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 Second Application for Rehearing

COMES NOW the Office of the Public Counsel and for its *Second Application for Rehearing* states:

SUMMARY

1. As Public Counsel said in its application for rehearing of the Commission's July 1, 2020, *Report and Order*, the Commission must consider all relevant factors when developing rates,[1] and has great discretion when doing so. As it did in its *Report and Order*, in its July 23, 2020, in its *Amended Report and Order* the Commission properly exercised that discretion in this case when it decided return on equity, capital structure, and other issues to project Empire's future cost-of-service for developing Empire's rates. However, where Empire shut Asbury down on December 12, 2019, and formally withdrew Asbury from the Southwest Power Pool ("SPP") markets effective March 1, 2020,[2] the Commission in its *Amended Report and Order* ordering Empire still to defer, starting from January 1, 2020, costs and revenues related to Asbury for potential consideration in a future rate case[3] does not satisfy the Commission's obligation to consider all relevant factors.

2. Likewise, in its *Amended Report and Order*, as it did in its *Report and Order*, the

[1] § 393.270(4), RSMo., *State ex rel. Missouri Water Co. v. Public Service Com.*, 308 S.W.2d 704 718-19 (Mo. banc 1957), ; *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41, 49 (Mo. banc 1979).
[2] *Amended Report and Order*, p. 110, finding of fact 290; p. 116.
[3] *Id.* at 119-120.

Commission continues to unlawfully and unreasonably include Empire's historical costs of its transactions with its affiliates in Empire's future cost-of-service[4] without evidence Empire prudently incurred those costs.[5]

3. While not impacting Empire's general rates, in its *Amended Report and Order* the Commission still erroneously concludes that Empire's contract with the Missouri Joint Municipal Electric Utilities Commission ("MJMEUC") is a "full or partial requirements sales contract" that is excluded from off-system sales revenues in Empire's Fuel Adjustment Clause ("FAC")[6] when MJMEUC is not a municipality.

Asbury

4. Empire's 200 MW Asbury coal-fired generating plant will neither generate electricity nor be available to generate electricity while new rates from this case are effective. That is a relevant and critical factor that this Commission must consider when setting Empire's rates.[7]

5. The Commission has projected Empire's cost-of-service as if Empire will continue to generate electricity at Asbury[8] and ordered Empire to defer, starting from January 1, 2020, costs and revenues related to Asbury for potential consideration in a future rate case.[9] Ordering that deferral does not satisfy the Commission's obligation to consider now the relevant and critical factor of the absence of Asbury in Empire's generation portfolio when developing Empire's rates in this case. Moreover, this Commission cannot bind itself to how it treats those deferred costs and revenues in the future; therefore, deferring costs and revenues related to Asbury does not insure that in the future Empire's customers will be made whole. Empire's customers *will* be made whole

[4] *Id*. at 135.
[5] *Office of the Public Counsel v Mo.PSC*, 409 S.W.3d 371 (Mo. banc 2013); § 393.150.2, RSMo.
[6] *Amended Report and Order*, p. 67, finding of fact 187, p. 72.
[7] § 393.270(4), RSMo., *State ex rel. Missouri Water Co. v. Public Service Com.*, 308 S.W.2d 704 718-19 (Mo. banc 1957), ; *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41, 49 (Mo. banc 1979).
[8] *Amended Report and Order*, pp. 114-118.
[9] *Id.* at 117-120.

if the Commission removes the historical impacts of Empire generating electricity at Asbury for projecting Empire's future cost-of-service for developing rates in this case.

6. In its *Amended Report and Order* on page 116 the Commission states, "When determining if events outside the test year should be included, the Commission considers whether the proposed adjustments are known and measurable and are representative of the conditions anticipated during the time rates will be in effect," citing to *State ex rel GTE North Inc. v Missouri Public Service Com'n* 835 S.W.2d 356, 368 (Mo. App. W.D. 1992). Then it states, "Regardless of whether Asbury retired on December 12, 2019, or after March 1, 2020, the impacts of the Asbury retirement are not known or measurable." It follows with its logic that because the level of Empire's future operations and maintenance activity costs at the Asbury site, and the extent to which Empire will repurpose existing assets at the Asbury site are not known and measurable now, the Commission should ignore the impacts to Empire's future cost-of-service because Empire no longer generates electricity at Asbury.

7. What are known and measurable are all of the costs and revenues that Empire historically incurred and received when it ran its Asbury generating plant to serve its electric customers. Knowing that Empire is no longer incurring these costs or receiving these revenues, the Commission has included amounts for them in its projection of Empire's future cost-of-service. Those amounts can, and should, be excluded from Empire's projected cost-of-service used for developing its prospective rates. As the party with the burden of proof,[10] it is Empire's burden to adduce and persuade the Commission of its Asbury-related costs, investment, and revenues to include in Empire's future cost-of-service used for developing its new rates. To the extent Empire's level of future operations and maintenance activity, and the extent of repurposing assets

[10] *Office of the Public Counsel v Mo.PSC*, 409 S.W.3d 371 (Mo. banc 2013); § 393.150.2, RSMo.

at the Asbury site are not known and measurable now, Empire has failed its burden of proof and the Commission must exclude them from Empire's future cost-of-service.

8. As Public Counsel has consistently argued throughout this case, Empire's depreciation expense, and operations and maintenance expense for its Asbury generating plant should be excluded from Empire's rate base and projected cost-of-service from which the Commission develops Empire's new rates—$11,179,375 for depreciation expense,[11] and about ** _____ _** for operations and maintenance expense.[12] Empire's balances for its Asbury generating plant in Empire's plant-in-service and accumulated depreciation reserves records should be set to zero.

Operation and Maintenance Normalization

9. In its *Report and Order* the Commission stated that it "[found] that $28,877,386 is the appropriate amount of O&M expense to include in Empire's revenue requirement before jurisdictional allocation factors are applied."[13] That O&M expense is "non-labor O&M costs for each of Empire's generating units,"[14] and includes "a five-year average to normalize O&M expenses for Asbury."[15] Therefore, as indicated above, that $28,877,386 should be reduced to exclude non-labor O&M costs for Empire's Asbury generating plant.

Asbury burn days' coal inventory

10. "The Commission [found] that the appropriate number of burn days to use for Asbury coal inventory is 60 days."[16] By ignoring the reality that Empire last ran Asbury on December 12, 2019, when Empire reduced its burn days of coal inventory at its Asbury site to

[11] Based on Ex. 124, Staff True Up Accounting Schedules, ER-2019-0374 Schedule 05 p. 1 ln 8-15 (Mar. 27, 2020).
[12] Ex. 219C, Public Counsel witness John Robinett, surrebuttal/true-up direct testimony, p. 4.
[13] *Amended Report and Order*, p. 124.
[14] *Id*. at p. 123, finding of fact 311.
[15] *Id*. at p. 123, finding of fact 315.
[16] *Id*. at p. 122.

zero, and that Empire has never replenished that inventory and does not intend to, the Commission is violating one of its fundamental purposes—to develop prospective rates designed to allow the utility an opportunity to recover its future cost-of-service.

11. In this case the Commission ordered both update and true-up periods. Empire both last ran Asbury and reduced its burn days of coal inventory at its Asbury site to zero within the true-up period of October 1, 2019, to January 31, 2020.

12. While the Asbury burn days of coal inventory issue is separately stated in the list of issues because Staff and Empire disagreed, from Public Counsel's perspective this is one of the impacts caused by Empire permanently withdrawing its Asbury coal plant from its generation portfolio, *i.e.*, it is an Asbury issue.

Commission Inconsistency

13. The Commission projecting Empire's cost-of-service as if Empire will continue to generate electricity at Asbury is not only unlawful and unreasonable, it is also inconsistent with how the Commission decided the lineman retention bonuses issue. For that issue the Commission found that Empire did not accrue any lineman retention bonuses until September, 2019,[17] and Staff excluded from Empire's cost-of-service the $1,021,080 Empire included for them.[18] The Commission decided to include $1,021,080 for lineman retention bonuses in Empire's projected cost-of-service.[19]

14. Empire did not incur *any* lineman bonuses before September 2019, well after the test year cutoff of March 31, 2020, and nearly outside the update period cutoff of September 30, 2019. Empire last ran Asbury on December 12, 2019, well within the true-up period which cutoff

[17] *Amended Report and Order*, finding of fact 518, p. 179.
[18] *Id*, findings of fact 517 & 518, p. 179.
[19] *Id*. at pp. 179-180.

on January 31, 2020. Yet, despite the over ten-fold difference in their impacts on Empire's cost-of-service—$1,021,080 for lineman retention bonuses and over ** _____ ** for the Asbury issues—and without any apparent justification for treating them differently, the Commission unreasonably included the $1,021,080 in Empire's prospective cost-of-service, but did not exclude the over ** _____ **.

Affiliate Transactions

15. The Missouri Supreme Court has held that, unless the evidence shows the transactions were prudent, it is unlawful and unreasonable for the Commission to use the historical costs of a utility's transactions with its affiliates for setting that utility's rates, and it is the utility's burden to adduce that evidence.[20]

16. The Commission's decision regarding affiliate transactions for purposes of Empire's rates follows:

> The Commission finds that the affiliate transactions presented under this case, with the exception of the $90 million promissory note as addressed in issue nine, were prudent and complied with the requirements of Commission Rule 20 CSR 4240-20.015. The Commission does not rely on a presumption of prudence in making this decision. OPC points to no specific costs and provides no examples of incurred costs that were imprudent, or that violate the Commission's Affiliate Transactions Rules, except for a $90 million affiliate promissory note. Therefore, the Commission sees no need for any adjustments to Empire's revenue requirement aside from those identified in issue nine.[21]

17. The Commission's finding that Empire's affiliate transactions comply with Commission Rule 20 CSR 4240-20.015 flies in the face of that rule which requires that for affiliate transactions, the cost of an electric utility's transactions to acquire goods or services is the lesser of the utility's fully distributed cost to provide the good or service itself and the fair market value

[20] *Office of the Public Counsel v Mo.PSC*, 409 S.W.3d 371 (Mo. banc 2013); § 393.150.2, RSMo.
[21] *Amended Report and Order*, p. 135.

of the good or service,[22] and that "[w]hen a regulated electrical corporation purchases information, assets, goods or services from an affiliated entity, the regulated electrical corporation shall either obtain competitive bids for such information, assets, goods or services or demonstrate why competitive bids were neither necessary nor appropriate."[23] None of the Commission's findings of fact support that either Empire or the Commission's Staff complied with that rule when developing Empire's prospective cost-of-service. In short, the Commission's finding that Empire's affiliate transactions comply with Commission Rule 20 CSR 4240-20.015 is not supported by its findings of fact or the record in this case.

18. Further, the Commission's unexplained decision that Empire's affiliate transactions were prudent is not supported by its findings of fact. At best, those findings of fact support that relying on services centralized at an affiliate *could* be prudent. Therefore, due to the lack of evidentiary support, despite its statement to the contrary—"The Commission does not rely on a presumption of prudence in making this decision," the Commission *is* requiring Public Counsel to prove Empire's affiliate transactions are imprudent and not requiring Empire to prove their prudence, unlawfully shifting the burden of proof to Public Counsel by an order issued in direct conflict with a binding opinion of the Missouri Supreme Court.[24]

FAC and MJMEUC contract

19. The Commission erroneously concluded that for purposes of Empire's Fuel Adjustment Clause ("FAC") Empire's contract with the Missouri Joint Municipal Electric Utilities Commission ("MJMEUC") is a "full or partial requirements sales contract"[25] that is excluded from

[22] 20 CSR 4240 -20.015(2)(A)1.
[23] 20 CSR 4240 -20.015(3)(A).
[24] *Office of the Public Counsel v Mo.PSC*, 409 S.W.3d 371 (Mo. banc 2013); § 393.150.2, RSMo.
[25] *Amended Report and Order*, p. 67, finding 187.

off-system sales revenues in Empire's FAC.[26] MJMEUC is not a municipality,[27] and the exclusion in Empire's FAC tariff expressly is limited to sales to municipalities—"Excluding revenue from full and partial requirements sales to municipalities."

Wherefore, the Office of the Public Counsel applies to the Commission to set aside its July 23, 2020, *Amended Report and Order* and rehear the Asbury issues (including Asbury non-labor operations and maintenance expense, and Asbury burn days' coal inventory), the affiliate transactions issues, and the issue of Empire's FAC tariff excluding Empire's contract with the Missouri Joint Municipal Electric Utilities Commission from the definition of OSSR in Empire's Fuel Adjustment Clause. Further, Office of the Public Counsel prays that on rehearing the Commission (1) excludes the historical impacts of Empire generating electricity at Asbury for projecting Empire's future cost-of-service (including Asbury non-labor operations and maintenance expense, and Asbury burn days' coal inventory), (2) excludes Empire's $100 million historical annual affiliate transactions cost when projecting Empire's future cost-of-service, and (3) concludes that Empire's contract with the Missouri Joint Municipal Electric Utilities Commission is excluded from the definition of OSSR in Empire's Fuel Adjustment Clause.

[26] *Id*. at pp. 72.
[27] MJMEUC is a municipal joint action energy agency, a public body politic and corporate formed under the *Joint Municipal Utility Commission Act*, §§ 393.700-770, RSMo.

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 31st day of July 2020.

/s/ Nathan Williams