

APPLICATION (Revised October 2013)
CIRCUIT JUDICIAL COMMISSION
ASSOCIATE CIRCUIT JUDGE

QUESTIONS WILL BE MADE PUBLIC IF THE APPLICANT IS
SEE.

NAME: Kevin Donald Gunn

1. State your present principal occupation: Shareholder at Polsinelli practicing primarily in the Energy and Public Policy practice groups.
2. Are you at least 25 years of age? Yes
3. (a) How long have you been a citizen of the United States? 43 years
(b) Have you been a resident of St. Louis County for at least one year immediately prior to the date of this application? Yes
(c) How long have you been a qualified voter of Missouri? 25 years
4. Are you licensed to practice law in Missouri? Yes

List any other states, courts, or agencies in which you are licensed as an attorney:
Illinois, Eastern District of Missouri

5. State the date you were admitted to the Bar in Missouri? February 1997

Missouri Bar Number: 48149

(In completing items 6 and 7, please account for all time periods between post-high school education and the date of this application.)

APPLICATION (Revised October 2013)
21st CIRCUIT JUDICIAL COMMISSION
ASSOCIATE CIRCUIT JUDGE

**RESPONSE TO THESE QUESTIONS WILL BE MADE PUBLIC IF THE APPLICANT IS
SELECTED AS A NOMINEE.**

NAME: Kevin Donald Gunn

**ATTACH
PHOTO
HERE**

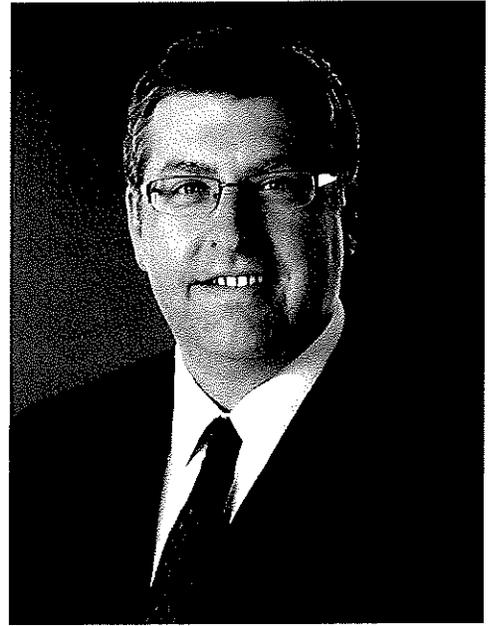
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Illinois, Eastern District of Missouri

5. State the date you were admitted to the Bar in Missouri? February 1997

Missouri Bar Number: 48149

(In completing items 6 and 7, please account for all time periods between post-high school education and the date of this application.)



6. State the name and address of all colleges and universities you have attended, together with the dates and degrees received:

Saint Louis University School of Law

J.D., 1996

The American University

B.A., 1992

Charles University - Prague, Czech Republic

Aug. 1992-Dec. 1992

7. State, in chronological order, your entire working career, including non-legal employment, if any. Include the name and address of each firm, corporation, partnership, or governmental body with which you have been associated, and the dates thereof. (Start with earliest date, conclude with present.)

Sonnenschein, Nath & Rosenthal

September 1996 – March 2000

Litigation Associate

Duties: performed all responsibilities of a litigation associate including drafting legal memorandum, pleadings and correspondence, depositions, court appearances, case management and client contact and assisted as coordinating counsel for national manufacturing company

Gephardt in Congress Committee

March 2000 – December 2002

General Counsel/Staff Member

Duties: performed extensive research regarding issues and candidates; provided legal advice pertaining to election and campaign finance law; coordinated direct mail research and other staff duties for Congressman Richard Gephardt

Missouri Redistricting Committee

January 2001 – May 2002

Counsel

Duties: coordinated legal strategy for Congressional redistricting process for Congressman Richard Gephardt; assisted with legal strategy for State Legislative redistricting and other staff duties for Congressman Richard Gephardt

Rep. Richard A. Gephardt
January 2003 – January 2005
Chief of Staff

Duties: managed all Congressional Operations including a \$1.3 million budget with 18 full-time staff members; supervised all legislative and constituent services

Gunn Communications, LLC
January 2005 – April 2005
President

Duties: provided strategic communications, research, government relation service to private sector business and political campaigns

Blackwell Sanders Peper Martin
April 2005 – December 2006
Partner

Duties: headed St. Louis Office Government Affairs Practice; assisted clients with government relations, strategic communications and lobbying; acted as Executive Director for “Missourians for Responsible Growth”

Sonnenschein, Nath and Rosenthal
December 2006 – April 2008
Of Counsel

Duties: practiced in the Public Law and Policy Strategies Group assisting clients with government relations, strategic communications, lobbying and government investigations

Missouri Public Service Commission
April 2008 – February 2011
Commissioner

February 2011 – March 2013
Chairman

Duties: regulated all investor-owned utilities in the State of Missouri, ensuring ratepayers receive safe, adequate and reliable utility service at reasonable rates

Polsinelli
June 2013 – Present
Shareholder

Duties: practice in both the Energy and Public Policy practice groups advising clients on a wide variety of issues

8. Are you able, with or without a reasonable accommodation, to perform the essential functions of a judge including the ability to preside over trials, perform legal research, attend court anywhere in the state, communicate clearly and effectively both orally and in writing, and expeditiously decide issues coming before the court? Yes
9. Attach a list of cases you have tried in the last five years. Set forth the style, cause number, date, and court, and identify who you represented, whether you were first or second chair, and the name and address of opposing counsel. Indicate for each case whether bench or jury tried and provide a one to three sentence description of each case and its outcome. If, during any of the last five years, you served as a commissioner or in any other judicial capacity, set forth the dates of same and a description of the duties performed.

For the past five years, I served as a Commissioner on the Missouri Public Service Commission. The Missouri Public Service Commission regulates investor-owned electric, steam, natural gas, water and sewer and telephone companies. Its mission is to ensure Missouri consumers have access to safe, reliable and reasonably priced utility service while allowing those utility companies under our jurisdiction an opportunity to earn a reasonable return on their investment. The PSC also regulates manufacturers and retail dealers who sell new and used manufactured homes and modular units.

Decisions before the Commission are made following evidentiary hearings. Contested cases are adjudicated according to the rules of evidence and of civil procedure, although the Commission is not completely bound by the formal rules of evidence. The Commission is bound, however, by the "fundamental" rules of evidence. Orders are approved through a majority of the Commission and individual Commissioners are free to draft opinions concurring with the order or in dissent. These opinions may be cited by the parties on appeal or by courts issuing a decision in such an appeal.

As a Commissioner and later a Chair of the Commission, I presided over approximately a thousand cases filed by parties as one of five Commissioners. Contested administrative cases required due process, evidentiary rulings, procedural rulings and each decision must be lawful and reasonable.

Cases included major rate increases by utilities, acquisition cases, financing cases, certification cases and complaints by staff and individual customers against the utilities. Monetarily, these cases would range in the hundreds of millions of dollars for major rate cases to a few hundred dollars for *pro se* customer complaint cases.

10. Have you briefed or argued any case in an appellate court? Yes
If yes, attach a list showing the citation for each case and describe the extent of your participation in briefing and arguing the case.

Jones v. O'Brien Tire & Battery Service Center, Inc., 322 Ill. App. 3d 418, 752 N.E.2d 8 (5th District, 2001).

I argued the original motion at the trial level and was substantially involved in the briefing to

the Illinois Appellate Court. I left my law firm before the oral argument was heard and did not participate in the argument.

11. Set forth any additional information that demonstrates the quality of your legal work as an attorney.

As a Commissioner, I had the ability to write concurrences or dissents to each order issued by the Commission, as well as file comments to any rulemakings undertaken. I have attached to this application a sample of each:

Concurring Opinion of Chairman Kevin D. Gunn, Case No. ER-2012-0166, December 12, 2012

Dissenting Opinion of Commissioner Kevin D. Gunn, Case No. ER-2008-0093, August 12, 2008

Comments of Commissioner Kevin Gunn on the Proposed Revisions to 4 CSR 240-4, Case No. AW-2009-0313, August 7, 2009

12. Have you ever been convicted of a misdemeanor or felony? No

If yes, provide details, including the style of the case, cause number, name of the jurisdiction, and date of conviction:

13. Have you ever been sued by a client or been a party to any other litigation, other than as guardian ad litem, plaintiff ad litem or defendant ad litem? Yes

If yes, provide details, including the style of the case, cause number, name of the jurisdiction and the approximate year in which such litigation was commenced and in which it was terminated:

As a Commissioner of the Missouri Public Service Commission, I was often sued by parties in underlying cases before the Commission that sought appellate review of the decision. I was sued always sued in my official capacity. A list of these cases can be provided upon request.

I also served on the Apportionment Commission for the Representative Districts in 2001, better known as the House Reapportionment Commission. There was a dispute about the creation of the Committee and I was named in my official capacity as a party Defendant to the suit. Summary Judgment was entered in the Defendant's favor. (Case. No. 01CV323865)

14. Have you ever been disciplined or cited for breach of ethics or professional conduct by a

court or by any bar association or committee thereof? No

If yes, provide details:

15. Have you ever been held in contempt of court? No

If yes, provide details:

16. If you are or were a member of the Judiciary of the State of Missouri, please state: N/A

(a) Whether an order of reprimand, removal, retirement, suspension or other disciplinary action has ever been entered against you by the Supreme Court of Missouri for breach of the Code of Judicial Conduct or the Canons of Judicial Conduct?
If yes, state the nature of such breach, the date discipline was imposed and the exact nature and duration of the discipline imposed:

(b) Whether a reprimand or admonishment has ever been entered against you by the Commission on Retirement, Removal and Discipline for any of the causes specified in Rule 12.07 of the Supreme Court Rules Governing the Judiciary.

If yes, provide details including date the order was entered, the date of your consent, and a description of the conduct you were ordered to cease and desist:

(c) Whether, to your knowledge, you have been a subject of a complaint and investigation by the Commission on Retirement, Removal and Discipline, which did not result in any action by the Commission? If yes, provide details:

17. To your knowledge, have you been investigated by a court or by any bar association or committee thereof for breach of ethics or professional conduct? No

If yes, provide details:

18. List all bar associations and other professional societies, of which you are a member, with any offices held and dates: Missouri Bar Association, Illinois Bar Association, American Bar Association, Bar Association of Metropolitan St. Louis

19. Describe your community activities, including any organizations, not listed above, with which you are affiliated:

National Association of Regulatory Utility Commissioners –
Member – Board of Directors
Co-Chair Washington Action Program
Co-Vice Chair, Committee on International Relations
Committee on Electricity

Previously served on the Committees for Water and Energy Resources and the Environment

Eastern Interconnect States Planning Council – Vice-President
Chair – Stakeholder Steering Committee of the Eastern Interconnect Planning Collaborative

Vice-Chair - National Council on Electricity Policy

Eisenhower Fellowship Alumni Advisory Council

Appointed by Governor Holden to the Apportionment Commission for the Representative Districts 2001

St. Clair Hospital Foundation Board (2003 – 2012) – Former Chair

Friends of Legal Services of Eastern Missouri (2006-2007)

Webster Groves City Councilman (2005-2008)

St. Louis Regional Commerce and Growth Association Public Policy Council (2005-2008)

St. Louis County Fire Standards Commission (2006-2008)

20. Do you now hold or have you ever held any elective or appointive public office or position?

Yes

If yes, provide details:

Commissioner -Missouri Public Service Commission, appointed by the Governor (2008)

Chairman – Missouri Public Service Commission, appointed by the Governor (2011)

City Councilmember – City of Webster Groves, appointed by Council and Elected (2005-2008)

Apportionment Commission for the Representative Districts – Appointed by the Governor (2001)

21. Provide the branches and dates of (a) military service, or (b) other public service, not otherwise covered in this application. If discharged from the military, was the discharge other than honorable? If military service continues, so state: N/A

22. List any professional articles or books which have been published or any special recognition or award of a professional nature which you have received:

AWARDS

St. Louis Business Journal 2006 - 40 Under 40 Award

Eisenhower Fellow 2009 (**Philip D. Reed Fellow**: Outstanding Fellow focused in energy, environment, minority advancement, or public policy)

NARUC Award Promoting International Cooperation Among Utility Regulators and Development of Professional Regulation in Honor of Terry Barnich (“Terry Barnich Award”) – Inaugural award- 2012

ARTICLES AND PRESENTATIONS

03/18/12 - **Guest Column: Lifting The Curtain On Utility Regulation** (St. Joseph News-Press, St. Louis Post-Dispatch, Jefferson City News Tribune and Columbia Daily Tribune)
01/24/12 - **Missouri Broadband Report and FCC Actions on Broadband -- Presentation to Senate Commerce Committee**
02/04/10 - **Presentation on Best Practices to ACERCA - Antigua, Guatemala**
11/19/09 - **The Cyber House Rules - What Regulators Need to Know About Cybersecurity**
09/15/09 - **Presentation on Climate Change to St. Louis RCGA Energy and Environmental Council**
07/21/09 - **NARUC ERE Committee - Presentation on Australia's Magnetic Island Energy Efficiency Program**
07/19/09 - **NARUC Task Force on Climate Policy - Presentation on Australia's Response to Climate Change**
03/29/09 - **KC Star - As I See It -- We Should Seek New Ways of Making Power**

23. Furnish the names and addresses, including zip codes and telephone numbers of not more than five persons, who are not judges, as references with respect to your judicial qualifications:

R. Lance Witcher
Ogletree Deakins
7700 Bonhomme Avenue
Suite 650
St. Louis, MO 63105

Allison Schreiber Lee
Paule, Camazine & Blumenthal LLC
165 North Meramec Avenue
Suite 110
Saint Louis, MO 63105

Edmund Quatmann, Jr.
Chief Legal Officer
Isle of Capri Casinos, Inc.
600 Emerson Road, Suite 300
Saint Louis, MO 63141

John Simon
The Simon Law Firm
800 Market Street, Suite 1700
St. Louis, MO 63101

Ed Hennessy
Community Investment Division
United Way
910 N 11th St.
St Louis, MO 63101

24. State any additional data you deem relevant:

As Chairman of the Missouri Public Service Commission, I was also the administrative head of the agency. I was responsible for all administrative functions of the Commission including budgeting, human resources, and legislative affairs. I implemented several efficiency measures including a reorganization of the Agency as well as a revision of our case procedure protocol. These all were an attempt to make ourselves more efficient and responsive to the parties that appeared before us.

By my signature to this application, I authorize: (1) the Commission by its chairperson to obtain relevant information, including but not limited to documents, records and files with respect to my medical, police or disciplinary records, and (2) the Commission and its members to obtain additional relevant information regarding my qualifications as well as the accuracy of my responses to the questions on this application, with the understanding that the information described in (1) and (2) above is available only to the members of the Twenty-Second Circuit Judicial Commission. Notwithstanding the above, in accordance with Supreme Court Rule 10, as amended effective February 29, 2008, if I am one of the three nominees listed on the certificate of nomination sent to the Governor, I authorize the Commission to send a complete copy of this application to the Governor and publicly release a copy of the application with personal and confidential information redacted as identified on the cover page of this application.

I hereby certify that all my statements as made above are correct and that if I am appointed to the office of Associate Circuit Judge of the Circuit Court St. Louis County, I will accept the appointment, qualify, and promptly enter upon the performance of the duties of that office.

DATE: 11/15/13

SIGNED: 

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of Union Electric Company, d/b/a)
Ameren Missouri's Tariff to Increase Its Annual) Case No. ER-2012-0166
Revenues for Electric Service.)

CONCURRING OPINION OF CHAIRMAN KEVIN D. GUNN

The Commission's order in ER-2012-0166 is a fair order and reflects just and reasonable rates based upon substantial and competent evidence. However, in order to expand on certain issues included in the Report and Order, I am attaching this very short concurrence.

The Report and Order correctly applies a Return of Equity of 9.8%. In the absence of contravening issues, I would have advocated for a slightly lower Return. However, in an Order of this magnitude, a balance in the public's best interest must be struck, and I recognize that a significantly lower ROE would have most likely resulted in an almost immediate filing of a new rate case. Additionally, such a low ROE would have had an unnecessarily negative impact on Ameren's cost of capital. Neither of these would, in the long term, benefit the ratepayer.

It is important to remember that ROE is essentially a theoretical number that defines a utility's "opportunity" to earn on its investment. It is not a guarantee of profit, nor is a utility guaranteed to earn that percentage. There does exist in the utility world an "echo chamber" where an ROE is driven not necessarily by evidence, but by concern about perceptions of investors. While it is important to recognize that this echo chamber tends to inflate ROE's beyond the actual cost of capital, one cannot ignore the very real world implications of earning below the mainstream of the industry. Investors will put their money where they believe they will earn a sufficient return. Utilities must compete for those dollars and the harder it is to attract investors, the more the cost of capital rises.

I think the markets and investors would have been comfortable with an ROE of below 9.8% and I would have supported that number. However, the evidence and testimony does support the higher ROE. Ameren should be on notice that if the cost of capital remains where it is today, lower ROE's may be awarded.

I would have also voted to end Ameren's vegetation management tracker. Trackers tend to remain past their usefulness and there is a danger that mechanisms meant to assist with acute issues become chronically renewed

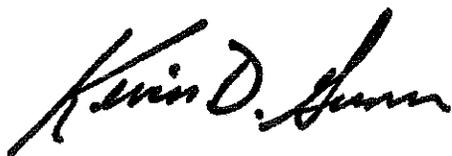
without much scrutiny. Through one full urban cutting cycle and 2/3 through a rural cutting cycle, costs have remained remarkably stable and could be accounted for in base rates. If the costs do fluctuate wildly over the next cycle, those may be demonstrated in the next rate case and adjustments may be made. Also, any extraordinary costs associated with vegetation management due to increase storm activity could be accounted for in the authorized storm tracker.

Although the Commission has authorized rate case expense in this case, it has also opened docket AW-2011-0330 open to explore the potential of sharing these costs between ratepayers and shareholders. A utility is required to go through a rate case filing in order to increase revenues, however, that requirement is because they enjoy a monopoly in their service territory. Clearly when revenues are increased and a utility gets to recover its cost plus a return, shareholders benefit. It is impossible to claim that shareholders do not benefit from the rate case proceedings and to do so is disingenuous. I believe it is appropriate to allow some sharing of rate case expense. If not for the open docket, I would have allocated some of the rate case expense costs to the utility. There are many questions as to what the correct allocation formula should be as how to calculate benefits that should be resolved using the docket/workshop process. The Commission should proceed with all deliberate speed in concluding the workshop and moving towards a rule that would allow for a fair allocation of rate case expense to utility shareholders.

This is an important report and order because it authorizes and incorporates a historic agreement on energy efficiency measures. Measures that I hope will allow individual customers to offset the increased rates in this report and order if efficiency programs are fully implemented and utilized. Ameren and the parties should continue to work together to allow customers to make their homes and their usage more efficient.

Despite these slight disagreements with the Report and Order, I believe that the conclusions are supported by substantial and competent evidence and concur in the result.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin D. Gunn". The signature is written in a cursive, flowing style.

Kevin D. Gunn
Chairman

Dated at Jefferson City, Missouri
On this 12th day of December, 2012.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of The Empire District Electric)	
Company of Joplin, Missouri for Authority)	
to File Tariffs Increasing Rates for Electric)	<u>Case No. ER-2008-0093</u>
Service Provided to Customers in the Missouri)	Tariff File No. YE-2008-0205
Service Area of the Company.)	

DISSENTING OPINION OF COMMISSIONER KEVIN GUNN

This Commissioner concurs with many of the majority positions contained in the Report and Order. However, the majority's authorization of a 10.8 percent return on equity (ROE), rather than an ROE of 10.5 percent or less, forces this Commissioner to respectfully dissent. While the record supports most of the findings made by the majority in reaching their ROE recommendation, the record does not support the majority finding that Empire remains more risky than the proxy groups used by Vander Weide, Gorman or Barnes following the implementation of the authorized fuel adjustment clause. Accordingly, the majority's upward adjustment to its ROE recommendation to compensate Empire's share holders for the risk associated with the company's BBB- bond rating, as opposed to the BBB+ average bond rating of each proxy group was inappropriate. The more credible evidence supports a ROE of no higher than 10.5 percent and demonstrates that a 10.8 percent ROE is simply too high.

The evidence supports, and this Commissioner agrees with, the following majority findings. First, some of the underlying assumptions in both Gorman's single-stage and two-stage DCF models were arbitrary and flawed yielding recommended ROE recommendations that were over 200 basis points apart. Second, although each may be

individually flawed, Gorman's single-stage and two-stage DCF models do not need to be discarded, but can reasonably be averaged in that combining the results of the two models mitigates their individual weaknesses thereby producing a reasonable and balanced ROE recommendation. And finally, a ROE of 10.5 percent, taken from averaging Gorman's single-stage and two-stage DCF models is an appropriate ROE for Empire provided Empire's level of business risk is comparable to that of the proxy groups.¹

The flaw in the majority opinion is that the majority's 25 basis point upward ROE adjustment to compensate for Empire's lower bond rating is not supported by record evidence. In determining the appropriate ROE for Empire, it is appropriate to consider whether the calculated ROE should be adjusted to take into account a higher or lower level of operational risk Empire faces compared to the companies in the proxy groups. If the calculation does not take into account additional risk faced by Empire that is not faced by the proxy group companies, it is appropriate to adjust the ROE slightly upward. However, if, as in the present case, the ROE calculation already takes any such risk differential into account, then an adjustment is not necessary.

The majority found Empire riskier than the companies contained in the proxy groups because the average bond rating of each proxy groups is BBB+ while Empire's current bond rating is only BBB-. The majority further found the risk difference associated with having a BBB+ verses a BBB- bond rating is worth 25-50 basis points and adjusted their starting ROE of 10.5 up to 10.75 based upon that perceived risk differential.

The majority's addition of 25 basis points to Empire's authorized ROE to account for Empire's higher level of risk compared to the proxy group companies based upon Empire's

¹ Although not relevant to this dissent it is worth noting that other record evidence not cited by the majority further supports a ROE of 10.5 percent for Empire provided its business risk is comparable to that of the proxy groups.

inferior bond rating would have been reasonable, but for their subsequent reduction to Empire's business risk through the authorization of a fuel adjustment clause. Empire's BBB- bond rating is based upon the level of risk it faced in the environment in which it operated on the date it received that rating. On the effective date of the majority's Report and Order a significant change occurred in Empire's level of risk. Specifically, the majority, with the support of this Commissioner, authorized Empire to adopt a fuel adjustment clause. In the environment where Empire received its BBB- rating, Empire did not have a fuel adjustment clause. As found by the majority, the implementation of a fuel adjustment clause will reduce the level of operating risk that Empire faces.

For Empire's proposed test year revenue calculation, the cost of fuel and purchased power equals 37.63 percent of the company's revenue requirement. Over the past 5 years, Empire's fuel costs have increased by seventy percent. Staff estimated that between 2002 and 2006, Empire's shareholders had to absorb approximately \$85.5 million of fuel and purchased power costs between rate cases. Due to rising fuel costs, Empire's actual earned ROE in 2006 was about nine percent, and that number dropped to about seven percent in 2007. The fuel adjustment clause authorized in this case will allow Empire to recover ninety-five percent of these costs going forward. Clearly the reduction in Empire's operational risk following the implementation of a fuel adjustment clause will be significant.

The majority also notes that most of the companies included in the proxy groups used by the analysts already operate under a fuel adjustment clause, and on that basis analysts Vander Weide and Barnes agreed no adjustment to their recommendations would be necessary to recognize the implementation of a fuel adjustment clause in this case. However, Barnes' position that his recommended ROE did not need to be adjusted downward if Empire received a fuel adjustment clause, was based upon his position that

the reduced risk Empire would face with a fuel adjustment clause was comparable to the risk level of the proxy group companies that already had fuel adjustment clauses. He did not support raising Empire's ROE to account for its higher level of risk compared to the proxy group companies as reflected by the difference in bond ratings, reducing that risk difference by authorizing Empire to implement a fuel adjustment clause, and then failing to account for that risk reduction in its ROE calculation.

The majority's circular logic on this point is flawed. Although the majority found the implementation of a fuel adjustment clause will reduce Empire's business risk, they ignore the impact the higher level of risk Empire faced prior to such authorization would have had on Empire's bond rating.

The record supports, and this Commissioner agrees with, the majority finding that a quarterly DCF model more correctly equates the present value of future dividends to the current stock price for the companies, like Empire, that pay quarterly dividends. However, the mere five basis point difference between the results obtained using the two models is too slight to be of real significance and does not justify making an adjustment in a ROE calculation.

In addition to the points above, this Commissioner also agrees with other findings by the majority. First, that a larger proxy group is preferable, if such a group consists of companies with similar risk. Second, the proxy groups used by Vander Weide, Gorman and Barnes are all, on average, less risky than Empire, at least prior to the majority's decision in this case given that each proxy group had an average bond rating of BBB+ verses Empire's BBB- bond rating.

The evidence further supports the finding that it is appropriate to utilize an average of recently authorized returns on equity for vertically integrated electric utilities, excluding

wires-only utilities, in a risk-premium analysis because Empire is a vertically integrated company and, as such, its risks are more in line with other vertically integrated electric utilities. The evidence shows that integrated electric utilities are generally more risky than wires-only electric utilities because, unlike wires-only electric utilities, they must make large investments in electric generation plant, operate generating plants and buy fuel to run those plants. The evidence further shows that increased risk generally translates into an increased allowed ROE and regulatory agencies around the country have recognized that increased risk by allowing integrated electric utilities higher returns on equity.²

This Commissioner also believes that the calculations performed by and ultimately the ROE recommendation of Empire witness, Vander Weide were seriously flawed. Specifically, Vander Weide's risk premium analysis was inflated due to his use of unreasonably high DCF return estimates. Further, Vander Weide's capital asset pricing model (CAPM) analysis resulted in an unreasonably high ROE estimate due to his inappropriate use of the 2007 average yield to maturity on 20-year Treasury bonds as his estimate of a risk-free rate. The record also supports the finding that the yield on 30-year Treasury bonds is the best measure of the risk-free rate for use in CAPM and risk premium analysis because common stock is generally viewed as a long-term investment where the dividends last indefinitely.

While most of the Report and Order is based upon the record evidence, in making their findings the majority seem more driven to justify a desired ROE than to analyze and accept the evidence presented in this case. This Commissioner believes the evidence

² It is worth noting that the Regulatory Research Associates reported the average return on equity allowed in 2007 to integrated electric utilities, excluding wires-only electric utilities, was 10.51 percent. See: Vander Weide Surrebuttal, Ex. 30, Page 10, Lines 3-11.

supports a ROE of 10.5 percent or less and does not support the 10.8 percent ROE authorized by the majority. Therefore, this Commissioner must dissent.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'K. P. Gunn', followed by a long horizontal flourish.

Kevin Gunn
Commissioner

Dated at Jefferson City, Missouri,
on this 12th day of August 2008.

Executive Director. The titles that make up the "Director" definition may be specifically enumerated if necessary in Proposed 4 CSR 240-4.300 (2)(A) while the shorthand may create confusion.

Proposed 4 CSR 240-4.120 through 4.140

These sections set up a very complex set of rules that deal with practices that are specifically banned by statute.¹ They should be eliminated. The system that has been set up that deals with gratuities works well and should be preserved. There are bright line tests for whether something can be accepted or not and those tests should remain.

Proposed Section 4 CSR 240-4.150

This section fails to distinguish between "extra-record" communications and "ex parte" communications. Both types of communications can be appropriate or inappropriate depending upon the content and context. However, communications between a non-party and a decision maker are "extra record" but not ex parte. For a communication to be "ex parte" it must be between a party and a decision maker.

The section also loosely refers to "interested in a contested case or anticipated contested case." Interested would easily apply to a union, customer or even a competitive power supplier, such as a propane dealer. However, it

¹ Section 386.200 RSMo 2006, prohibits any public utility, corporation and person, and every officer, attorney, agent and employee thereof, from offering to any Commissioner, the public counsel, or to any person employed by the Commission or public counsel, "any free pass or transportation or any reduction in fare to which the public generally are not entitled or free carriage for property or any present, gift, entertainment or gratuity of any kind."

could also apply to many other people or legal entities, such as anti-nuclear groups, having no direct pecuniary interest in a case.

This subsection states that ALL requests for expedited treatment must be filed. Although this mirrors the current rule, it is too restrictive. Parties often come to the judge with procedural issues that need to be addressed expeditiously. Most of such requests are unanimous. Parties to a case should always be allowed to contact the presiding judge concerning uncontested procedural issues.

Proposed Section 4 CSR 240-4.160

The inclusion of an exceptions section is troubling, because it implies that any conversation not listed, irrespective of how innocuous, may be a violation. Further, subsection 4.160(3) makes an exception for notification of unanticipated power outages, but not for planned outages.

Subsection (1) refers to communications by the General Assembly or other governmental official. This section is problematic for a several reasons. First, the General Assembly is not a party to a case and their comments would not be ex parte and therefore no exception was necessary. However, some government officials such as the Director of the Department of Natural Resources may be a party to a case and comments would be ex parte and should not be subject to an exception.

The Commission is already required to keep copies of all records, financial statements and public documents for a minimum of five years pursuant to Section 386.145 RSMo 2006.

In subsection (2) there are repeated references to "the Commission's advisory staff," and that phrase is also used interchangeably with "Commission staff." Each of these references should be changed to "the Commission's technical advisory staff," as defined in Section 386.135 RSMo (2008 Cum Supp) to avoid confusion with general Commission staff members.

This section also requires ex parte notices be retained under the name of the "public utility" or person making the communication. First, this is duplicative data retention. Each notice should simply be filed in each applicable case.

However, if such an additional and duplicative data retention system is established, there are additional issues with the draft language. First, "public utility" is inadequate and should be replaced with "person and/or legal entity," because there are many non-utility individuals and legal entities that participate in contested Commission cases. For example, the Commission has jurisdiction over not only public utilities, but manufacturers and dealers of manufactured homes and modular units. Further, there are many non-utility parties in contested Commission cases. These parties can include industrial companies and groups, government agencies, cities, public interest groups, the Office of the Public Counsel, and the Commission's Staff. Any of these parties could make an ex parte communication.

Proposed Section 4 CSR 240-4.170

Subsection (1) does not appear to fit with the rest of the draft rule or even subsection (2). It is titled Extra-Record Statements Regarding Contested Case, but the text of the draft section talks about both ex parte and extra record

communications again without distinguishing between them. Subsection (1) has no independent purpose. It merely creates a new rule violation if a "person" intentionally violates 4.150, 4.160 or subsection (2).

Subsection (2) merely reprints the first half of current rule 4 CSR 240-4.020 which addresses attorney conduct during Commission proceedings. The language in question is basically a reprint of Missouri Supreme Court Rule 4-3.6 regarding extra-record statements made about an adjudicative proceeding. It is unclear why these two sections were combined.

Proposed Section 4 CSR 240-4.200

This Section appears to hold the Commission to a judicial bias standard verses the standard applicable to an administrative tribunal.

Further, in instances where any allegation of conflict or bias is made subsection (4) would unreasonably shift the burden from the party alleging that conflict or bias to the individual Commissioner against whom such allegation is made. The party alleging bias should have to provide written or testimonial documentation evidencing the conflict or bias. An individual Commissioner should not have to prepare a written explanation to prove he/she does not have a conflict and/or is not biased any and every time any party alleges bias, unless some evidence of a conflict/bias is presented.

Proposed 4 CSR 240-4.220

Section 105.462 (3) RSMo 2006 prohibits any person with rulemaking authority from attempting to influence the tribunal upon which that person sat regarding rulemaking decisions for one year following termination of his or her

office or employment. This section expressly states that the prohibition does not extend to adversarial proceedings, unless the member in question directly participated in such adversarial proceeding during their term on the board or commission. Accordingly, draft rule section 4 CSR 240-4.220 is not necessary as to the individual Commissioners. Further, not only is there is no justification to extend this limit to any and every employee of the Commission, but, such a restriction would seriously limit the Commission's ability to attract qualified personnel. It is unlikely that a former employee, appearing in a rulemaking/ stakeholder process would exert undue influence over the proceeding or over five independent Commissioners.

Proposed 4 CSR 240-4.900(1)

This section appears to inappropriately vest the Commission with legal authority to grant relief in equity. However, it is well-settled law that the Commission cannot grant monetary relief for damages or order a pecuniary reparation or refund.² As the court of appeals noted in *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*:

While the "Commission does have exclusive jurisdiction of all utility rates," "when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of an overcharge is made, only the courts can require an accounting or render a judgment for the overcharge." *Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971). This is so because the Commission "cannot 'enforce, construe nor annul' contracts, nor can it enter a money judgment." *Id.* (quoting *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937)). Likewise, the Commission does not have the authority to do equity or grant equitable relief. *Am.*

² *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 57-58 (Mo. 1937).

Petroleum Exch. V. Pub Serv. Comm'n, 172 S.W.2d 952, 955 (Mo. 1943).³

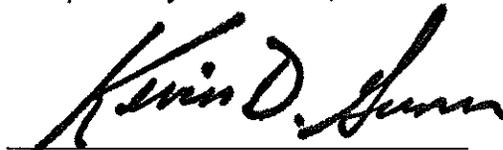
Further, subsection 4.900(1)(E) of the draft rule states that the Commission is authorized to recommend to "the Commission" that an employee in violation of 240-4 be fired or disciplined. This subsection makes no sense and should be removed.

Proposed 4 CSR 240-4.900(2)

This subsection inaccurately indicates law judges deliberate and vote on Commission orders. Only Commissioners deliberate or vote on Commission orders. Second, it inaccurately indicates law judges are appointed, rather than simply being employees of the Commission.

Finally, if the rule sets out sanctions, it should also be clear on the process and procedures that will be utilized by the Commission to enforce the sanction provisions. Due Process must be recognized as well as standards set for the imposition of the sanctions.

Respectfully submitted,



Kevin D. Gunn
Commissioner

Dated at Jefferson City, Missouri
on this 7th day of August, 2009.

³ 116 S.W.3d 680, 696 (Mo. App. 2003).