Exhibit No.:	_____
Issues:	Financing Conditions Standard Ring-Fencing Standard SERP
Witness:	Steven M. Fetter
Exhibit Type:	Surrebuttal
Sponsoring Party:	Joint Applicants
Case No.:	EM-2016-0213
Date:	August 5, 2016

MISSOURI PUBLIC SERVICE COMMISSION

CASE NO. EM-2016-0213

SURREBUTTAL TESTIMONY

OF

STEVEN M. FETTER

ON BEHALF OF

JOINT APPLICANTS

SURREBUTTAL TESTIMONY
STEVEN M. FETTER
CASE NO. EM-2016-0213

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SURREBUTTAL TESTIMONY
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INTRODUCTION

Q. PLEASE STATE YOUR NAME, POSITION AND BUSINESS ADDRESS.

A. My name is Steven M. Fetter. I am President of Regulation UnFettered. My business address is 1240 West Sims Way, Port Townsend, Washington 98368.

Q. ON WHOSE BEHALF ARE YOU TESTIFYING?

A. I am testifying on behalf of The Empire District Electric Company ("Empire"), Liberty Utilities (Central) Co. ("LU Central") and Liberty Sub Corp. ("LSC") (collectively, "Joint Applicants"), before the Missouri Public Service Commission ("Commission").

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am President of Regulation UnFettered, a utility advisory firm I started in April 2002. Prior to that, I was employed by Fitch, Inc. ("Fitch"), a credit rating agency based in New York and London. Prior to that, I served as Chairman of the Michigan Public Service Commission ("Michigan PSC"). I am also an attorney, having graduated from the University of Michigan Law School in 1979.

Q. PLEASE DESCRIBE YOUR SERVICE ON THE MICHIGAN PSC.

A. I was appointed as a Commissioner to the three-member Michigan PSC in October 1987. In January 1991, I was promoted to Chairman and retained that designation following reappointment in 1993. During my tenure as Chairman, timeliness of commission processes was a major focus and my colleagues and I achieved the goal of eliminating the agency's case backlog for the first time in 23

years. While on the Michigan PSC, I also served as Chairman of the Board of the National Regulatory Research Institute ("NRRI"), the research arm of the National Association of Regulatory Utility Commissioners ("NARUC"). After leaving regulatory service, I was appointed to the NRRI Board as a public member. I have also served as a lecturer at Michigan State University's Institute of Public Utilities Annual Regulatory Studies Program ("Camp NARUC") and at NARUC's New Commissioner Regulatory Orientation.

Q. PLEASE DESCRIBE YOUR ROLE AS PRESIDENT OF REGULATION UNFETTERED.

A. I formed a utility advisory firm to use my financial, regulatory, legislative, and legal expertise to aid the deliberations of regulators, legislative bodies, and the courts, and to assist them in evaluating regulatory issues. My clients include investor-owned and municipal electric, natural gas and water utilities, state public utility commissions and consumer advocates, non-utility energy suppliers, international financial services and consulting firms, and investors.

Q. WHAT WAS YOUR ROLE IN YOUR EMPLOYMENT BY FITCH?

A. I was Group Head and Managing Director of the Global Power Group within Fitch. In that role, I served as group manager of the combined 18-person New York and Chicago utility team. I was originally hired to interpret the impact of regulatory and legislative developments on utility credit ratings, a responsibility I continued to have throughout my tenure at the rating agency. In April 2002, I left Fitch to start Regulation UnFettered.

Q. HOW LONG WERE YOU EMPLOYED BY FITCH?

A. I was employed by Fitch from October 1993 until April 2002. In addition, Fitch retained me as a consultant for a period of approximately six months shortly after I resigned.

Q. HOW DOES YOUR EXPERIENCE RELATE TO YOUR TESTIMONY IN THIS PROCEEDING?

A. My experience as Chairman and Commissioner on the Michigan PSC and my subsequent professional experience with financial analysis and ratings of the U.S. electric and natural gas sectors – in jurisdictions involved in restructuring activity as well as those still following a traditional regulated path – have given me solid insight into the importance of a regulator's role in setting rates and also in determining appropriate terms and conditions of service for regulated utilities. These are among the factors that enter into the process of utility credit analysis and formulation of individual company credit ratings. It is undeniable that a utility's credit ratings significantly affect the ability of a utility to raise capital on a timely basis and upon reasonable terms, which ultimately benefits ratepayers. My experience at Fitch provides me with insight into the actions of credit rating agencies.

Q. HAVE YOU PREVIOUSLY GIVEN TESTIMONY BEFORE REGULATORY AND LEGISLATIVE BODIES?

A. Since 1990, I have testified before the U.S. Senate, the U.S. House of Representatives, the Federal Energy Regulatory Commission, federal district and bankruptcy courts, and various state and provincial legislative, judicial, and regulatory bodies in more than 100 proceedings or hearings on the subjects of

credit risk and cost of capital within the utility sector, electric and natural gas utility restructuring, fuel and other energy cost adjustment mechanisms, regulated utility mergers and acquisitions, construction work in progress and other interim rate recovery structures, utility securitization bonds, and nuclear energy. I have previously testified and been accepted as an expert witness before the Missouri Public Service Commission on behalf of Union Electric Company d/b/a AmerenUE in Case No. EC-2002-1 [re credit quality] and Case No. GR-99-315 (Laclede Gas Company Case) [re depreciation methodology, including treatment of net salvage]; Empire in Docket No. ER-2006-0315 [re fuel and purchased power adjustment mechanism]; and Aquila, Inc. in Case No. ER-2007-0004 [re fuel and purchased power adjustment mechanism].

My full educational and professional background is presented in **Sur. Schedule SMF-1**.

PURPOSE

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?

A. Utilizing my past experience as a state utility commission chairman, head of a major utility credit rating practice, and majority general counsel to a state legislative body, I respond to Office of the Public Counsel ("OPC") witnesses Ara Azad and Ryan Pfaff on the subjects of credit ratings and outlooks, ring-fencing, and merger standards; and to The Empire District Electric SERP Retirees ("EDESR") witness W. Keith Wilkins on the subject of the Supplemental Executive Retirement Plan ("SERP") established January 1, 1994.

CREDIT RATINGS AND OUTLOOKS

Q. BEFORE ADDRESSING THE SPECIFIC CREDIT RATING ISSUES IN THIS CASE, COULD YOU BRIEFLY SHARE WHAT A CREDIT RATING IS AND WHY IT IS IMPORTANT?

A. Yes. A credit rating reflects an independent judgment of the general creditworthiness of an obligor or of a specific debt instrument. While credit ratings are important to both debt and equity investors for a variety of reasons, their most important purpose is to communicate to investors the financial strength of a company or the underlying credit quality of a particular debt security issued by that company.

Credit rating determinations are made by credit rating agencies through a committee process involving individuals with knowledge of a company, its industry, and its regulatory environment. Corporate rating designations of S&P and Fitch have 'AAA', 'AA', 'A' and 'BBB' category ratings within the investment-grade ratings sphere, with 'BBB-' as the lowest investment-grade rating and 'BB+' as the highest non-investment-grade rating. Comparable rating designations of Moody's at the investment-grade dividing line are 'Baa3' and 'Ba1', respectively.

Corporate credit rating analysis considers both qualitative and quantitative factors to assess the financial and business risks of fixed-income debt issuers. A credit rating is an indication of an issuer's ability to service its debt, both principal and interest, on a timely basis. It also at times incorporates some consideration

of ultimate recovery of investment in case of default or insolvency. Ratings can also be used by contractual counterparties to gauge both the short-term and longer-term financial health and viability of a company, including decisions related to required collateral levels.

Q. WHAT RATINGS DO EMPIRE AND ITS ULTIMATE PARENT POST-MERGER NOW HOLD?

A. Moody's senior unsecured rating on Empire is "Baa1" with a Stable outlook, unchanged from before the merger announcement in February 2016.[1] That agency does not rate what would be Empire's ultimate parent company, Algonquin Power & Utilities Corp. ("Algonquin"). S&P utilizes a consolidated methodology (where a core entity like Empire would have its ratings track those of its parent company), so it has assigned corporate credit ratings for both Empire and Algonquin at "BBB" with a negative outlook (the "S&P Outlooks"), those outlooks having been added at the time of the merger announcement in February.[2]

Q. TURNING TO THE OPC REBUTTAL, COULD YOU DISCUSS THE CREDIT RATING ISSUE YOU ARE RESPONDING TO?

A. Yes. OPC witness Azad points to the S&P Outlooks that were assigned to Empire and Algonquin and argues that S&P's action supports the Commission rejecting the Joint Application filed in this case. I hold a different opinion.

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[1] Moody's Research: "The Empire District Electric Company," March 4, 2016.

[2] S&P Research: "Empire District Electric Co. Ratings Affirmed, Outlook Revised to Negative on Proposed Acquisition by Algonquin Power," February 10, 2016.

Q. HOW DO YOU VIEW THE SITUATION?

A. I am not concerned with the S&P Outlooks. First, in order to analyze the S&P Outlooks, it is important to discuss the different steps S&P could have taken and what they mean. The most severe action would have been an immediate downgrade of one notch or possibly more. That did not occur. The next most severe action would have been placing the two entities on CreditWatch Negative. S&P states:

> CreditWatch highlights our opinion regarding the potential direction of a short-term or long-term rating. It focuses on identifiable events and short-term trends that cause ratings to be placed under special surveillance by [S&P] analytical staff. Ratings may be placed on CreditWatch under the following circumstances: *When an event has occurred or, in our view, a deviation from an expected trend has occurred or is expected and when additional information is necessary to evaluate the current rating. Events and short-term trends may include mergers, recapitalizations, voter referendums, regulatory actions, performance deterioration of securitized assets, or anticipated operating developments; *When we believe there has been a material change in performance of an issue or issuer, but the magnitude of the rating impact has not been fully determined, and we believe that a rating change is likely in the short-term. ...A CreditWatch listing, however, does not mean a rating change is inevitable, and when appropriate, a range of potential alternative ratings will be shown. ... "[N]egative means a rating may be lowered."

Next on the S&P list come Rating Outlooks:

> An [S&P] outlook assesses the potential direction of a long-term credit rating over the intermediate term (typically six months to two years). In determining a rating outlook, consideration is given to any changes in the economic and/or fundamental business conditions. An outlook is not necessarily a precursor of a rating change or future CreditWatch action. ... *Negative means that a rating may be lowered.[3]

[3] S&P Global Ratings Definitions, June 29, 2016.

Q. WITHIN THE CONTEXT OF THIS CASE, AND BASED UPON YOUR PRIOR BOND RATING EXPERIENCE, HOW DO YOU INTERPRET S&P'S ACTION FOLLOWING THE MERGER?

A. First, and importantly, a downgrade did not occur, which could have happened immediately upon announcement of the merger agreement. Next, notwithstanding the fact that one of the purposes of CreditWatches is to react to the potential rating effects from an event such as a merger, S&P did not assign a CreditWatch Negative to the circumstances. Rather, S&P only changed the outlooks to Negative, a much more benign step that indicated that they would be assessing the situation over the next six months or so.

Q. IS THIS ASSESSMENT CAUSE FOR CONCERN?

A. The very targeted nature of the topic under consideration must be considered along with guidance provided at the time of S&P's action. S&P acknowledges that the use of convertible debentures (initially to be treated as debt) will materially weaken Algonquin's credit measures in 2016, but that the agency sees "a very high likelihood of conversion [to equity] in 2017 when the transaction closes." At that point, the weak credit measures are forecasted to improve to levels consistent with Algonquin's (and Empire's) current investment-grade "BBB" rating. The likelihood of Algonquin's successful execution of this aspect of its financing plan is discussed by Joint Applicants witness Peter Eichler in his Surrebuttal Testimony.

Q. WITHOUT CITATION, MS. AZAD GOES ON TO STATE HER VIEW AT PAGE 8 OF HER REBUTTAL TESTIMONY THAT "FROM A CREDIT RATINGS

STANDPOINT, NON-UTILITY (I.E., NON-REGULATED) OPERATIONS – EVEN WITH LONG-TERM CONTRACTS IN PLACE – ARE ASSOCIATED WITH A GREATER LEVEL OF BUSINESS RISK THAN REGULATED BUSINESSES/UTILITY OPERATIONS." HOW DO YOU RESPOND TO THIS STATEMENT?

A. I previously referred to S&P's consolidated ratings methodology, which spreads rating impacts across a family of companies, and thus can result in rating effects at Empire that are actually occurring at its eventual parent company, Algonquin. Moody's, however, for the most part looks at Empire on a standalone basis, so we can benefit from what that agency is indicating as to its merger concerns. A month after the merger was announced, Moody's issued a report in which it maintained Empire's senior unsecured rating at "Baa1", with the statement:

> As the announced transaction is in an early stage, no details related to capital structure, dividend distribution requirements and other integration related information have been disclosed. Empire's current rating assumes that its capital structure will be maintained and that no additional debt will be added at the Empire level. Empire's rating or outlook could be revised as Empire and Algonquin provide more details of the transaction structure and financing over the course of the approval process.[4]

Nowhere in that report does Moody's express a generalized concern with regard to non-utility operations, vis-à-vis any potential effects on Empire. Since the agency did include in that report numerous rating considerations, both positive and negative, one would expect that Moody's would have referenced OPC's concerns, if it shared them.

[4] Moody's Research: "The Empire District Electric Company," March 4, 2016.

RING-FENCING

Q. HAVE YOU HAD AN OPPORTUNITY TO REVIEW THE FINANCING AND RING-FENCING CONDITIONS TO WHICH THE JOINT APPLICANTS HAVE AGREED, THAT ARE ATTACHED TO JOINT APPLICANTS WITNESS DAVID PASIEKA'S SURREBUTTAL TESTIMONY AS SUR. SCHEDULE DP-1?

A. Yes, I have.

Q. DO YOU HAVE A VIEW AS TO THE ADEQUACY OF THOSE CONDITIONS AS PROTECTION FOR CUSTOMERS, OR A MITIGATION OF ANY POTENTIAL DETRIMENT?

A. It is my belief that the financing and ring-fencing conditions, as a package, should provide significant protection to customers, as opposed to the status quo. Even if one believes that there is a risk of detriment associated with the transaction, these conditions should be adequate to mitigate and prevent such potential detriment.

MERGER STANDARD

Q. CAN YOU DISCUSS THE MISSOURI UTILITY MERGER STANDARD AS IT RELATES TO THIS PROCEEDING?

A. Yes. As I reviewed the testimony filed earlier in this case, the merger standard did not stand out as a major issue, since all witnesses seemed to be pretty close together on the issue. Joint Applicants witness Christopher Krygier testifies, "[I]t is my understanding that the Commission must approve the transaction unless it

can be shown to be detrimental to the public interest. Under this standard, the joint applicants need not show that there is a positive benefit being derived from the transaction, however, any such showing of benefit would certainly establish that there will be no detrimental impact" (Krygier Dir., p. 3). Staff witness Kimberly Bolin agreed with that view, stating, "Staff utilized the standard of 'no detriment to the public interest,' as it has in other merger and acquisition cases," while noting some clarifying conditions to assure no detriment (Bolin Reb., p. 2, 5). And OPC witness Pfaff, while addressing his views about which party carries the burden of proof, appears to agree that Joint Applicants must "demonstrate that the transaction is not detrimental to the public interest" (Rebuttal testimony at 4). But then Mr. Pfaff's rebuttal testimony heads off in an unusual direction.

Q. HOW SO?

A. Having stated the prevailing Missouri standard, he then discusses how that standard actually correlates with a "net benefits" standard, and then both he and his colleague Ms. Arad list the benefits that should be inserted into an order approving transaction to be consistent with a "net benefits" outcome.

Q. HOW DOES HE DO THAT?

A. First off, he quotes Mark Beyer, Chief Economist of the New Jersey Board of Public Utilities, that "From a practical viewpoint, there is no significant difference between the positive benefits test and the no-harm standard," and then he follows up by quoting from an attorney who has long represented consumer interests (as well as assisting commissions, including the Michigan PSC, I recall), Scott Hempling, that "Whether a utility merger statute prescribes 'no harm' or

'positive benefits,' the result should be the same: a utility obligation to choose the merger that produces the maximum benefit, and provides the full benefits, net of merger costs, to the customers" (Pfaff Reb., p. 6).

Q. HOW DO YOU REACT TO THESE QUOTES?

A. I do not agree with their view of the Missouri legal standard. Neither of these individuals can be considered an authoritative source, such as a court or utility commission. They are merely two individuals voicing their personal viewpoints. Beyond that, I have been involved with utility regulatory issues for almost thirty years, and prior to that served as Majority General Counsel to the Michigan Senate. Both of those experiences inform my judgment and my response here.

As a regulator, I believed in following the statutory and case law within the jurisdiction where I served; and as a legislative counsel, I believed that if the law was not serving the public interest, the right way to remedy that was by working to amend the law, not by ignoring it. Accordingly, I am surprised at both of the above quotes: the "no harm test" is not the same as the "net benefit" test, and those two are not the same as the "public interest" test. If they were the same, it certainly would come as a significant surprise to Regulatory Research Associates ("RRA"), the leading utility regulatory analysis service, which on April 6, 2016, published a report entitled, "Electric and Gas Utility Mergers and Acquisitions: Regulatory Overview of Merger Review Standards." The mere fact that RRA undertook the effort to compile this merger standards survey report belies the notion that the "no net harm" and "net benefits" standards are actually one and the same.

In that report, RRA classified jurisdictions by their standard of merger review: as "public interest"; "no net harm to ratepayers"; "net benefit to ratepayers"; or some combination of those three standards. In the exclusively "no net harm to ratepayers" group, Missouri is joined by Illinois, Montana, Nebraska, South Dakota, Virginia, West Virginia, Wisconsin, and Wyoming. A copy of the chart I referenced is provided as a schedule to the testimony of Joint Applicants Witness Eichler.

In Mr. Beyer's role at the New Jersey Board of Public Utilities, he is called upon to utilize some combination of a "public interest" and "net benefit to ratepayers" standard, with RRA noting that the New Jersey commission has generally employed the "positive net benefits standard" when reviewing proposed mergers, rather than the "no detriment" standard relevant to this proceeding. Worthy of mention in this context is the fact that in February 1998, the Ratepayer Advocate in Mr. Beyer's home state of New Jersey issued a report addressing the legal framework in New Jersey for review of utility mergers. Among other things, the report states:

> [I]t is unclear which legal standard the [New Jersey] Board must use in reviewing a merger application. Utilities take the position that the Board should employ a "no adverse impact" test. Consumer advocates urge the application of the "positive benefit to the public interest" standard.[5]

Thus, the report made clear that a "no harm test" and a "positive benefits test" do not equate to the same thing.

[5] New Jersey Division of the Ratepayer Advocate, "Preliminary Position Paper on Utility Mergers and Acquisitions," February 1998.

Q. AND WITH REGARD TO MR. HEMPLING'S POSITION?

A. I know Mr. Hempling well and consider him a friend, but I strongly disagree with him here. There is an aspect of his quote that doesn't resonate with me. Due to various SEC regulations, merger discussions between publicly-listed utilities are almost always conducted in private with total confidentiality, with no notice to the public, most especially investors. So when Mr. Hempling sets as a requirement, "a utility obligation to choose the merger that produces the **maximum benefit** ... to the customers," [emphasis added] he is creating an impossibility. Mergers do not come about by way of public auction or through competitive bidding related to consumer benefits. They are done through two boards of directors working toward a financial agreement that both sides can agree to, while carrying out their fiduciary duties to shareholders and *respecting the merger standards as set down by statutory and case law within the relevant jurisdictions*. To create a statutory or regulatory obligation that those parties must be responsible to know whether there exists, somewhere, another utility willing to provide a greater benefit for customers – or that they themselves had not maximized what they could have given to customers, notwithstanding that their agreement meets the relevant merger standard -- is a ridiculous requirement.

Q. HOW DID THE INCLUSION OF THOSE TWO QUOTES IMPACT THE REST OF THE OPC REBUTTAL TESTIMONY?

A. It appears that Mr. Pfaff believes that those two isolated quotes gives him license to urge the Commission to move beyond the "not detrimental" standard and

adopt the stricter "public interest" standard, when he asks at page 13, "Is the merger application in the public interest?"

Thereafter he and Ms. Azad seem to craft testimony employing a "positive benefits" standard, requesting that several benefits, including "Bill Credits," become part of the merger decision (Pfaff Reb., p. 33). But, in my mind, the question that seals the deal on such movement to the inappropriate "positive benefits" standard is addressed to Ms. Azad at page 42 of her Rebuttal Testimony: "How can the Commission ensure that Missouri is protected **in the event that another jurisdiction receives benefits in excess of those achieved in Missouri**?" [Emphasis supplied]. Thus is born the proposed benefit of "Most Favored Nation" status, or as negotiators would describe it -- it doesn't matter whether what we received is fair; we want the better deal that another party has negotiated in another jurisdiction, notwithstanding that merger standards differ between the two locales.

Q. DID OPC CONFUSE THE STANDARDS ANY FURTHER?

A. Yes, they did. At page 41 of his Rebuttal Testimony, Mr. Pfaff lists four failed mergers as representing an inability to meet the burden of proof related to the specific legal standard within a jurisdiction. The principal flaw in this testimony is that the four states to which he refers utilize different legal standards than that used by the Commission in Missouri (per RRA):

- Connecticut: Public Interest standard
- Washington, DC: Net Benefit / Public Interest standard
- Louisiana: Net Benefit / Public Interest / No Net Harm standard

- Hawaii: Public Interest standard

Accordingly, these examples do not have relevance here due to their legal differences.

Q. YOU NOTE ABOVE SOME DIFFERENCE BETWEEN MR. KRYGIER AND MR. PFAFF AS TO WHERE THE BURDEN OF PROOF LIES WITH REGARD TO THE "NO DETRIMENT" STANDARD. PLEASE EXPLAIN.

A. Yes. Mr. Krygier states that the Commission must approve the transaction unless it can be shown to be detrimental to the public interest. To the contrary, Mr. Pfaff states that the Commission must not approve the transaction unless the Applicants can show that the transaction is not detrimental to the public interest. I believe neither of them are attorneys. I am one, but while I defer the legal issues for the parties' attorneys to argue on brief, I do believe that the answer probably lies somewhere in between the two, as shown by the Missouri Court of Appeals' fairly recent discussion of the burden of proof and the burden of persuasion. Once an applicant has made its *prima facie* showing that there is no detriment, the burden of production shifts to the other party "to produce . . . competent controverting evidence which, if believed, will offset the . . . prima facie case."[6]

[6] *In the Matter of the Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Company*, 438 S.W.3d 482, 490 (Mo.App.W.D. 2014).

SERP

Q. YOU REFERENCE EDESR WITNESS MR. WILKINS WITH REGARD TO ISSUES INVOLVING EMPIRE'S SERP. PLEASE EXPLAIN.

A. Mr. Wilkins proposes at page 8 of his Rebuttal Testimony that the Commission require as a condition of approval of the Joint Application that Empire fully fund a Rabbi trust (grantor trust), as permitted under the SERP, in an amount of approximately $10 million.

Q. WHAT IS THE JUSTIFICATION MR. WILKINS PROVIDES FOR MAKING THIS RECOMMENDATION?

A. Mr. Wilkins, on pages 4 to 8, contends that the post-merger Empire will be financially weaker and that the parent company, Algonquin, will be subject to a number of financial and business risks that may impact Empire.

Q. CAN YOU ELABORATE ON MR. WILKINS' SPECIFIC CONCERNS?

A. Mr. Wilkins suggests that the premium to be paid to Empire stockholders presents "a risk of a write-down of a portion of the goodwill, which could result in a charge to earnings." He states a concern that the post-merger retained earnings of Algonquin represent a weaker balance sheet, which results in an increased risk to Empire. He states that Algonquin's financial profile is "more complex" than that of Empire and that this "potentially" results in increased risk. He states there is a "potential for arbitrage in tax rates between Canada and the United States" and "currency swings" which "obviously increases risk."

Q. DOES MR. WILKINS ADDRESS ANY OTHER CONCERNS?

A. Yes. He states that "[i]f Algonquin were to go bankrupt, the assets of Empire could be at risk", presumably since they would be subject to creditor claims, of which the Participants would be unsecured creditors.

Q. HAS MR. WILKINS QUANTIFIED ANY NEW RISKS THAT THE EDESR WILL FACE?

A. No. Mr. Wilkins' workpapers, provided in accordance with the Commission's scheduling order, do not appear to quantify any risks that he maintains will exist.

At page 6, lines 11-13, of his Rebuttal Testimony, Mr. Wilkins mentions the "potential" for "increased risk" associated with Algonquin's "more complex" financial profile. He did not provide a quantitative risk assessment backing this allegation, although requested to provide it in a data request. I conclude that Mr. Wilkins' allegation of "increased risk" is unsupported by any data-driven analysis that validates the statement.

Also at page 6, lines 23-24 of his Rebuttal Testimony, Mr. Wilkins states that Algonquin's business strategy "appears to be riskier" than that of Empire. Again, he did not provide a quantitative risk assessment backing this claim, although requested to provide it in a data request. I conclude that this statement is merely a general allegation that is not supported by any effort on his part to provide the Commission with a meaningful context in which to understand the nature or degree of the "risk" to which he refers. It certainly provides no basis for the Commission to find that there is a discrete, defined detriment.

Q. HOW DO YOU VIEW MR. WILKINS' POSITION?

A. I am in complete disagreement with Mr. Wilkins. The SERP was established January 1, 1994. I would generally expect that the SERP participants were provided or had access to a copy of the SERP at the time they became eligible to join. Thus, they had full knowledge of the following provisions in Section 4.1 of the SERP:

- "All benefits under this Plan shall be paid directly from the general funds of the Employer, and no special or separate fund shall be established and no other segregation of assets shall be made to assure payment."
- "Nothing contained in this Plan, and no action taken pursuant to its provisions, shall create or be construed to create a trust of any kind, or a fiduciary relationship, between the Employer and any Participant, spouse, or beneficiary of a Participant."
- "To the extent that any person acquires a right to receive payments hereunder, such rights shall be no greater than the right of an unsecured creditor of the Employer."
- Notwithstanding the foregoing, the Employer may, in its sole discretion establish a grantor trust, commonly known as a Rabbi Trust, as a vehicle for accumulating the assets needed to pay the promised benefits.

Q. WHAT DOES THAT LANGUAGE SAY TO YOU?

A. It says to me that the EDESR, from the first day they were eligible to join, knew that their status would be no greater than the right of an unsecured creditor, and

that future circumstances might interrupt the payment of benefits under the SERP. Remember, only former executives of Empire qualify under the SERP. These are all sophisticated individuals.

Q. MR. WILKINS MENTIONS S&P'S ANNOUNCEMENT ASSIGNING A NEGATIVE OUTLOOK TO EMPIRE'S "BBB" RATING. IS THAT A VALID CONCERN FOR THE PARTICIPANTS?

A. Only in the sense that any unsecured creditor of any entity watches the ups and downs of their debtor.

Q. DO MR. WILKINS' OBSERVATIONS CONCERNING THE UTILICORP/ AQUILA CREDIT RATINGS ON PAGE 7 OF HIS TESTIMONY HAVE ANY BEARING ON THIS TOPIC?

A. Not to my mind. Let me explain by broadening the discussion. The Empire SERP was established on January 1, 1994. On December 2, 2001, Enron Corp. filed for bankruptcy. On April 6, 2001, Pacific Gas & Electric Company filed for bankruptcy. On September 3, 2002, Moody's lowered Aquila's credit rating to "junk" status. On May 17, 2006, S&P downgraded Empire to "BBB-", the lowest investment-grade rating, a very weak status that continued for almost seven years until an upgrade came on March 6, 2013. And on May 25, 2011, Empire temporarily suspended its dividend due to the tragedy of a deadly and destructive tornado striking Joplin, Missouri. I have seen no evidence that, through all of those negative or tragic events, any of the SERP participants petitioned Empire to transition its SERP into a grantor trust/Rabbi Trust. With Empire merely holding a Negative outlook for what, according to S&P, will likely be a very short

period of time – and with Moody's continuing to maintain its strong "Baa1" rating on Empire, there does not appear to be any reason to now seek that this Commission require such SERP modification to be a condition of approval of the pending merger.

Q. DOES THIS CONCLUDE YOUR SURREBUTTAL TESTIMONY?

A. Yes, it does.

AFFIDAVIT

STATE OF WASHINGTON)
) ss
COUNTY OF JEFFERSON)

I, Steven M. Fetter, state that I am President of Regulation UnFettered; that the Surrebuttal Testimony attached hereto has been prepared by me or under my direction and supervision; and, that the answers to the questions posed therein are true to the best of my knowledge, information and belief.

Subscribed and sworn to before me this 2ND day of August, 2016.

Notary Public

My Commission Expires:

03-29-2020

HEATHER GAMBLE
Commission Expires
NOTARY
PUBLIC
03-29-2020
STATE OF WASHINGTON

1

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Education University of Michigan Law School, J.D. 1979
Bar Memberships: U.S. Supreme Court, New York, Michigan
University of Michigan, A.B. Media (Communications) 1974

April 2002 – Present
President - Regulation UnFettered- Port Townsend, Washington

Founder of advisory firm providing regulatory, legislative, financial, legal and strategic planning advisory services for the energy, water and telecommunications sectors, including public utility commissions and consumer advocates; federal and state testimony; credit rating advisory services; negotiation, arbitration and mediation services; skills training in ethics, negotiation, and management efficiency.

Service on Boards of Directors of: Central Hudson (Fortis Inc. subsidiary) (Chairman, Governance and Human Resources Committee); and Previously CH Energy Group (Lead Independent Director; Chairman, Audit Committee, Compensation Committee, and Governance and Nominating Committee); National Regulatory Research Institute (Chairman); Keystone Energy Board; and Regulatory Information Technology Consortium; Member, Wall Street Utility Group; Participant, Keystone Center Dialogues on RTOs and on Financial Trading and Energy Markets.

October 1993 – April 2002
Group Head and Managing Director; Senior Director -- Global Power Group, Fitch IBCA Duff & Phelps -- New York / Chicago

Manager of 18-employee ($15 million revenue) group responsible for credit research and rating of fixed income securities of U.S. and foreign electric and natural gas companies and project finance; Member, Fitch Utility Securitization Team.

Led an effort to restructure the global power group that in three years time resulted in 75% new personnel and over 100% increase in revenues, transforming a group operating at a substantial deficit into a team-oriented profit center through a combination of revenue growth and expense reduction.

Achieved national recognition as a speaker and commentator evaluating the effects of regulatory developments on the financial condition of the utility sector and

individual companies; Cited by Institutional Investor (9/97) as one of top utility analysts at rating agencies; Frequently quoted in national newspapers and trade publications including The New York Times, The Wall Street Journal, International Herald Tribune, Los Angeles Times, Atlanta Journal-Constitution, Forbes and Energy Daily; Featured speaker at conferences sponsored by Edison Electric Institute, Nuclear Energy Institute, American Gas Assn., Natural Gas Supply Assn., National Assn. of Regulatory Utility Commissioners (NARUC), Canadian Electricity Assn.; Frequent invitations to testify before U.S. Senate (on C-Span) and House of Representatives, and state legislatures and utility commissions.

Participant, Keystone Center Dialogue on Regional Transmission Organizations; Member, International Advisory Council, Eisenhower Fellowships; Author, "A Rating Agency's Perspective on Regulatory Reform," book chapter published by Public Utilities Reports, Summer 1995; Advisory Committee, Public Utilities Fortnightly.

March 1994 – April 2002
Consultant -- NYNEX -- New York, Ameritech -- Chicago, Weatherwise USA -- Pittsburgh

Provided testimony before the Federal Communications Commission and state public utility commissions; Formulated and taught specialized ethics and negotiation skills training program for employees in positions of a sensitive nature due to responsibilities involving interface with government officials, marketing, sales or purchasing; Developed amendments to NYNEX Code of Business Conduct.

October 1987 - October 1993
Chairman; Commissioner -- Michigan Public Service Commission -- Lansing

Administrator of $15-million agency responsible for regulating Michigan's public utilities, telecommunications services, and intrastate trucking, and establishing an effective state energy policy; Appointed by Democratic Governor James Blanchard; Promoted to Chairman by Republican Governor John Engler (1991) and reappointed (1993).

Initiated case-handling guideline that eliminated agency backlog for first time in 23 years while reorganizing to downsize agency from 240 employees to 205 and eliminate top tier of management; MPSC received national recognition for fashioning incentive plans in all regulated industries based on performance, service quality, and infrastructure improvement.

Closely involved in formulation and passage of regulatory reform law (Michigan Telecommunications Act of 1991) that has served as a model for other states; Rejuvenated dormant twelve-year effort and successfully lobbied the Michigan Legislature to exempt the Commission from the Open Meetings Act, a controversial step that shifted power from the career staff to the three commissioners.

Elected Chairman of the Board of the National Regulatory Research Institute (at Ohio State University); Adjunct Professor of Legislation, American University's Washington College of Law and Thomas M. Cooley Law School; Member of NARUC Executive, Gas, and International Relations Committees, Steering Committee of U.S. Environmental Protection Agency/State of Michigan Relative Risk Analysis Project, and Federal Energy Regulatory Commission Task Force on Natural Gas Deliverability; Eisenhower Exchange Fellow to Japan and NARUC Fellow to the Kennedy School of Government; Ethics Lecturer for NARUC.

August 1985 - October 1987
Acting Associate Deputy Under Secretary of Labor; Executive Assistant to the Deputy Under Secretary -- U.S. Department of Labor -- Washington DC

Member of three-person management team directing the activities of 60-employee agency responsible for promoting use of labor-management cooperation programs. Supervised a legal team in a study of the effects of U.S. labor laws on labor-management cooperation that has received national recognition and been frequently cited in law reviews (U.S. Labor Law and the Future of Labor-Management Cooperation, w/S. Schlossberg, 1986).

January 1983 - August 1985
Senate Majority General Counsel; Chief Republican Counsel -- Michigan Senate -- Lansing

Legal Advisor to the Majority Republican Caucus and Secretary of the Senate; Created and directed 7-employee Office of Majority General Counsel; Counsel, Senate Rules and Ethics Committees; Appointed to the Michigan Criminal Justice Commission, Ann Arbor Human Rights Commission and Washtenaw County Consumer Mediation Committee.

March 1982 - January 1983
Assistant Legal Counsel -- Michigan Governor William Milliken -- Lansing

Legal and Labor Advisor (member of collective bargaining team); Director, Extradition and Clemency; Appointed to Michigan Supreme Court Sentencing Guidelines Committee, Prison Overcrowding Project, Coordination of Law Enforcement Services Task Force.

October 1979 - March 1982
Appellate Litigation Attorney -- National Labor Relations Board -- Washington DC

Other Significant Speeches and Publications

Filing for Bankruptcy Isn't the Right Solution for Puerto Rico (Forbes Online, November 2015)

The "A" Rating (Edison Electric Institute Perspectives, May/June 2009)

Perspective: Don't Fence Me Out (Public Utilities Fortnightly, October 2004)

Climate Change and the Electric Power Sector: What Role for the Global Financial Community (during Fourth Session of UN Framework Convention on Climate Change Conference of Parties, Buenos Aires, Argentina, November 3, 1998)(unpublished)

Regulation UnFettered: The Fray By the Bay, Revisited (National Regulatory Research Institute Quarterly Bulletin, December 1997)

The Feds Can Lead...By Getting Out of the Way (Public Utilities Fortnightly, June 1, 1996)

Ethical Considerations Within Utility Regulation, w/M. Cummins (National Regulatory Research Institute Quarterly Bulletin, December 1993)

Legal Challenges to Employee Participation Programs (American Bar Association, Atlanta, Georgia, August 1991) (unpublished)

Proprietary Information, Confidentiality, and Regulation's Continuing Information Needs: A State Commissioner's Perspective (Washington Legal Foundation, July 1990)