BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of The Empire District Electric Company's Request for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in its Missouri Service Area	)))))	Case No. ER-2019-0374

The Office of the Public Counsel's Response Brief

Respectfully submitted,

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Denotes Highly Confidential Information was redacted

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Denotes Confidential Information was redacted

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Non-Proprietary

TABLE OF CONTENTS

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

Introduction

In this brief Public Counsel is responding to arguments and assertions other parties make in their initial briefs and in answers to Commission questions. Due to time constraints and resource limitations Public Counsel will not respond to every argument and assertion, but by not doing so Public Counsel is not conceding to any argument or assertion.

As before, Public Counsel is structuring its brief to follow the list of issues, including Issue 9.b., an AFUDC issue which Staff omitted from the joint issues list it filed: *Should Empire's rate base be reduced to reflect the source and cost of the financial transaction behind Empire's $90 million promissory note with LUCo?* Public Counsel has identified that in its Initial Brief it omitted FAC issue 5.b. in listing the issues in its brief, which caused it to mislabel issues 5.c-e as 5.b-d. They are correctly labeled in this brief—had Public Counsel not inadvertently omitted issue 5.b., it would have been shown with strikethrough.

As indicated by the response Empire filed on May 11, 2020, the parties view the following issues to not be before the Commission for decision: Issue 2 (Rate Design, Other Tariff, and Data Issues), subparts f-q and s-y; Issue 5 (FAC), subparts b, second sentence of d-ii, d-iii, and e; Issue 15 (energy efficiency); Issue 22 subpart b (reliable service); Issue 23 (estimated bills); and Issue 45(retirement). Public Counsel has included these issues in its brief, and used yellow highlighting to identify them. The issues to which Public Counsel is not taking a position are also included and shown by strikeout.

As it stated in its Initial Brief, the Commission is setting prospective rates in this case predicated on historical information to inform what rates will be just and reasonable in the future.

Despite Public Counsel witness Schallenberg's reference to *Office of the Public Counsel v. Mo.PSC*, 409 S.W.3d 371 (Mo. banc 2013), in its Initial Brief Empire asserts its affiliate transactions are entitled to a presumption of prudence. As Public Counsel extensively addressed in its Initial Brief, when the utility is seeking to base its rates on historical costs it incurred in transactions with its affiliates, there is no presumption the transactions were prudent, and the evidence must show that they were prudent in all respects. *Office of the Public Counsel v. Mo.PSC*, 409 S.W.3d 371 (Mo. banc 2013). No other party has cited to any evidence that any of Empire's transactions with affiliates were prudent—there is none.

In their initial briefs the other parties argue that when setting rates in this case the Commission can ignore the relevant factor of Empire retiring Asbury by March 1, 2020, at the latest. As Public Counsel extensively discussed in its Initial Brief, Empire operationally retired Asbury on December 12, 2019, by finally shutting it down on that day. Even assuming Empire did not retire Asbury until March 1, 2020, the Commission cannot ignore that relevant factor when setting prospective rates in this case based on evidence offered to it on April 16 and 17, and May 6, 2020, where it is undisputed that Asbury did not operate after December 12, 2019. Public Counsel will expand somewhat on this under Issue 13 Asbury.

Ironically, Staff witness Oligschlaeger in his supplemental testimony filed on May 6, 2020, (Ex. 162) cites to the COVID-19 pandemic as a motivational force in late March for Staff settling on the terms of the global agreement. Matters of common knowledge of which the Commission can take notice, the WHO declared COVID-19 a global pandemic on March 11, 2020, and President Trump declared a national emergency for COVID-19 on March 13, 2020. Both

declarations are after the end of the Commission-ordered true-up period (January 31, 2020) and after the March 1, 2020, date Empire claims that it retired Asbury.

PUBLIC COUNSEL'S RESPONSES TO ARGUMENTS OF OTHER PARTIES

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

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

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

As Public Counsel explained in detail in its Initial Brief, Empire's rate-of-return witness Robert Hevert is not credible because his cost-of-equity results that the electric industry has a cost of equity of 9.8% to 10.6%, are inconsistent not only with those of Public Counsel witness David Murray (5.5% to 6.5%)[2] and Staff witness Chari (7.34% to 8.14%), they are inconsistent with those of professional equity analysts upon whom utility investors rely for guidance on managing their stock portfolios (5% to 6%).[3]

[1] Public Counsel's witness on these issues is David Murray (including Public Counsel's failure to comply with Commission order adjustment to ROE (Issue 46); except that Public Counsel's witness Geoff Marke testifies to a service quality adjustment to ROE (Issue 22)).
[2] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 35, ll. 4-8 (6.5%), p. 38, ll. 20-22 (5.5%).
[3] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 30, ll. 8-9.

The fact that Mr. Hevert believes it is reasonable to conclude his double-digit COE estimates are reliable in a capital market environment which is allowing for long-term utility debt costs of around 3% to 4% is incredible.

For example, it is well-established in the investment community that utility stocks are viewed as bond-proxies, such that the primary cause for utility stock price changes is a change in bond yields.[4] A majority of a utility equity investor's return is realized through the dividend yield, with the growth in the dividend making up less than half of an investor's total return over longer holding periods.[5] An awareness of this basic characteristic of utility stock investments implies a maximum COE of 6% for utility stocks, given that electric utility companies currently have a dividend yield of 3%, which means equity investors do not expect more than 3% of total returns to be achieved by capital gains. Another basic accepted rough estimate for a U.S. company's COE is to simply add a 3% to 4% risk premium to the company's bond yield.[6] Adding a 3% risk premium to recent utility bond yields of 3.4% to 3.75% results in a COE estimate of 6.4% to 6.75%.

Mr. Hevert's most incredible results come from his CAPM analyses. These results depend on Mr. Hevert's market risk premium estimates (12.15% to 12.25%) that are twice what investors use for purposes of estimating a reasonable COE to apply to projected utility cash flows. In fact, Mr. Murray discovered market risk premiums used by investor analysts covering APUC's stock that were in the range of 5.5% to 7%.[7]

[4] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 21, l. 9 – 22, l. 3.
[5] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 39, l. 19 – 40, l. 2
[6] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 39, ll. 13 – 18.
[7] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, pp. 19, l. 14 – 20, l. 3

For Mr. Hevert to claim he is accurately and reliably estimating the market risk premium at a level twice those used by professional investment analysts is unfounded. Likewise, Mr. Hevert's claim that investors expect that the market will deliver compound annual returns of around 15% over the long-term is irrational and not grounded in reality. As Mr. Murray determined, Mr. Hevert's assumptions would result in a stock market capitalization to GDP ratio of 67.5x. To put this in perspective, when markets were trading at lofty valuation levels right before the market downturn in response to the COVID-19 pandemic national emergency, this ratio was 1.4x. Mr. Hevert's assumed market returns would result in a total stock market capitalization level of $13.3 quadrillion in 50 years compared to an estimated total GDP of $196.3 trillion in 50 years.[8] Because of the absurd valuation levels embedded in such assumptions, Mr. Hevert's CAPM analysis is meaningless.

Mr. Hevert's bond-yield-plus-risk premium COE analysis assumes that allowed ROEs are a good proxy for COE. As Mr. Murray demonstrates throughout his testimony, this is a faulty conclusion, and only perpetuates the widening spread between allowed ROEs and COE as COE continues to decline.[9]

Response to Empire's arguments on ROR issues

Because Empire consolidated all of its ROR issues (ROE and capital structure) arguments together in its Initial Brief, Public Counsel is addressing them together in this brief.

In its Initial Brief Empire relies entirely on Robert B. Hevert's surrebuttal testimony to support its return on equity ("ROE") issue arguments. It does so despite the fact that Mr. Hevert

[8] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, pp. 18, l. 28 – 19, l. 13
[9] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, pp. 31, l. 12 – 32, l. 2.

evaluated capital market conditions up to mid-2019[10] for purposes of his direct testimony, and through January 2020 for his rebuttal testimony.[11] It is almost as if none of his other testimony matters. Public Counsel acknowledges that the extraordinary actions taken due to the COVID-19 pandemic significantly impacted utility capital markets starting at the end of February, reaching extreme levels around the third week of March, and then recovering through mid-April.[12]

In fact, these events prompted Public Counsel to issue several data requests to Empire in an effort to understand the practical impact these events might have had on Empire's ready access to reasonably priced capital. However, Empire did not answer these data requests on the ground that Public Counsel's request for financial information related to "recent capital market conditions" and "recent volatility in capital markets" was irrelevant because these events occurred after the January 31, 2020 true-up period cutoff date.[13] Consequently, based on Empire's own rationale for not providing updated financial information to Public Counsel, Empire's brief as it relates to the ROE issues is not supported by relevant information. Due to this fact alone, Public Counsel recommends the Commission disregard Empire's brief as it relates to determining the ROE for Empire for purposes of setting rates in this case.

As is demonstrated throughout Public Counsel witness Murray's testimony in this case, he regularly reviewed and considered updated capital market conditions because of the rapidly evolving economic and capital market events that were, and are, occurring during the pendency of this case. Although he decided to increase his ROE recommendation by 25 basis points when he filed his surrebuttal testimony, he also recognized the long-standing correlation of utility stock

[10] Ex. 36, Empire witness Robert Hevert, direct testimony, p. 48.
[11] Ex. 37, Empire witness Robert Hevert, rebuttal testimony, p. 2.
[12] Ex.213, Public Counsel witness David Murray, supplemental surrebuttal testimony, p. 4.
[13] Ex.213, Public Counsel witness David Murray, supplemental surrebuttal testimony, pp. 2-3 and Sch. DM-1.

valuation levels, as measured by price-to-earnings (P/E), with long-term yields.[14] Although long-term yields rapidly increased during the third week of March 2020, Mr. Murray continued to follow utility bond yields and reported to the Commission through his supplemental surrebuttal testimony that they had returned to levels consistent with capital market conditions at the end of 2019.[15] Therefore, Mr. Murray returned to his original ROE recommendation of 9.25%.

Although capital market conditions when Mr. Murray filed rebuttal testimony showed an all-time low cost of capital for the electric utility industry, he did not reduce his ROE recommendation because he is aware that conditions must be sustained to justify an increase or decrease to ROEs. [16] Other than a brief period in late March, the long-term trend as it relates to the electric utilities' cost of capital has been a declining one.[17] There is no reason not to expect this to continue.[18] Therefore, a review and analysis of utility capital market information that takes into consideration several months of data still supports the Commission using a ROE of 9.25%, for purposes of determining Empire's cost-of-service used for setting rates in this case. That ROE is below the approximate 9.5% this Commission has for the other major electric utility companies for which it has set rates in recent years.[19]

Empire also follows a familiar strategy of citing to authorized ROEs to attempt to influence the Commission to use a higher ROE in this case. This Commission has authorized its electric utilities 9.5% ROEs since 2015.[20] In authorizing those ROEs, this Commission considered average authorized ROEs at that time in each of these cases. While Public Counsel understands the

[14] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, pp. 1, l. 15 – p. 2, l. 14.
[15] Ex.213, Public Counsel witness David Murray, supplemental surrebuttal testimony, pp. 3-7.
[16] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, pp. 3-4.
[17] Ex.213, Public Counsel witness David Murray, supplemental surrebuttal testimony, pp. 8 – 9.
[18] Ex.213, Public Counsel witness David Murray, supplemental surrebuttal testimony, p. 8, ll. 1-2.
[19] See Case Nos. ER-2016-0285, ER-2014-0258 and ER-2014-0370.
[20] *Id.*

Commission's desire to consider ROEs authorized in other jurisdictions as a guide to determining the ROE it uses in this case, this evidence should not control. In fact, other than the final ROE from these cases, there is no other evidence offered to provide the context of the capital market conditions evaluated in those cases.

In this case, the Commission has evidence of current capital market data, analysis and investors' corroborating views. As Mr. Murray indicated, utility debt costs have not been this low in almost 70 years.[21] Before the decline in utility stock prices immediately preceding declaration of the COVID-19 pandemic, electric utility stocks were trading at all-time highs.[22] The increase in utility stock valuation levels could directly be tied to the secular decline in the utility industry's cost of capital.[23] In fact, utility stock investors expected commissions to eventually lower their ROEs because the capital market data justified them doing so.[24] Not only had long-term interest rates continued to decline at a steady pace, but utility stock betas had declined considerably since 2015.[25] A lower beta indicates a lower required risk premium to invest in utility stocks.

As Mr. Murray discussed, investors seem perplexed at the "stickiness" of allowed ROEs despite a period of sustained low long-term interest rates.[26] As Mr. Murray explains in his rebuttal testimony, the Commission also needs to recognize that average allowed ROEs as recently as 2019 reflect expectations that long-term interest rates would increase, not decrease. In fact, Mr. Hevert indicated such an expectation in ROR testimony he filed on behalf of Ameren Missouri in Case No. GR-2019-0077. If that case had been decided by the Commission, the *Report and Order*

[21] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, p. 13.
[22] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, p. 3.
[23] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 24 – 28.
[24] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 25.
[25] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 28 – 29.
[26] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 25, l. 24 – p. 26, l. 13.

would have been issued in the third quarter of 2019. Since utility stock values increased significantly during 2019, ROEs authorized in 2019 would have been based on different market evidence than that which exists now.[27] Mr. Murray so indicates the following excerpt from his rebuttal testimony:

> The effect of low yields on utilities' cost of capital is not controversial among capital market participants. The value of utility stocks increase as yields decrease. It is a rather simple relationship that is widely accepted in the investment community. It should not be a matter of *if* utility commissions should lower allowed returns, but a matter of *when* and by *how much*. I propose that Empire's shareholders should accept a modest 25 basis point reduction to Missouri's previous authorized ROE level of approximately 9.5%.[28]

While the Commission may consider other authorized ROEs when deciding what it considers to be a reasonable ROE, this should not be done at the expense of evaluating and understanding the context of capital markets and the fairly straight-forward relationship of a utility company's cost of capital to changes in long-term interest rates.

Interestingly enough, Empire claims in its Initial Brief that "as markets become increasingly volatile, it is important to look well beyond two methods to understand how investors view the risk now facing them and the returns they will now require." [29] It appears Empire is attempting to get the Commission to take a step back from the theoretical arguments and consider the practical impact an authorized ROE of 9.25% would have on Empire's access to capital during volatile capital market conditions related to COVID-19. Empire provided the following excerpt from Mr. Hevert's testimony in its brief:

> The practical issue is plain: when utility investors are faced with such extraordinary market uncertainty, regulatory consistency and supportiveness become critically important. If the Commission were to

[27] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, p. 3, ll. 11-24
[28] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, p. 4, ll. 12-17.
[29] Empire Initial Brief, p. 7.

> adopt the [Staff and OPC] recommendations, it would convey the opposite; it would suggest a lack of support and an increase in regulatory risk just as the support is most critical. The inevitable result will be diminished access to higher-cost capital, ultimately to detriment of customers…[30]

Empire's attempt to be practical as it relates to the impact of a lower ROE on its ability to attract capital at reasonable costs flies in the face of its current state of financial affairs. As Mr. Murray discussed in his testimony, Empire's credit metrics are stronger than LUCo's consolidated credit metrics. Empire's FFO/debt ratio in the 21% to 23% range supports a secured credit rating as high as an 'A.'[31] This compares to LUCo's FFO/debt ratios of 15% to 16%.[32] LUCo has a 'BBB' credit rating because of its more liberal use of debt. Of course, the practical effect of this situation is that Empire now depends on LUCo's access to capital and the cost of this capital. If LUCo had a financial risk profile consistent with Empire, then it would have a higher credit rating and more financial flexibility.[33] However, this is not the case. Of course, LUCo could raise more debt if the Commission authorizes Empire a higher ROE, because this allows it to generate higher cash flows to LUCo, which supports LUCo's FFO/debt metrics.[34] Mr. Murray determined that if the Commission authorized a ROE of 9.25% for Empire, and this were applied to a capital structure consisting of 46% equity and 54% long-term debt, the resulting FFO/debt ratio is higher than the FFO/debt ration APUC targets for LUCo.[35]

Empire doubles down on its attempt to persuade the Commission that it not only needs to save Empire from Mr. Murray's impractically low ROE recommendation, but also his suggestion that Empire take on "unnecessary levels of debt just as the capital markets require

[30] Empire Initial Brief, pp. 7-8.
[31] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 16 and Murray Surrebuttal, p. 19.
[32] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 16.
[33] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, p. 16, ll. 18-26.
[34] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 11 and p. 16.
[35] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 16-17.

stronger, not weaker balance sheets."[36] In this situation, apparently Empire does not want to be practical. Empire continues to ignore the fact that it now relies on LUCo's much more levered capital structure for its debt financing. If Empire wants the Commission to authorize an equity-rich capital structure for Empire on a stand-alone basis, then it should also convince its intermediate parent company, LUCo, to target a similar capital structure. Mr. Hevert claims that an amount of leverage similar that which LUCo carries in its capital structure "will compound extraordinary high levels of market risk with inefficient levels of financing risk." If this is a sincere concern, then the Commission needs to closely monitor LUCo's ability to provide capital to Empire to ensure Empire continues to provide safe, adequate, and reliable service.

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The Commission should adopt Public Counsel's recommended capital structure of 46% common equity and 54% long-term debt for purposes of setting rates in this case, as Public Counsel witness David Murray recommends.

Response to Staff's Capital Structure Arguments

Staff claims the Commission's September 7, 2016 *Order Approving Stipulations and Agreements and Authorizing Merger Transaction*, in Case No. EM-2016-0213 requires the use of Empire's per books capital structure because it is more economical than LUCo's per books capital structure.[37] For purposes of Staff's conclusion, it accepted LUCo's balance sheet figures as being representative of LUCo's use of leverage, despite the fact that rating agencies do not. Rating

[36] Empire Initial Brief, p. 8.
[37] Staff Initial Brief, p. 20.

agencies recognize the $395 million of LUCo off-balance-sheet debt in evaluating LUCo's credit-worthiness.[38] This $395 million of off-balance sheet debt was used to invest in LUCo's regulated utilities.[39] The cost of LUCo's debt is based on this more leveraged capital structure,[40] and LUCo charges Empire a cost based on LUCo's 'BBB' rated capital structure although Empire's capital structure is consistent with an 'A' secured credit rating.[41] If Staff had recognized that LUCo's FFO/debt ratios of 15% to 16% imply much more leverage than Empire's FFO/debt ratios of 21% to 23%, Staff may have recognized the contradiction of LUCo's per books capital structure implying LUCo's assets supported less debt than Empire's do. Not only is LUCo's capital structure more levered and economical than that which is assigned to Empire, but LUCo is charging Empire for longer-term debt issuances than LUCo supports at the corporate level.[42] In fact, the lowest cost debt tranche from LUF's $750 million debt issuance on March 24, 2017, was loaned to LUCo's immediate parent company for the purpose of maintaining equity ownership in LUCo.[43]

Staff incorrectly indicates that Liberty Utilities Finance GP1 ("LUF") raises debt on behalf of APUC and LUCo subsidiaries.[44] LUF is recognized by rating agencies as being LUCo's debt platform used for purposes of raising debt to invest in LUCo's regulated utility subsidiaries.[45] LUF issues debt directly to third-party debt investors, but the cost of this debt is based on LUCo's credit profile, which includes that of LUCo's adjusted capital structure.[46] The LUF debt is not used for

[38] Ex. 210C, Public Counsel witness David Murray, direct testimony, Sch. DM-D-5 and Murray Surrebuttal, p. 17 and Schedule DM-S-6.
[39] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, pp. 15 – 16.
[40] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, p. 10.
[41] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, p. 21.
[42] *Id.*
[43] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, p. 15, ll. 19-22.
[44] Staff Initial Brief, p. 20.
[45] Ex. 210C, Public Counsel witness David Murray, direct testimony, Sch. DM-D-5 and Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, Sch. DM-S-6.
[46] *Id.*

APUC's non-regulated subsidiaries. Algonquin Power Company ("APCo") has its own debt platform.[47] Staff also is mistaken in its claim that LUF holds debt for other regulated subsidiaries of APUC.[48] LUF issues debt on behalf of LUCo and its immediate parent company, Liberty Utilities (America) Holdco, Inc.[49] LUCo then distributes these funds to its regulated utility subsidiaries.

Staff also claims that it would be unfair to both LUCo and Empire to include the $395 million of long-term debt in LUCo's capital structure because LUCo unconditionally guarantees this debt.[50] Of course, it would be especially egregious if LUCo, the entity Empire now relies on for its debt financing needs, guaranteed debt it didn't use for investment in its regulated utility subsidiaries. This would impair LUCo's regulated utility debt capacity for purposes of investment in APUC's other businesses. Public Counsel would consider this to be a detriment to Empire's debt capacity associated with its low-risk regulated utility assets.[51] The Commission itself has evaluated whether a subsidiary guarantees the parent company's debt in determining whether such debt should be included in the ratemaking capital structure. The Commission cited the fact that Spire Missouri did not explicitly guarantee Spire Inc.'s holding company debt as a reason for why it did not find the use of the holding company's capital structure to be appropriate.[52] The facts and circumstances are different here as it relates to LUCo and LUCo's guarantee of the intermediate holding company debt specifically used to invest in LUCo's regulated utility subsidiaries.

[47] *Id.*
[48] Staff Initial Brief, p. 21.
[49] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, p. 14.
[50] Staff Initial Brief, p. 21.
[51] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, p. 15, ll. 1-4.
[52] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, pp. 18-19.

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

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

2. Rate Design, Other Tariff and Data Issues[53]

~~*a. Should the GP and TEB rate schedules be fully consolidated?*~~
~~*b. Should the CB and SH rate schedules be partially consolidated?*~~
~~*c. Should "grandfathered" multifamily customers taking service through a single meter be given the option of being served on the CB/SH rate schedule?*~~
~~*d. How should Empire's revenue requirement be allocated amongst Empire's customer rate classes (Class revenues responsibilities)?*~~
~~*e. How should the rates for each customer class be designed?*~~
~~*f. What should be the amount of the residential customer charge?*~~
~~*g. Should Empire continue its Low-Income Pilot Program as is, or modify it?*~~
~~*h. Should Empire be ordered to consolidate the PFM rate schedules into the GP/TEB rate schedule in a future proceeding?*~~
~~*i. Should Empire be ordered to incorporate shoulder months into the Special Contract / Praxair rate structures in the next rate proceeding?*~~
~~*j. Should Empire be ordered to work to incorporate shoulder months into the rate structures of all non-lighting rate schedules?*~~
~~*k. Should Empire be ordered to retain each of the following: Primary costs by voltage; Secondary costs by voltage; Primary service drops; Line extension by rate schedule and voltage; Meter costs by voltage and rate schedule*~~
~~*l. Should Empire be ordered to use of AMIs for near 100% sample load research as soon as is practical, but no more than 12 months after 90% of AMI are installed*~~
~~*m. Should Empire be ordered to retain individual hourly data for future bill comparisons*~~
~~*n. Should Empire be ordered to retain coincident peak determinants for use in future rate proceedings*~~
~~*o. How should the amount collected from customers related to the SBEDR charge be billed, and should there be a separate line item on customers' bills?*~~
~~*p. By when should Empire move customers served on CB/SH that exceed the demand limits of those schedules to the appropriate rate schedule.*~~

[53] Public Counsel's witness on the remaining issue is Geoff Marke.

~~*q. What, if any, revenue neutral interclass shifts are supported by the class cost of service study?*~~

r. How should any revenue requirement increase or decrease be allocated to each rate class?

As Public Counsel advocated in its Initial Brief, because of the unprecedented turmoil in the economy caused by the COVID-19 national emergency, which is impacting residential customers in ways they cannot evade and from which it will be difficult if not impossible for them to recover, Public Counsel primarily recommends that, if the Commission finds that Empire's rates should be reduced, it is only the residential customer class' rates that should be reduced, and the rates of all of the other customer classes should remain unchanged. As a secondary alternative to 100% of the reduction going to residential customer class rates, Public Counsel recommends for 75% of the reduction go to residential customer class rates and the remaining 25% go to commercial service/small heating service customer class rates.

In its brief MECG relies heavily on parties' class cost of service studies to justify shifting more of an increase or less of a decrease in Empire's revenue requirement to Empire's residential customers than to its other customer classes. Public Counsel cannot overemphasize enough how the number of estimated billings makes the parties' class cost-of-service studies so unreliable that they are of no use for designing class rates in this case.

MECG also relies on comparative rates for industrial customers across utilities based on data from the Edison Electric Institute. Public Counsel used similar rate comparison data from SNL and EIA to make the same point about Empire's residential customers and all of its customers, respectively, as follows:

Table 7: Rankings of 2018 average price to residential customers in Missouri per S&P Global Market Intelligence

	Price	Sales %	Revenue %	Annual Bill	Monthly Bill
Empire	14.07	41	48	$1,936	$161.33
Evergy Metro	13.64	32	39	$1,459	$121.58
Evergy West	11.16	45	52	$1,464	$122.00
Ameren MO	10.89	42	49	$1,471	$122.58

Table 8: S&P Global Market Intelligence 2018 four largest average annual electric residential bills

US Rank	Utility	Largest Average Residential Annual Bill
1	Maui Electric	$2,141
2	Hawaii Electric Light	$2,096
3	Nantucket Electric Co.	$2,077
4	**Empire District Electric**	**$1,936**

Table 1: EIA 2018 utility bundled retail sales of "comparable" Missouri utilities[1]

Utility	Ownership	Customers	Sales (MW)	Revenues	Average Price
Barton County	Coop	6,564	159,345	17,763,000	11.15
Sac Osage	Coop	11,121	151,722	19,353,200	12.6
Ozark	Coop	33,324	535,3186	1,925,200	11.57
Barry	Coop	9,667	182,820	20,639,500	11.29
New-Mac	Coop	17,740	413,943	44,041,000	10.64
Southwest	Coop	41,317	611,562	65,113,000	10.65
Webster	Coop	18,520	384,763	31,904,000	8.29
White River Valley	Coop	44,231	787,048	97,635,000	12.41
Laclede	Coop	37,064	685,606	69,410,800	10.12
Se-MA-NO	Coop	6,106	112,216	9,955,800	8.87
Springfield	Muni	115,823	3,142,918	272,379,900	8.67
Empire	IOU	154,042	4,321,595	522,849,900	12.10
Evergy West	IOU	326,627	8,385,396	805,203,200	9.60
Evergy Metro	IOU	289,299	8,675,389	966,953,500	11.15
Ameren Missouri	IOU	1,223,595	33,699,583	3,161,693,900	9.38

All of Empire's customer classes are paying more for their electric service relative to their peers. Importantly, all classes are also producing a positive earned return to Empire.

Cost-of-service studies are only one factor the Commission should consider when designing class rates. Further, because class cost-of-service experts assign and allocate costs in a logical manner in their studies and there is more than one way to logically assign and allocate those costs, much like return on equity, what costs should be assigned and allocated to each particular class is hotly disputed among experts in the field of class cost-of-service studies. Staff's "highest hours" methodology is no more of an impractical academic theory than the "average and excess" approach MECG advocates.

While class cost-of-service studies are not the universe of what the Commission should consider when designing rates, the Commission should understand that the parties' class cost-of-service studies are unreliable due to the significant amount of estimated billing data used as inputs into them and, therefore, the Commission should not rely on the results of those studies for designing customer rates in this case.

Public Counsel strongly believes that residential customers are going to be impacted hardest by COVID-19 due to the shelter-in-place orders, and the accompanying increase in arrearages that will follow when the moratoriums on disconnects end. If small businesses cannot stay open they will shut down. They will not continue to accrue debt beyond their fixed charges. Residential customer cannot "shut down." The nature of this pandemic is such that self-distancing and quarantining is a reality that necessitates continual utility services. The same cannot be said for many businesses. Public Counsel does not doubt that industrial customers are paying more in Empire's service territory relative to other service territories. All of Empire's customers appear to be paying more. However the economic realities for industrial customers relative to residential

customers is very different in the near term. As such, the Commission should set rates that reflect those realities.

~~*s. How should any residential revenue requirement increase or decrease be apportioned to the energy (kWh) rates?*~~
~~*t. What, if any, changes to the CB, SH, GP and TEB customer charge are supported by the class cost of service study?*~~
~~*u. What, if any, changes to the CB, SH, GP and TEB customer charge should be made in designing rates resulting from this rate case?*~~
~~*v. How should any CB and SH revenue requirement increase or decrease be apportioned to the energy (kWh) rates?*~~
~~*w. How should any GP and TEB revenue requirement increase or decrease be apportioned to the demand (kW) and energy (kWh) rates?*~~
~~*x. How should any LP revenue requirement increase or decrease be apportioned to the demand (kW) and energy (kWh) rates?*~~
~~*y. What, if any, changes to the current SC P energy (kWh) rates should be made to align with Market Prices?*~~
~~*z. How should production-related costs be allocated to each rate class?*~~
~~*aa. How should plant accounts 364, 366 and 368 be classified?*~~
~~*bb. How should primary and secondary distribution plant facility costs be allocated to each rate class?*~~
~~*cc. How should General plant facility costs be allocated to each rate class?*~~

3. Jurisdictional Allocation Factors[54]

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

Public Counsel's position has not changed from that it took in its Initial Brief. Any allocation factors for affiliate transactions should be based on the costs and values of the goods or services provided and received.[55]

[54] To the extent this is an issue related to affiliate transactions, Public Counsel's witness is Robert Schallenberg.
[55] Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, pp. 6-7, 17-19.

4. WNR and SRLE Adjustment Mechanisms[56]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The Commission should reject it. Empire's proposed weather normalization rider should be dismissed out-of-hand and not even be considered before Empire demonstrates with historical empirical data that it can provide consistently accurate bills to its customers.

In its initial brief, Public Counsel explained why both Empire's WNR and Staff's alternative SRLE proposals should be rejected. Neither are legally compliant with Section 386.266.3, RSMo, and neither are justified when Empire is currently making its authorized return. In fact, by Staff's own math and numbers, Empire is actually overearning, and its customers should be receiving a rate decrease through this case.[57] Although Staff abandons its own positions because it does not believe it a "likely outcome" that this Commission will order a rate decrease, this Commission should still consider Staff's true-up accounting schedules when evaluating whether a WNR or a SRLE is justified.[58]

Neither Empire's nor Staff's arguments in favor of their proposed rate mechanisms should convince this Commission. In its initial brief Empire argues that Empire should receive either a WNR or a SRLE. In fact, that Empire and Staff are at odds on which mechanism should be adopted should not be lost on the Commission. Despite agreeing to a stipulation supporting the SRLE, Empire is nonetheless undercutting its signatory position by arguing for the WNR in tandem with its support for the stipulation. This is not mere irony or oddity, but troubling.

[56] Public Counsel's witnesses on these issues are Lena Mantle and Geoff Marke.
[57] Exhibit 164, Staff Responses to Commission Questions, p. 25; Ex. 162, Supplemental Testimony of Mark Oligschlaeger p. 3.
[58] Exhibit 164, Staff Responses to Commission Questions, p. 25.

Regardless, Empire complains that a WNR is necessary because while its costs are relatively static, its revenues are not. Empire argues that as customer energy usage is dependent on fluctuating weather, Empire's revenues from electric sales in turn fluctuate and result in a "misalignment between rates and costs."[59] This makes sense in the abstract, but ignores the reality of Empire earning well above its authorized return.

Empire's initial brief does not address Empire's excessive hearings, but does devote considerable time explaining how a WNR or a SRLE supposedly "decouples" its revenues from energy use. Beyond this, little justification is given for why Empire should get this decoupling treatment, beyond merely pointing to a statute that authorizes a weatherization mechanism when such a mechanism is justified.[60] However, that statute also states that the first factor this Commission must consider when evaluating a company's requested decoupling mechanism is the company's "sufficient opportunity to earn a fair return on equity."[61] As Empire is earning above its fair return on equity, there is no reason why the Commission should approve the proposed WNR or the proposed SRLE.

Empire does claim that the primary benefit of a WNR or a SRLE is that it "stabilizes customer bills."[62] However, this argument reveals the public policy rationale for why this Commission should not authorize Empire to have a WNR or a SRLE. If a customer's bill will not fluctuate, then what incentive does a customer have to engage in personal energy use reduction measures? What incentive does Empire have to pursue true energy efficiency if bills do not fluctuate? Public Counsel submits that the answers to both hypotheticals are "none," and that this

[59] Initial Brief of the Empire District Electric Company, p. 11
[60] Id. at 14.
[61] § 386.266.5(1), RSMo.
[62] Initial Brief of the Empire District Electric Company, p. 15.

Commission should avoid such a result by disapproving both the proposed WNR and the proposed SRLE.

For Staff's part, it acknowledges that Empire's proposed WNR poses technical issues related to inconsistent weather monitoring, and legal issues pertaining to noncompliance with Section 386.266.[63] Staff then proposes its alternative, a SRLE.

In its initial brief Staff explores the technical operation of its SRLE, [64] but fails to account for why Empire should have a SRLE, when Empire is overearning by Staff's own measure, or how a SRLE will work with Empire's startling increase in estimated billings.[65] Staff defends its SRLE as legal simply because it is "almost identically structured" to the SRLE the Commission approved for Ameren Missouri Gas.[66] Public Counsel notes that the phrase "almost identical" carries considerable weight in Staff's initial brief, but Staff does not explain what structural differences may exist between Ameren Missouri Gas' mechanism and its SRLE. Regardless, a SRLE for Empire should be judged on its own legal and technical merits, and not offered to Empire as an entitlement because another company got a similar mechanism or because Empire proposed a poorly constructed weather normalization rider. Public Counsel witness Lena Mantle testifies that the SRLE encompasses more than revenue changes due to weather, conservation, or both.[67] Section 386.266, RSMo, only permits a recovery mechanism for the impacts of weather, conservation, or both. As Staff has designed a mechanism beyond statutory constraints, the Commission should reject it.

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

[63] Staff's Initial Brief p. 33; Ex. 123, Rebuttal Testimony of Michael Stahlman, p. 2-3.
[64] See Staff's Initial Brief p. 39-41.
[65] *See* Public Counsel's Initial Brief p. 26-27.
[66] Staff's Initial Brief p. 38.
[67] Ex. 205NP, Public Counsel witness Lena Mantle, surrebuttal testimony, p. 24.

Public Counsel's position has not changed from that it argued in its Initial Brief. It is not lawful for the Commission to authorize a SRLE, either as proposed by Staff or Empire.

c. Should the Commission adopt Staff's Sales Reconciliation to Levelized Expectations Proposal ("SRLE") or approve the SRLE with modifications as suggested by the Company?

Public Counsel's position has not changed from that it argued in its Initial Brief. No. Staff's proposed methodology is not an appropriate substitute for Empire's proposed weather normalization rider, nor should the Commission feel that it has to provide a substitute for Empire's proposal since a weather normalization rider is a privilege, not a right.

5. FAC[68]

a. What is the appropriate incentive mechanism in Empire's FAC for sharing between Empire and its retail customers the difference between its actual and base net fuel costs?

Public Counsel's position has not changed from that it argued in its Initial Brief. The appropriate mechanism for sharing between Empire and its customers for costs for which Empire recovers through its FAC is a sharing of 85% to Empire's customers and 15% to Empire.

Both Empire and Staff argue that Empire's FAC sharing mechanism should remain as a 95/5 split whereby customers pay for 95% of fuel and purchased power price increases, and Empire receives 5% of decreases. Both employ different tactics to support the 95/5, but neither are satisfactory.

Empire's initial brief mainly is devoted to attacking Public Counsel's proposed 85/15 sharing, as opposed to explaining why the 95/5 sharing works as an efficiency incentive. In fact, Empire's initial brief does not explore why any efficiency incentive is necessary. Empire's absent discussion for why a 95/5 sharing is enough to incentivize it to continually reduce costs should

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

concern the Commission because that incentive is a necessary component of any FAC. As prior Commissions have found that "an after-the-fact prudence review is not a substitute for an appropriate financial incentive, nor is an incentive provision intended to be a penalty against the company. Rather, a financial incentive recognizes that fuel and purchased power activities are very complex and there are actions [Ameren Missouri] can take that will affect the cost-effectiveness of those activities."[69]

Empire focuses instead on arguing that an 85/15 sharing is improper because it supposedly places more risk on Empire, which in turn allegedly harms Empire.[70] No public utility is entitled to be free from risk, nor should it expect to. The entire purpose of ROE is that a utility receive returns commensurate with its risk in serving the public. The Commission should also recall that although Empire arguably faces more risk under an 85/15 sharing scenario when fuel prices rise, it conversely has more to gain, three times more than with its current 95/5 sharing, when prices fall.[71]

Empire also maintains that altering the efficiency incentive in its FAC from 95/5 to 85/15 would increase the payments customers pay when actual fuel and purchased power costs are below the FAC base factor.[72] Empire's argument does not accurately reflect how its FAC works. Customers do not "pay" when fuel prices are below its FAC base factor. Rather, Empire's FAC returns savings when its FAC base factor within the commodities charge is higher than Empire's actual fuel and purchased power prices.

[69] *Report and Order*, ER-2008-0318, p. 72.
[70] Initial Brief of the Empire District Electric Company, p. 22
[71] Ex 203NP, Public Counsel witness Lena Mantle, direct testimony, pp. 11-12.
[72] Initial Brief of the Empire District Electric Company, pp. 21-22.

Staff also responds negatively to Public Counsel's proposed 85/15 sharing with similarly lackluster reasons. In its initial brief Staff says that the Commission "has consistently ordered" a 95/5 sharing, and argues that therefore 95/5 should continue because that is what has always been done.[73] This position effectively halts any reevaluation or consideration of changing circumstances or particulars. It certainly does not judge a company's FAC request on its merits, but rather defers to history and intransigence. This Commission should use history as a guide, but ultimately order an efficiency mechanism that actually induces cost-effective behavior on the part of Empire. Doing so fulfills the statutory directive to "improve the efficiency and cost-effectiveness of […] fuel and purchased power procurement activities."[74]

Staff also claims that changing the current 95/5 sharing is not necessary because "Empire is managing its fuel and purchased power costs effectively."[75] Staff's conclusion on this point is a paradox. Recall that Empire lost nearly $100 million through its gas hedging practices.[76] Staff did not challenge those losses as imprudent, and supported Empire's gas hedging as a risk management practice. However, Empire abandoned its gas hedging after the losses came to light.[77].

It seems that Staff will not take a position contrary to the 95/5 sharing absent Commission guidance. The Commission should offer that guidance and prescribe an 85/15 sharing in Empire's FAC. Such a sharing will compensate Empire for the virtual totality of all of its increasing fuel and purchased power prices, while providing a key disincentive for behavior such as the gas hedging practices where Empire incurred significant losses that its retail customers bore.

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

[73] Staff's Initial Brief, p. 44.
[74] § 386.266.1, RSMo.
[75] Staff's Initial Brief, p. 45.
[76] Ex 205NP, Public Counsel witness Lena Mantle, surrebuttal testimony, p. 3.
[77] Ex. 205HC, Public Counsel witness Lena Mantle, surrebuttal testimony, p. 5.

c. What is the appropriate base factor?

Public Counsel's position has not changed from that it argued in its Initial Brief. The base factor is a price per energy value derived from the NBEC. Public Counsel cannot independently determine the NBEC or base factor, but Public Counsel is positive that what the signatories to the stipulation offer the Commission does not accurately reflect Empire's fuel and purchased power costs.

Both Empire and Staff support the $0.02415/kWh contemplated by their stipulation and agreement.[78] Public Counsel does not present its own calculated base factor, but notes the obvious concern that Empire's new FAC base factor should be accurate and, therefore, be crafted by excluding fictional Asbury costs and revenues. Empire is correct that the NBEC and base factor should match, but neither the FAC base factor Empire is proposing nor the current FAC base adopted in the Stipulation and Agreement accurately reflects the reality that Asbury is closed.[79]

Empire admits that the base factor it endorses is one that was "established in the Company's last general rate case."[80] That is, it is a base factor that was established when Asbury was operating and, consequentially, includes Asbury's associated costs and revenues. Asbury is no longer operational, and to adopt a base factor that pretends otherwise sends incorrect price signals to customers, and will ultimately result in higher FAC charges than they should be due to the absences of Asbury related revenues. There is no good reason to allow this. The only justification appears to be that Empire wants everyone to continue pretending that it is not timing a plant retirement such that its customers will pay for a fictional plant costs.

[78] Stipulation p. 3.
[79] Initial Brief of the Empire District Electric Company, p. 17-18.
[80] Id. at 17.

Staff likewise advocates for the base factor from Empire's last rate case, admitting that "the components of the base factor in ER-2016-0023 and Staff's proposal in this case are generally the same."[81] Therefore, Staff is supporting a base factor that pretends that Asbury is still operating and consuming fuel. Staff's justification for maintaining this fictional base factor is that it is supposedly "balanced," since Empire did not consistently under- or over-recover its fuel costs over its last seven FAC rate filings.[82] This is an indefensible justification. It is indefensible because it does not address the fact that Asbury was operating during those last seven rate filings, but is not, and will not, operate now and in the future. It is the equivalent of justifying one's stockpiles on the previous seven months, while ignoring the obvious oncoming winter. Staff's position is also indefensible because it skirts the goal of the NBEC and base factor being grounded in Empire's prospective fuel costs. The costs included in Empire's current FAC base and Empire's and Staff's alternative bases are vastly different.[83] By Staff's logic, so long as the result is relatively close, then it does not matter what inputs are put into Empire's NBEC and FAC. We might as well discount any actual measure of fuel costs, and just continually use the same numbers into perpetuity. Staff's position simply makes no sense.

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

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The nature of the costs and revenues that flow through Empire's FAC should remain the same as those which currently flow through it, with the exception of the addition of transmission revenues and the

[81] Staff's Initial Brief p. 46.
[82] Id.
[83] Ex. 299-15, Public Counsel witness Lena Mantle, Reply to Testimony Responding to Commission Questions, Sch. LMM-Q-1.

removal of short-term capacity costs as described in Public Counsel's positions to the more specific issues below. The appropriate percentages of transmission costs and revenues to flow through Empire's FAC should be modified to match the supply-side mix circumstances that will impact those transmission costs and revenues when rates from this case become effective; *i.e.*, 50% percent of MISO transmission costs and a percentage of SPP costs based on a Staff fuel run that does not include Empire's Asbury plant as a supply-side resource.[84] The issue underlying Empire and Staff's position as to the percentage of transmission costs and revenues to include in Empire's FAC is that, like nearly every other FAC issue, both are operating under the faux assumption that Asbury is still generating energy and consuming fuel.[85] As an alternative to its stipulated position of keeping the transmission percentage the same as it currently is, Empire wants all transmission costs to be included in its FAC, including all charges related to the tie-in of Plum Point into SPP and MISO.[86] Staff supports the stipulation's terms of maintaining 34% and 50% of Empire's respective SPP and MISO transmission costs being included in Empire's FAC.[87] These percentages are based on assumptions as to the amount of energy Asbury formerly delivered into SPP, but no longer does. There is no justifiable reason why Empire's FAC should be designed as if Asbury is not retired. Therefore, the Commission should order its Staff to recalculate the transmission cost percentages with the impacts of Asbury operating excluded.

As an aside, Staff wants to exclude all transmission revenues from Empire's FAC.[88] Staff's only justification for excluding transmission revenues, while obligating customers to support costs, is that this is supposedly in line with past Commission decisions. This thinking does not explore

[84] Ex. 203NP, Public Counsel witness Lena Mantle, direct testimony, pp. 14-16.
[85] In addition, it is worth nothing that Empire's proposed alternative base factor is in direct conflict with the Stipulation and Agreement in that it includes 100% of Empire's transmission costs and revenues. Ex. 18, Supplemental Direct testimony of Aaron Doll, p. 4.
[86] Initial Brief of the Empire District Electric Company, p. 19.
[87] Staff's Initial Brief p. 47.
[88] Id. at 48.

why depriving customers of those revenues is beneficial, good public policy, or even desirable. It is merely an unwillingness to challenge the status quo.

What, if any, portion of the MJMEUC contract should be included or excluded from the FAC? ~~*Should the Company provide any additional reporting requirements within its FAC monthly reporting in regards to MJMEUC?*~~

Public Counsel's position has not changed from that it argued in its Initial Brief. When the purchased power contract Empire entered into with the Missouri Joint Municipal Electric Utilities Commission ("MJMEUC") goes into effect on June 1, 2020, it should be treated under Empire's FAC as any other contract for the sale of power would.[89] Empire's contract with the Missouri Joint Municipal Electric Utilities Commission (MJMEUC) is not a full or partial requirement sales contract, and should not be treated as such. Empire does not want the revenues from its MJMEUC contract to flow back to its customers through its FAC unless it is granted an AAO for jurisdictional allocator changes.[90] Empire's basis for this position is that since its tariffs exclude "full or partial requirement sales to municipalities" from its FAC, then its contract with MJUMEUC should accordingly be excluded as a full or partial requirement sales contract.[91] However, as Public Counsel recounted in its initial brief, Empire's contract with MJMEUC is far more extensive than Empire's previous full or partial requirement sales contracts.

For instance, Empire's contract with the Missouri cities of Monett and Mt. Vernon plainly called themselves "full requirement" contracts.[92] Those contracts detail Empire's service

[89] *See* Ex. 203NP, Public Counsel witness Lena Mantle, direct testimony, pp. 16-18.
[90] Initial Brief of the Empire District Electric Company, p. 19.
[91] Id.
[92] Exhibit 277.

obligations to the city, but with no set price or discussion of which resource Empire uses to meet its obligations. Empire's contract with MJMEUC on the other hand details ***_____

_____

_____ ***[93] If Empire's contract with MJMEUC was a full or partial sales requirement contract, then it would certainly be entitled to treat it as such per Tariff sheet 17z and exclude it from the FAC, but it isn't either a full or partial requirement contract. It is a full-blown power purchase agreement, and therefore its revenues should be accounted for in Empire's FAC.

Staff also disputes Public Counsel's position on the MJMEUC contract by arguing that Public Counsel is claiming that the contract is one "for the sale of power."[94] Staff seemingly does not understand Public Counsel's position or testimony. Staff maintains that the MJMEUC contract revenues should be excluded from Empire's FAC because it will allegedly offset lost revenues from current municipal customer contracts that are expiring.[95] In its initial brief Staff argues that "the energy purchased from Liberty-Empire related to the MJMEUC agreement will be billed to the cities."[96] Accordingly, these are still off system sales revenues related to municipal customers and analogous to partial or full requirement sales contracts whose revenues are excluded from the FAC by tariff. However, what Staff fails to acknowledge is that neither MJMEUC nor any municipality is purchasing any energy from Empire through this contract. A full or partial requirements customer would purchase some of its energy requirements from the utility it has a contract with. However, ***_____

[93] Exhibit 203C, Direct Testimony of Lena Mantle, Sch. LMM-D-3.
[94] Staff's Initial Brief p. 48.
[95] Id. at 49.
[96] Id.

***[97] Treating the MJMEUC contract as a full or partial sales contract matters because doing so secures those revenues solely to the benefit of Empire as municipal customers are leaving Empire's load. If the Commission treats this contract as a full or partial requirements contract then in Empire's next rate case jurisdictional allocation factors should include this contract as a wholesale customer with costs allocated to them. However, Empire witness Richard, in her direct testimony indicates that this contract would be treated as it should after the next rate case in which new jurisdictional allocation factors would be calculated without the loads of these cities.[98] Empire is essentially hiding an attempt to secure lost revenues through an argument that its MJMEUC contract is a full or partial sales contract. It was this very misallocation of FAC revenues by an electric company arguing that something was a partial requirement contact that this Commission has found imprudent.[99] The Commission should now not allow Empire to repeat this behavior.

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

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

Public Counsel's position has not changed from that it argued in its Initial Brief. Empire's short-term capacity costs should be excluded from flowing through Empire's FAC.[100]

In its initial brief Empire does not speak to short-term capacity costs being included in its FAC, but Staff supports the stipulation's terms of excluding short-term capacity costs from Empire's FAC.[101] However, the stipulation only agrees to the exclusion for one year, until June 1,

[97] Ex205C, Public Counsel witness Lena Mantle, surrebuttal testimony p. 12; Ex 203C, Public Counsel Lena Mantle, direct testimony, LMM-D-3 p. 25.
[98] Ex. 4C, Corrected Direct Testimony of Sheri Richards, pp. 26-27.
[99] Ex. 205NP, Public Counsel witness Lena Mantle, surrebuttal testimony, p. 11.
[100] Id. at 20.
[101] Staff's Initial Brief p. 49.

2021. Empire has filed for SPP acceptance of its resource adequacy, and expects official acceptance by May 15, 2020.[102] However, as Empire admits in its recent resource plan update, its reserve margin for the summer of 2020 is **_____**[103] Combine this with a change in the SPP accreditation methodology for wind and Empire's own admission that SPP's resource adequacy calculations are a "dynamic process and Empire may not be able to count on the exact same rates as prior years for deliverable capacity,"[104] the June 1, 2021 limitation is not meaningful. If the wind projects are not completed on time or a large customer comes on line, then Empire may not have the capacity it needs for the summer of 2021. The agreement would allow the cost of short-term capacity to flow through Empire's FAC. Public Counsel recommends that the language regarding short-term capacity be removed and in the next rate case, if Empire shows that it does indeed have the capacity it needs, short-term capacity payments can be added back into Empire's FAC.

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

6. Credit Card Fees[105]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. No. Empire should not be allowed to add the credit card convenience fee to its cost-of-service. The socialization of these fees are not only unjust for those unable to pay in this method, but it is charging customers twice for their internet payment option, and this is not fair to those who cannot or will not be using this method to pay their Empire electric bills.

[102] Exhibit 21, Surrebuttal testimony of Aaron Doll, p. 3.
[103] Update, Case No. EO-2020-0284 (Mar. 23, 2020)
[104] Exhibit 21, Surrebuttal testimony of Aaron Doll, p. 3.
[105] Public Counsel's witness on this issue is Amanda Conner.

b. If so, what level of fees should be included?

N/A.

7. Rate case Expense [106]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. Empire's expense for using a chartered plane for four individuals to travel between the cities of Joplin and Jefferson in Missouri should not be included when the cost of renting a car, hotel rooms, and three meals a day for them is less.[107] After the Commission determines the amount of allowable rate case expenses, then it should reduce that amount by the shared mechanism chosen by the Commission for determining the amount of Empire's rate case expense to include in Empire's revenue requirement.

b. Should Empire's prudent rate case expenses be normalized or amortized, and over what period of time?

Public Counsel's position has not changed from that it argued in its Initial Brief. Since Empire files rate cases every three years, and no more than four to continue its Fuel Adjustment Clause, its rate case expenses should be normalized over three years since this is the normalized time period over which Empire comes in for rate cases.[108]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. Recognizing that both the utilities and their customers benefit by matching prospective rates with

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

what it takes for the utility to provide prospective service—investment, costs, etc.—the purpose of general rate cases, the Commission ordered in Case No. ER-2014-0370 that Kansas City Power & Light Company's rate case expenses be shared between it and its customers based on a ratio of the amount of increase requested and the amount granted by the Commission.[109] The Commission's same rationale applies in this case. As Public Counsel and the Commission's Staff both recommend, the appropriate sharing in this case should be calculated in this same manner using Staff's rate case expense amount.

8. Management expense[110]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. Yes. Empire's management expense includes meal costs for what Empire claims without support are business meetings in the amount of $686,087. The disallowance of all other charges Public Counsel has deemed unreasonable or unjustifiable due to lack of justification of how these charges benefit Empire's retail customers is $3,021,797. The total test year disallowance of $3,707,884 recorded in account 923 for the test year.[111] Public Counsel also has a disallowance of $3,006,363 in account 923 for the true-up. Since Staff's account 923 number is based only on the test year, the amount that should be removed from account 923 is $3,707,884.

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

9. Allowance for Funds Used During Construction[112]

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

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

b. *Should Empire's rate base be reduced to reflect the source and cost of the financial transaction behind Empire's $90 million promissory note with LUCo?*[113]

Public Counsel's position has not changed from that it argued in its Initial Brief. Yes. Empire's June 1, 2018, refinancing of its mortgage bonds was not a normal business decision; instead, by refinancing secured first mortgage bonds with proceeds of an unsecured 15-year promissory note with LUCo where LUCo obtained the funds from its line-of-credit facility provided LUCo a preference—a financial advantage—and was contrary to the affiliated services agreement cost allocation manual for transactions between Empire and LUCo.[114]

10. Cash Working Capital[115]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The Commission should assign an expense lag of 365 days as the appropriate metric for measuring

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

Empire's income tax lag for purposes of cash working capital ("CWC") due to the Company's lack of income tax liability. This will reduce Empire's CWC by $14,002,453

~~*b. What is the appropriate expense lag days for cash vouchers?*~~
~~*c. Should bad debt expense be a component of cash working capital? If so, what is the appropriate lag days?*~~
~~*d. What is the appropriate expense lag days for employee vacation?*~~

11. Accumulated Deferred Income Tax[116]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. No. Empire's proposed accumulated deferred income tax ("ADIT") reduction of $2,621,928 by an accounting labeled, Net Operating Loss ("NOL"), should be disregarded. When Empire was included as part of the consolidated group in Liberty's consolidated tax returns, it no longer had the use of specific NOL tax deductions. NOLs are tax return items, and Empire cannot randomly apply them to its rate base. entry

~~b. *Should FAS 123 deferred tax asset for stock-based compensation be included in ADIT balances for rate base?*~~

12. Tax Cut and Jobs Act of 2017 federal income tax rate reduction from 35% to 21% impact for the period January 1 to August 30, 2018[117]

a. How should the Commission treat the 2017 TCJA regulatory liability the Commission established in Case No. ER-2018-0366 when setting rates for Empire in this case?

As Public Counsel advocated in its Initial Brief, the Commission should recognize that Empire has had the use of interest free money as a result of the Tax Cuts and Jobs Act stub period and, therefore, reduce Empire's rate base, just as the Commission reduces rate base for

[116] Public Counsel's witness on this issue is John Riley.
[117] Public Counsel's witness on this issue is John Riley.

accumulated deferred taxes. The stub period tax overearning of $11,728,453 should be returned to Empire's Missouri retail customers as quickly as possible and, so long as Empire continues to have the free use of the funds, then the funds balance should be applied as an offset to Empire's rate base.

In his supplemental testimony (Ex. 162) Staff witness Mark L. Oligschlaeger testifies at pages four to five that Staff views deferring return to Empire's 2017 TCJA regulatory liability until Empire's next rate case rather than in this case is appropriate given the national emergency of COVID-19. The settlement agreement would have the Commission include the amount of $5,000 per month ($60,000 annually) in Empire's revenue requirement in this case for a deferred balance of some $11.7 million and then review the amortization period and deferred balance in Empire's next general rate case. This is not what the Legislature contemplated. In §393.137.3, RSMo, the Legislature directed the Commission to adjust the rates of electrical corporations in Empire's circumstance to forthwith reflect the reduction in the federal income tax rate and to require the utility to defer to a regulatory asset (*sic*) the benefits it reaped from the reduced tax rate from January 1, 2018, until the Commission changed its rates. The Commission did so for Empire in Case No. ER-2018-0366. In the same statutory subsection the Legislature then directed, "The amounts deferred under this subsection shall be included in the revenue requirement used to set the electrical corporation's rates in its subsequent general rate proceeding through an amortization over a period determined by the commission."

The Legislature's intent is that the Commission establish a ***reasonable*** amortization period in this case for the $11.7 million and require the amortized amount be included in Empire's revenue

requirement in this case. That the Commission recognizes this is shown by its following questions (Shown under Issue 35):

1. Empire - How difficult would it be to have a line item credit to Empire customers to eliminate the entire $11.7 million stub period revenues over a six-month period?

2. Empire - What is the shortest time period to refund the stub period revenues to customers that would not create cash flow problems, considering that Empire has had interest free use of these revenues since 2018?

3. Staff - Does Staff see any reason to not return the stub period revenues collected from Empire customers over a time period to correspond with the estimated period of time until Empire's next rate case tariffs go into effect?

Staff's rationale has no merit.

13. Asbury[118]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. It is not lawful to require Empire's customers to pay for Asbury costs through new rate. In response to the initial briefs of the other parties on this issue, as well as the supplemental testimony of Staff witnesses Charles Poston and Mark Oligschlaeger in particular, Public Counsel adds the following to the arguments it made on this issue in its Initial Brief.

Public Counsel's position on Asbury does not change even if the material date for whether the Commission must address them in this case is March 1, 2020, instead of the December 12, 2019, final shutdown date. Among the definitions of retirement at Dictionary.com is the following: "5 removal of something from service or use: retirement of the space shuttle fleet."[119]

[118] Public Counsel's witnesses on these issues are John Robinett and Geoff Marke.
[119] https://www.dictionary.com/browse/retirement#, accessed May 12, 2020, at 1:12 P.M.

Additionally, the following definition is in the version of the FERC Uniform System of Accounts that the Commission has adopted (Ex. 274, p. 318 of USOA).

> 28. *Property retired,* as applied to electric plant, means property which has been removed, sold, abandoned, destroyed, or which for any cause has been withdrawn from service.

While Empire removed Asbury from service on December 12, 2019, even if it had not, no one disputes that Empire had removed Asbury from service by March 1, 2020. The Commission would be arbitrary and capricious to not treat Asbury as shut down when determining Empire's cost-of-service for setting rates in this case. In consolidated Case Nos. ER-2009-0089, ER-2009-0090 and HR-2009-0092, when the parties disputed the true-up period cutoff date, the Commission issued an order on November 30, 2008, where it set a procedural schedule that included a true-up period cutoff date of March 31, 2009, but stated it would consider an extension of that cutoff date if Kansas City Power and Light Company and Aquila needed it to include costs at Iatan in their costs-of-service.

On March 18, 2009, at the utilities' request, the Commission extended the true-up period cutoff date from March 31, 2009, to April 30, 2009. It also ordered the test year and update period. The schedule always contemplated new rates in eleven months with an effective date of August 5, 2009. For the Commission to extend the true-up period to capture the addition of generating plant capital improvements in the utilities' cost-of-service when it was not impractical to do so, but deny doing so here, where it is at least practical, would be arbitrary and capricious. Copies of these two orders are marked and offered as Exhibit Nos. 299-19 and 299-20.

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

Public Counsel's position has not changed from that it argued in its Initial Brief—"No."

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The Commission should remove, at a minimum, the depreciation expense and operations and maintenance (O&M) expense from Empire's cost of service and rate base. Both categories amount to $11,179,375 for depreciation expense based on Staff's true up accounting schedules,[120] and between **_____ _** for O&M expense.[121] The Asbury station should be removed from plant-in-service and accumulated depreciation reserves, and set to zero.

14. Fuel Inventories[122]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. Zero. By December 12, 2019, Empire had no usable coal inventory remaining at Asbury,[123] and Empire had no intention of generating electricity from its 200 MW coal-fired generator at Asbury after that date, submitting Asbury into the SPP market as being in outage for lack of fuel[124] until it officially retired Asbury on March 1, 2020.[125]

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

[120] Ex. 124, Staff True Up Accounting Schedules, ER-2019-0374 Schedule 05 p. 1 ln 8-15 (Mar. 27, 2020).
[121] Ex. 219C, Public Counsel witness John Robinett, surrebuttal/true-up direct testimony, p. 4.
[122] Public Counsel's witness on this issue is Robert Schallenberg.
[123] Ex. 219C, Public Counsel witness John Robinett, surrebuttal/true-up direct testimony, Schs. JAR-S-1C and JAR-S-2C; and Exs. 261C, February 2020 Fuel Report submitted by Empire on 03-31-2020 BEGR-2020-1067, and 262C, Electric Net Fuel and Purchased Power Report submitted by Empire on 03-31-2020 BFMR-2020-1070.
[124] Ex. 263, Empire response to MPSC DR 333.
[125] Ex. 20, Empire witness Aaron Doll, rebuttal testimony, p. 2.

16. Operation and Maintenance Normalization[126]

a. What is the appropriate level of operation and maintenance expense to be included in the cost of service?

~~*b. Should inflation factors be used to calculate operation and maintenance expense?*~~

~~*c. What is the appropriate normalized average of years to be used for the Riverton, State Line Combined Cycle Unit, the Common Unit and State Line 1 Unit?*~~

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

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

18. Affiliate Transactions[127]

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

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

Public Counsel's position has not changed from that it argued in its Initial Brief. Empire's June 1, 2018, refinancing of its $90 million first mortgage bonds by executing a 15-year $90

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

million unsecured promissory note with it affiliate LUCo is imprudent, but Public Counsel has not seen sufficient evidence to opine as to the prudency of Empire's other affiliate transactions.

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

Public Counsel's position has not changed from that it argued in its Initial Brief; they do not.

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

Public Counsel's position has not changed from that it argued in its Initial Brief. None, but based on Empire's 2018 and 2019 affiliate transactions reports,[128] Empire has about $100 million of transactions with its affiliates annually.

~~**19. Riverton 12 O&M Tracker**~~
~~**20. Software Maintenance Expense**~~
~~**21. Advertising Expense**~~
22. Customer Service[129]

a. Is Empire providing satisfactory customer service?
i. If not, what should the Commission order to ensure better customer service?

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

~~*b. Is Empire providing reliable service?*~~
~~*i. If not, what should the Commission do?*~~

[128] Ex. 220C, Public Counsel witness Robert Schallenberg, direct testimony, Sch. RES-D-6 C (Empire's 2018 affiliate transactions report); Ex. 229 (Empire's 2019 affiliate transactions report).
[129] Public Counsel's witness on this issue is Geoff Marke.

~~**23. Estimated Bills**~~
~~**24. Material and Supplies**~~
~~**25. Asset Retirement Obligations**~~
~~**26. LED Replacement Tracker**~~
~~**27. May 2011 Tornado Unamortized AAO Balance**~~

28. Depreciation and Amortization[130]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. See Public Counsel's positions on Issue 13 (Asbury) in its Initial Brief.

~~*b. Should depreciation expense for transportation equipment that was charged through a clearing account be removed from depreciation expense?*~~
~~*i. What are the authorized depreciation rates for accounts 371 & 373 to be used in the cost of service?*~~

~~**29. Iatan/Plum Point Carrying Costs**~~
~~**30. Incentive Compensation**~~
~~**31. Customer Demand Program (DSM)**~~
~~**32. Bad Debt Expense**~~

33. Retail Revenue[131]

a. What is the appropriate amount to remove from retail revenue for unbilled revenue, franchise tax revenue, and FAC revenue?
b. What is the level of billing determinants per rate schedule that should be used to calculate retail rate revenue in this case?
c. Should the billing adjustment and the retail revenues be trued up to January 31, 2020 in the cost of service?

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

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

~~**34. Other Revenue**~~

35. Tax Cut and Job Acts Revenue[132]

a. What is the appropriate amount of tax cut and job act revenue to remove from test year revenues?

b. Should revenues associated with the tax cut and job act stub period be removed from revenue?

~~**36. Property Insurance**~~

~~**37. Injuries and Damages**~~

38. Payroll and Overtime[133]

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

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

Public Counsel's position has not changed from that it argued in its Initial Brief. Both should be adjusted to disallow affiliate transactions.

~~**39. Retention Bonuses**~~

40. Employee Benefits[134]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. It should be adjusted to disallow affiliate transactions.

41. Property Taxes[135]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. See Public Counsel's positions in its Initial Brief on Issue 13 (Asbury)—property taxes for Asbury should not be included.

~~*b. What is the proper method to be used for calculating the property tax amount to be included in the cost of service?*~~

~~**42. Dues and Donations**~~

[132] Public Counsel's witness on this issue is John Riley.
[133] Public Counsel's witness on this issue is Robert Schallenberg.
[134] Public Counsel's witness on this issue is Robert Schallenberg.
[135] Public Counsel's witnesses on this issue are John Robinett and Robert Schallenberg.

43. Outside Services[136]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. It should not include affiliate transactions.

44. Common Property Removed from Plant and Accumulated Depreciation[137]

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The impacts of Asbury should be excluded.

~~**45. Retirement**~~

46. Case No. EM-2016-0213 Commission-ordered conditions[138]

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

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

Response to Empire's arguments on Commission-ordered conditions

Because Empire consolidated all of the merger condition arguments together in its Initial Brief, Public Counsel is addressing them together in this brief.

Consistent with Empire's testimony about the Commission's merger conditions, Empire's Initial Brief does not shed much light on why Empire did not provide evidence comparing Empire's capital structure to LUCo's capital structure, the entity Empire relies on for its debt

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

financing needs. As Mr. Timpe stated in his rebuttal testimony, APUC made clear in Case No. EM-2016-0213 that it intended to consolidate Empire's debt financing needs with those of other affiliates at some corporate level if it acquired Empire.[139] Because Staff and Public Counsel knew of this intention, they proposed conditions that the Commission imposed in that case to ensure Empire and its ratepayers were not treated unfairly. Condition A.4 required Empire not to seek an increase to its cost of capital as a result of the transaction. In that instance, the benchmark would be Empire's cost of capital when it was a stand-alone company.[140] Condition A.5 ensured that Empire would not be charged a higher cost of capital due to capital structure differences between the entity, or entities, on which Empire relied for its financings. Empire has failed to give either of these conditions serious attention, even when presented with evidence that they failed both.[141] Although these conditions were very specific about the comparison of specific companies within APUC's family and Empire both before and after the acquisition, Empire chose to do its "own thing" by comparing its unsupported requested capital structure to other unrelated companies.[142]

Perhaps most disturbing about Empire's reaction to these conditions is that Empire still maintains in its brief that "the Company was not obligated to undertake this task,"[143] with "this task" meaning providing evidence that compares LUCo's capital structure to Empire's capital structure. This utter disregard of the Commission's conditions to APUC's acquisition of Empire raises a red flag. Not only have APUC and Empire disregarded their obligation to satisfy this condition, LUCo's books have been manipulated to make it appear as if LUCo has more equity than it actually has. Despite this manipulation of LUCo's per books capital structure, rating

[139] Ex. 43C, Empire witness Mark Timpe, rebuttal testimony, p. 5.
[140] Ex. 210C, Public Counsel witness David Murray, direct testimony, p. 11, ll. 16-23.
[141] Ex. 210C, Public Counsel witness David Murray direct testimony, pp. 8-16.
[142] Ex. 36, Empire witness Robert Hevert, direct testimony, pp. 11-12.
[143] Empire Initial Brief, p. 73.

agencies recognize the true amount of debt supported by LUCo's regulated utility companies when they calculate its credit metrics.[144] In fact, even APUC's CEO, Ian Robertson includes this debt when he discusses FFO/debt targets.[145]

Public Counsel repeats the condition A.5 again here for convenience and context:

> If Empire's per books capital structure is different from that of the entity or entities in which Empire relies for its financing needs, Empire shall be required to provide evidence in subsequent rate cases as to why Empire's per book capital structure is the most economical for purposes of determining a fair and reasonable allowed rate of return for purposes of determining Empire's revenue requirement.

Investors and rating agencies recognize the economic consequence of LUCo's unconditional guarantees of the off-balance-sheet debt. Consequently, they factor this debt into their credit metric calculations when determining the level of financial risk debt investors are exposed to when they invest in this debt.[146] It is absurd to suggest that the cost of LUCo's debt, which is being charged to Empire through affiliate notes, is premised on a capital structure that contains 53% common equity. It also contradicts APUC's own investor communications where it indicates that APUC targets a common equity ratio range of **_____ ** for the LUCo debt platform.[147]

Empire claims its affiliate promissory note complies with Condition A.6 because the cost it assigned was based on a $750 million LUCo third-party debt issuance. First, Public Counsel already explained that the cost of these funds was based on LUCo's short-term debt issuance, which had a cost of 2.43% as of September 30, 2019.[148] This represents the cost of the funds

[144] Ex. 210C, Public Counsel witness David Murray, direct testimony, Sch. DM-D-5 and Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, Sch. DM-S-6.
[145] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, p. 36, ll. 14 – 20.
[146] Ex. 210C, Public Counsel witness David Murray, direct testimony, Sch. DM-D-5 and Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, Sch. DM-S-6.
[147] Ex. 210C, Public Counsel witness David Murray, direct testimony, pp. 12, l. 16 – 13, l. 6.
[148] Ex. 211C, Public Counsel witness David Murray, rebuttal testimony, p. 9, ll. 18-19.

provided to Empire. Second, even the long-term rate Empire assigned to the affiliate note is subjective. In fact, Empire provides misleading information when it indicates that the cost assigned to the Empire promissory note was based on LUCo's $750 million debt third-party debt issuance. LUF actually issued the $750 million of debt. Additionally, the $750 million included six tranches of debt, but Empire only used two of these tranches to assign a debt cost to Empire.[149] Finally, the cost of this debt was based on LUCo's more leveraged capital structure as compared to Empire's less leveraged capital structure, which would have received consideration in a market transaction.

Condition G.3

Public Counsel and Staff had unfettered access to Empire's Board of Director material when it was an independent company. That was important because Empire had its own financing functions, financing team and issued its own external capital. Public Counsel and Staff, and, more importantly, the Commission recognized the importance of access to that type of material after APUC acquired Empire and imposed a condition to that end. The intent of this condition is to ensure that regulators have ready access to internal company materials that may impact Empire's cost of service. Part of that ready access includes copies. The disputes on capital structure, affiliate transactions and other cost allocations, has highlighted the importance of this condition. Public Counsel witness Mr. Murray asked for information about corporate level strategies and decisions related to APUC's regulated utilities, but Empire refused to provide it. Mr. Murray also requested copies of materials he was allowed to review, but Empire refused to provide those copies.[150]

[149] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, pp. 21, l. 16 – 22, l. 4.
[150] Ex. 212C, Public Counsel witness David Murray, surrebuttal/true-up direct testimony, Sch. DM-S-1 and Sch. DM-S-8.

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The Commission should adopt Public Counsel's recommended use of LUCo's adjusted capital structure and resulting rate of return positions and consider this item for choosing the low end of Public Counsel's reasonable ROE range, which is 8.5%.

b. Has Empire complied with Condition A.5 the Commission imposed in Case No. EM-2016-0213?

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

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The Commission should adopt Public Counsel's recommended use of LUCo's adjusted capital structure and resulting rate of return positions and consider this item for choosing the low end of Public Counsel's reasonable ROE range, which is 8.5%.

c. Has Empire complied with Condition A.6 the Commission imposed in Case No. EM-2016-0213?

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

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The Commission should adopt Public Counsel's recommended use of LUCo's adjusted capital structure and resulting rate of return positions and consider this item for choosing the low end of Public Counsel's reasonable ROE range, which is 8.5%.

d. Has Empire complied with Condition G.3 the Commission imposed in Case No. EM-2016-0213?

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

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

Public Counsel's position has not changed from that it argued in its Initial Brief. The Commission should adopt the low end of Public Counsel's return-on-equity range for non-compliance—8.5%, and compel Empire to comply with this condition prospectively.

CONCLUSION

As Public Counsel stated in its conclusion to its Initial Brief, because there is no evidence in this case that any of Empire's transactions with its affiliates were prudent—a showing that Empire had the burden to make—the Commission should not include $100 million of affiliate transactions costs in Empire's cost-of-service that it uses for setting rates in this case. Because Empire shut Asbury down for the final time on December 12, 2019, and "retired" it by no later than March 1, 2020, the Commission cannot include Empire's costs of running Asbury and investment in Asbury as if Asbury is still running for determining Empire's cost-of-service for setting rates in this case, an impact of $32.9 to $43.5 million. Public Counsel's evidence of rate of return more closely aligns with how analysts actually evaluate investing in equity and debt supported by Empire's utility operations and, therefore, the Commission should adopt Public Counsel's recommended rate of return of 6.77% based on a return-on-equity of 9.25%, a cost of long-term debt of 4.65%, and a capital structure of 46% common equity and 54% long-term debt.

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

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 12th day of May 2020.

/s/ Nathan Williams