in its Report and Order as the Court's holding**. To the extent later cases reply upon the *Laclede* Court as holding the Commission's point of view, those cases are misapplied.

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[21] Just because a fact situation is not squarely addressed by existing law, does not mean that the existing law cannot be applied. Standard rules of statutory interpretation are capable of application in this case.

[22] *Cf.* (relief which granted in a speedy fashion and a tariff that is designed to operate for a shortened period of time).

And while the *Laclede* Court never examined the law with regard to the distinction between an interim rate and a permanent rate, the Court accepted this distinction without question which it recognized in its very reasoning for taking the case for examination in the first instance. The *Laclede* Court stated:

> In its very nature, an interim rate request is merely ancillary to a permanent rate request, and in overwhelming probability the permanent rate request will have been granted before any denial of an interim increase can work its way to the point of decision by an appellate court. If the important legal propositions presented by this appeal are to be decided at the appellate level at all, it is apparent that jurisdiction for that purpose must be exercised despite the technical point of mootness. Because of these considerations, this case should be retained and decided.

Citations omitted. To the extent that *Laclede* is relied upon for anything, it's very lack of statutory analysis regarding a "rate" and its legal distinction as an "interim" rate or "permanent" rate, in my opinion, makes the decision unsound because there appears no distinction in the plain language of the statutes between types of rates based upon the length of operation of the rate, which the Court readily accepts without inquiry.

While the Court read that granting an "interim" rate is an implied power of the agency, it was unnecessary for the Court to look for an implied power where an express power is clearly articulated in section 393.150 RSMo. Implied in each rate change approval by the Commission is the very temporary nature of that rate. **On the other hand, the idea that a rate is "permanent" would disgorge the Constitutional protections afforded the utility against confiscation, and the ratepayer from the benefit of rate reductions as well**. Interestingly, the Commission abandoned its arguments at the appellate court regarding a "test" for interim rates and instead focused on Laclede's constitutional argument that Laclede failed to carry its burden

of proving facts amounting to confiscation.[23] The *Laclede* Court held "[…] that 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."[24]

The holding of *Laclede* is antiseptic at best, as it merely recites the power and authority the Commission is empowered with by statute, and does not negate the application of the "just and reasonable" standard set forth in section 393.150.2 RSMo., nor does the holding bless any specific "test" for application to a rate that is not permanent, and thereby interim. To the extent that later cases rely upon *Laclede* for such blessing, they are incorrect.[25]

The problem with the majority's reliance on *Laclede* here is that Laclede did not submit a tariff for interim rate relief which the Commission then suspended. Rather, Laclede filed an Application. The Commission did not suspend an interim rate tariff. Since no tariff was filed or suspended, arguably the Commission had discretion[26] to use an emergency standard. So, pursuant to those unique facts, the Court of Appeals affirmed. Neither the underlying Commission Report and Order or the *Laclede* decision mentioned or cited the *Bluefield, Hope* or *State ex rel. Washington University* cases, and thus never even considered them, presumably

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[23] 535 S.W.2d 561 (Mo. App. K.C. Dist. 1976).
[24] *Id.* at 567.
[25] A generous number of cases, too numerous to delineate here, inappropriately cite to *Laclede* for the proposition that a "test" should apply, or that "interim rates" are afforded unique non-statutory rate-making treatment. Other cases cite to the Commission's Report and Order in the Laclede case, as well as later Commission Report and Orders for the proposition that an "emergency" test or other versions of it were approved by the appellate courts of this state; they were not.

because no tariff was suspended in accordance with section 393.150.2 RSMo.[27]

And, while many seem to rest their case on *Laclede*, the *Laclede* Court made clear that its opinion was merely advisory, and as such, it has no precedential value. *Laclede Gas Company v. Missouri Public Service Commission*, 535 S.W.2d 563, 565 (Mo. App. K.C. Dist. 1976).

The *Laclede* Court spent much of the opinion talking about discretion, much of it *dicta*. While this Commission has broad discretion under Section 393.150 RSMo. in determining whether to suspend a rate, that is not the case here – the Commission suspended Empire's tariff – and once that suspension occurred, denial of Empire's rate could only be because the existing filed rate was found by the Commission to not be just and reasonable. To suggest that the Commission can rest on broad discretionary powers to create new rules for implementation of a rate increase, simply because the tariff rate filed by the utility carries with it a condition that the rate will operate for a limited period of time and terminate upon a condition in the future, overlooks the plain meaning of the words used in section 393.150.2 RSMo.

In the *Dissenting Option of Commissioner Terry M. Jarrett*, Case No. ER-2010-0036, I discussed this very issue as to "discretion" and when the discretionary power terminates and shifts to the statutory standard for rate determination. The discretion afforded a regulatory agency is implied and serves as a "gap filler" of power where none is enumerated. But where there are express discretionary powers, those powers control. In this case, the majority cannot have it both ways and suggest that their discretion trumps application of section 393.150.2 RSMo and a determination of "just and reasonable" rates. No matter the concerns of the majority as to the length of time a rate will operate or the length of time it will take for that rate to go into

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[27] To the extent the *Laclede* Court discusses anything about the file and suspend provisions in the statutes, such discussion is mere *dicta* and speculation because no tariff for interim rates was filed and suspended in that case.

effect; the law is the law and it calls for a just and reasonable rate after suspension and hearing – both of the latter which have occurred here.

The *Report and Order* also cites *State ex rel. Fischer v. Public Service Commission of Missouri,* 670 S.W.2d 561 (Mo. App. 1984). However, the citation is a string citation that just quotes *Laclede* for the proposition that the commission has authority to give immediate rate relief to maintain the economic life of the company, which does not preclude the Commission from granting immediate rate relief for other reasons. Further, the only issue in *Fisher* was whether an interim rate increase could be reviewed by the courts when a permanent rate case was under review. *Id.* at 27. Neither situation is present here, so *Fischer* is neither helpful nor controlling.

And, repeatedly cited by parties in this matter is the case of *State ex rel. Utility Consumer's Council of Missouri, Inc., v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo., 1979) ("UCCOM") for support of an emergency or other "interim" relief standard. Closer examination of the UCCOM case reveals not only that interim rate relief was not before the Court, but that a string cite to the *Laclede* decision has risen like a Phoenix to more than the UCCOM Court ever could have intended. UCCOM does not stand for, articulate or hold standards for "interim" rate increases. *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission* 585 S.W.2d 41, 49 (Mo., 1979).

In this case, Empire filed a tariff for "interim" rate relief which the Commission suspended and set for hearing. Once the Commission suspended that tariff, section 393.150.2 RSMo. mandates that the Commission use the just and reasonable standard under the guidelines established in the *Bluefield, Hope* and *State ex rel. Washington University* cases.

By using the wrong standard, and misreading *Laclede* and its progeny, the majority fails to be fair to both the public and the investors as required by *State ex rel. Washington University*. Had the majority applied the correct standard, I believe it would have been legally bound to find in favor of Empire.

C. Empire is Entitled to Immediate Rate Relief

Not only did the majority fail to apply the proper constitutional standard, but it brushed aside Empire's claim that it is entitled to immediate rate relief. Curiously, the majority abrogates its responsibility to fully decide the case and instead kicks the can down the road for another day.

In the *Report and Order* the majority stated on page 15: "Based on its findings of fact and conclusions of law, the Commission concludes that Empire has failed to meet its burden of proof to demonstrate that an interim rate increase is just and reasonable **at this point in time**." (Emphasis added). This was because Empire failed to show a "financial emergency, or near emergency, and is able to provide safe and adequate service to its customers, regardless of whether or not it receives an interim rate increase." *Id.* The majority goes on to say that the "interim" request can be considered with the "permanent" rate case. *Id.* Presumably, the majority believes that since they don't see a financial emergency or near emergency, they don't have to grant any increase, even if it is just and reasonable. They can just sort it all out in the future "permanent" rate case. Meanwhile, Empire is not recovering what it is entitled to recover now, which is unconstitutionally confiscatory.

With respect to the need for interim rate relief, the controlling principle was stated in a classic phrase of Justice Cardozo's:

> (P)resent compensation is not atoned for by merely holding out the hope of a better life to come.

West Ohio Gas Co. v. Ohio Public Utilities Commission, 294 U.S. 79, 83 (1935).

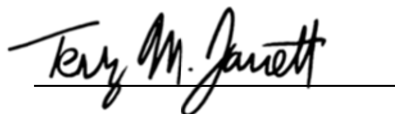
V. Conclusion

This Commission has authority to authorize rate relief whether it is called temporary, emergency, interim, or permanent. Empire's request at issue here is just another rate case under our statutes.

Empire has met its burden of proof under section 393.150, RSMo. The evidence is undisputed that Empire has chronically failed to earn its allowed return on equity, and that this ability was exacerbated by the tornado. Empire is currently experiencing a $30.7 million revenue deficiency. Empire's electric sales were adversely impacted as a result of the tornado. Immediately following the tornado, Empire lost 8,000 customers. The decreased customer levels as well as deferred costs related to the tornado have not been reflected in Empire's rates, will continue to exist and grow, respectively, until they are reflected in rates. Under the *Bluefield, Hope* and *State ex rel. Washington University* standards, Empire has proved that its proposed rate increase is just and reasonable.

I would approve Empire's tariff as filed.

Respectfully submitted,



Submitted this 10th day of September, 2013.