BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of The Empire District Electric Company for Approval of Its Customer Savings Plan	)))	Case No. EO-2018-0092

REPLY BRIEF OF THE CITY OF JOPLIN

Respectfully submitted,

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COME NOW the City of Joplin and for its Reply Brief states as follows:

I. The West Virginia PSC Recently Denied a Similar Application by the Appalachian Power Company (APCo)

On May 30, 2018 the Public Service Commission of West Virginia denied an extremely similar application in Case No. 17-0894-E-PC.[1] In that case, the company sought approval for acquisition of 225 MW of wind.[2] Like Empire, APCo was requesting rate base treatment for the costs of the wind facilities and planned to take advantage of Federal Production Tax Credits.[3] Like Empire, APCo argued the Wind Projects offered an opportunity to take advantage of PTCs, capitalized on the exceptional low cost of the power produced, and offered a hedge against market energy prices and future

[1] The West Virginia PSC Commission Order is attached hereto as Exhibit 1.

[2] APCo Case No. 17-0894-E-PC, Order at 1.

[3] *Id*. at 2-3.

regulation.[4] The Commission's Findings of Fact ("FOF") related to capacity show just show similar this case is to the APCo case:

FINDINGS OF FACT

1. The Companies have sufficient capacity. Tr. II at 52-53 (Scalzo).

2. The low net cost to ratepayers in the first ten years due to the PTC creates a concern for fairness to future ratepayers who will be required to bear the higher costs in years eleven through twenty-five.

3. The Companies do not generate sufficient energy to serve their customers in the winter months.

4. PJM plans its supply resources to meet its summer peak demand and energy requirements and, therefore, has more than enough generating capability in the winter to make up for any shortfall between APCo's energy generation and its customer energy needs.[5]

With respect to FOF 1, the record is clear that Empire has sufficient capacity.[6] Empire Witness Mertens admits, "[W]e [Empire] do not need to add additional capacity to meet the peak load of our retail customers."[7]

With respect to FOF 2, the Stipulation and Agreement creates equal concerns about fairness, although inversely. Here, even Empire's numbers show the potential for existing customers (year 1 – 6 customers) to subsidize

[4] *Id.* at 4.

[5] *Id.* at 16.

[6] *See* Joplin's Initial Brief at 12-13.

[7] Hrg. Tr. Vol. 5, 374:6-8 (Mertens).

future customers (years 7+ customers).[8] No party disputes that Empire's existing customers will see rate increases. Empire promises these increases will be offset in the long-term. This is troublesome because Empire's customers are not static. The Non-Unanimous Stipulation and Agreement is inherently unfair. The unfairness is also built into the "market protection provision." While current ratepayers (in the first ten years) share 50% of the risk up to $70 million, future ratepayers are subject to 100% of the risk.[9]

With respect to FOFs 3 and 4, the evidence in the APCo case was that the companies did not generate sufficient energy to serve their customers in the winter months, but that any shortfall could be covered by the PJM energy market. Like Empire and the SPP, "APCo sells all of its generated energy into the PJM wholesale market and purchases all of its energy requirements from the same market."[10] Unlike Empire, APCo is a net buyer.[11] Empire is a

[8] Non-Unanimous Stipulation, Appendix A at 12.

[9] Non-Unanimous Stipulation, ¶17(c) and Appendix A.

[10] APCo Case No. 17-0894-E-PC, Order at 7.

[11] Case No. 17-0894-E-PC, Initial Brief of APCo and Wheeling Power Company, at 5 (filed April 6, 2018) ("APCo purchased, on average, 6,111 GWh of energy annually during the period 2014-2016. APCo also sold, on average, 2,887 GWh of energy annually during the same period, resulting in a market exposure, on average, of about 9,000 GWhs annually.").

"net seller" in the SPP market, and sells approximately half a million megawatt hours to SPP annually.[12]

Despite APCo being a net buyer, the Virginia State Corporation Commission ("VSCC") held that APCo failed to establish the wind facilities were needed to address an energy deficiency.[13] The VSCC found that its access to additional generation through the PJM market was sufficient to meet its generation requirements.[14] Empire is in an even better position as far as need than APCo. It is a net seller. Based on its Findings of Fact, the Public Service Commission of West Virginia concluded:

> Because of the availability of an ample wholesale purchase option from the PJM energy market, the Companies do not have a need to own or bi-laterally contract for additional energy to meet their internal load requirements.[15]

The record is clear that additional generation is not needed to meet present demand. Still, Joplin agrees that this Commission can consider future needs in CCN cases. This "future need" showing may be made in different ways. Some utilities have been able to show an expected increase in customer

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[12] Hrg. Tr. Vol. 5, 399:14-400:10 (Mertens).

[13] Appalachian Power Co., Commonwealth of Virginia State Corp. Comm'n., Case No. PUR-2017-00031, Final Order at 4-5 (April 2, 2018).

[14] *Id.*

[15] Case No. 17-0894-E-PC, Order at 17.

demand.[16] Other utilities have shown that additional facilities are needed to comply with federal regulations.[17]

Empire has not even attempted to show either. There is no evidence that the increase in customer demand is such that Empire needs an addition of 600MW of generation. In addition, Empire has not shown that such generation is needed for some other reason – such as compliance with federal regulations.[18] This Commission can only consider the evidence which Empire has chosen to present to it. In this case, the record is completely devoid of any showing of present or future need for 600 MW of wind owned by Empire. As such, the Commission should dismiss Empire's Application and reject the Non-Unanimous Stipulation and Agreement.

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[16] See *State ex rel. Util. Consumers Council v. Pub. Serv. Comm'n*, 562 S.W.2d 688, 691 (Mo. App. 1978).

[17] See Report and Order, *In re KCP&L Greater Missouri Operations Company*, File No. EA-2015-0256 (March 2. 2016).

[18] Empire suggests that once its PPA expires, it will need generation to meet the Missouri RES requirements. Tr. 494-495 (Wilson). It is undisputed that Empire has the option to continue its existing PPAs to 2028 and 2030. Missouri's current RES is 10% and that increases to 15% in 2021. https://empiredistrict.com/Home/ Document/6679. Of the 15%, 2% must be solar, which Empire meets by paying solar rebates to qualifying Missouri customers. That leaves Empire with a 13% requirement, .085% is met with hydro generation. The Wind PPAs (at just 255 MW Capacity) currently account for 16.70% of existing supply-side resources. Empire is currently significantly over the 2020 RES Reqirement. Even in ten years, when the PPAs expire, Empire could meet the RES requirement with less than its current 255MW of wind. There is no justification to add (or own) 600, or 800 MW of wind.

II. Empire's Requests are Not Authorized by Statute

The Signatories ignore that the Commission is a body of limited jurisdiction. From Staff's Initial Brief: "In Staff's review of relevant statutory authority and case law, there is nothing that explicitly prohibits the Commission from making a finding of reasonableness."[19]

The Commission does not have any authority that is not explicitly prohibited. Rather, the Commission has only that authority which is expressly provided. The Missouri Supreme Court states plainly, "If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power." *State ex rel. MoGas Pipeline, LLC v. Missouri Pub. Serv. Comm'n*, 366 S.W.3d 493, 496 (Mo. banc 2012).

A. Empire

Empire suggests the Commission has "general jurisdiction" over Empire's request pursuant to Section 393.140, RSMo.[20] As MEGG stated in its [Original] Statement of Positions, "Consistent with its limited authority, a reviewing court demands that the Commission provide specific authority for its actions…In this regard, the Commission may not simply divine the desired authority out of the broad general authority conveyed in Sections 386

[19] Staff's Initial Brief at 5.

[20] Empire's Initial Brief at 5-6.

and 393."[21] The Supreme Court of Missouri has already rejected previous attempts to utilize the Commission's "general jurisdiction" to find authority that is not expressly granted elsewhere.[22]

B. Staff

The Staff also relies on *AG Processing*, the 1997 MAWC CCN case, the MEEIA Opt-Outs case, and Regulatory Plan cases to support their argument that the Commission has the authority to make a reasonableness determination in this case. These are addressed in turn below.[23]

(1) AG Processing

Staff suggests that "*AG Processing* seems to stand for the proposition that the Commission cannot punt reviewing the reasonableness of issues that impact the public interest to future cases."[24] *AG Processing* was a merger case. Pursuant to Section 393.190, RSMo, a company cannot proceed with a

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[21] MECG Statement of Positions at 2 (filed April 4, 2018).

[22] See *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 55–56 (Mo. 1979) (These statutes give "the PSC general supervisory power over electric utilities…it gives the PSC broad discretion only within the circumference of the powers conferred on it by the legislature; the provision cannot in itself give the PSC authority to change the rate making scheme set up by the legislature.")

[23] Joplin previously distinguished the 1997 MAWC Case (Joplin's Initial Brief at 10-11) and will not restate that argument here.

[24] Staff's Initial Brief at 5-6.

merger without obtaining the Commission's approval. The application must state, "The reasons the proposed merger is not detrimental to the public interest[.]"[25] No one contested that the "standard used to evaluate a merger subject to approval by the PSC, which is whether or not the merger would be 'detrimental to the public.'" [26] The court in *AG Processing* found that *in a merger case under Section 393.190, RSMo,* a determination of whether the acquisition premium was reasonable should be considered "as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public."[27]

This is not a merger case. Even the Signatories do not agree that the standard in evaluating Empire's requests is "no public detriment." *AG Processing* does not give the Commission authority, let alone require the Commission, to make a reasonableness determination in this case.

(2) MEEIA Opt Outs

The Staff suggests the MEEIA Opt-Outs is a case where the "Commission arguably pre-approved a utility request."[28] That case was a

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[25] 4 CSR 240-3.115(1)(D).

[26] *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State*, 120 S.W.3d 732, 735 (Mo. banc 2003).

[27] *Id.*

[28] Staff's Initial Brief at 8-10.

complaint case which the Commission had specific authority to resolve under Section 386.390.1, RSMo.[29] In addition, the case was resolved by a consent order specifically authorized by Section 536.060, RSMo. This case is not a complaint case and cannot be resolved by a consent order. Moreover, the Stipulation and Agreement in that case related to an AAO, which the Commission has the specific statutory authority to grant. There is no similar specific statutory authority (outside a CCN case) for the Commission to grant Empire's requests (even if such requests are now contained in a Non-Unanimous Stipulation and Agreement).

(3) Experimental Alternative Regulation Plans ("EARPs")

Staff suggests that the "Empire and KCPL regulatory plans are by far the most analogous to the requests being made in this case."[30] Staff continues, "Empire's *Revised Statement of Position* confirms that Empire is essentially requesting a regulatory plan."[31]

The Commission, in its Report and Order in the KCPL Case stated, "[T]he authority of this Commission to approve an experimental rate plan is

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[29] *In the Matter of Kansas City Power & Light Company's Practices Regarding Customer Opt-Out of Demand-Side Mgmt. Programs & Related Issues*, EO-2013-0359 (June 26, 2013).
[30] Staff's Initial Brief at 11.

[31] Staff's Initial Brief at 12.

well within its powers."[32] But the EARPs previously approved by the Commission are something altogether different than what Empire requests here. In *Union Electric Co. v. Public Service Commission*, the court described the EARP:

> The Commission approved the first EARP by an order on July 21, 1995, and it ran from August 1, 1995, through June 30, 1998. The second EARP was approved on February 21, 1997, and encompassed the period from July 1, 1998, through June 30, 2001. The Commission opened a case to monitor each EARP and resolve disputes that might arise in their operation. Upon the expiration of the second EARP, UE reverted to traditional utility regulation on July 1, 2001.
>
> …
>
> The EARP contemplated extensive and continuous monitoring and embraced the recognition that not all items could be anticipated and addressed and that disputes could arise."

136 S.W.3d 146, 149, 152 (Mo. App. W.D. 2004) (emphasis added). The plan in the KCPL case also contemplated extensive and continuous monitoring.[33]

The 200 Empire Case is not on point because, like the MAWC case relied upon by the Signatories, it was a CCN case.[34] Moreover, like the KCPL case, as a true EARP, it contained extensive and continuous monitoring

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[32] Case No. EO-2005-0329, Report and Order at 33 (July 28, 2005) (citing *Union Electric Co. v. PSC*, 136 S.W.3d 146, 149, 152 (Mo. App. W.D. 2004)).
[33] Case No. EO-2005-0329.

[34] See Case No. EO-2005-0329, Report and Order, at 41 (July 28, 2005).

provisions.[35] The Non-Unanimous Stipulation and Agreement filed in this case contains no similar provisions. It was not filed as an "experimental alternative regulation plan." It likewise cannot be called an "experimental" regulatory plan. The crux of an experimental plan is as a test for some set period. The "experiment" is monitored during that period and reconsidered at the close of the period.[36] As Empire points out, essentially all of the costs of Empire's proposed project is up front.[37] Once Empire builds $1 billion of wind projects, ratepayers are stuck with them. In three years, even if the parties and the Commission collectively decide the "experiment" was a bad one, there is no undoing it.

All the cases relied on by Staff are significantly different from this case. This is not a merger case. This is not a CCN case. Empire has never claimed, and this is not an EARP case. None of these cases give the Commission carte blanche authority to issue "findings of reasonableness." For these reasons, the Non-Unanimous Stipulation should be rejected and the Application dismissed.

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[35] Case No. EO-2005-0329, Stipulation and Agreement, ¶ 9 at p. 6 (filed July 18, 2005).

[36] See *Union Elec. Co. v. Pub. Serv. Comm'n of State*, 136 S.W.3d 146, 149, 152 (Mo. App. W.D. 2004); *State ex rel. City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 47 S.W.2d 102, 116 (Mo. banc 1931).

[37] Empire's Initial Brief at 24.

III. The Commission is Not Authorized to Issue an Advisory Opinion

Staff argues "[t]he mere fact that the model is forward-looking and there is no final cost figure does not render the case a request based on a hypothetical any more than a utility requesting to build any other generation unit in a typical CCN case." [38] Staff ignores the fact that this is not a *typical* CCN case, or a CCN case at all. As was pointed out in Joplin's Initial Brief, if a company wants to use forward modeling and seek approval of the construction of the wind projects, there's a statute for that.[39] And "Where…the statutes prescribe a manner in which proceedings before a public utility commission are to be initiated, that procedure must be followed."[40] In seeking the Commission's opinion regarding how future investments will be treated for ratemaking purposes, Empire is requesting an unlawful advisory opinion.[41]

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[38] Staff's Initial Brief at 26.

[39] Section 393.170, RSMo.

[40] *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d 561, 568 (Mo. App. 1976).

[41] See Joplin's Initial Brief at 4-8.

IV. Empire has failed to Sustain is Burden

The Signatories do not agree on the legal standard to be applied. Staff argues the appropriate legal standard to use is "no public detriment."[42] Empire suggests the appropriate legal standard is whether the Application is in the "public interest."[43] Whatever the standard, Empire has failed to meet it.

Empire cannot even meet the very lowest standard -- "no public detriment." Empire's modeling is insufficient to give the Commission confidence that there will be no public detriment. As OPC has shown, the modeling omitted known costs, omitted known inputs, and included faulty assumptions.[44] In addition, even under the company's flawed modeling, the costs of the project and recovery sought from ratepayers is substantial.[45] In not being able to show no public detriment, Empire has also failed to show that is Application would be in the public interest.

Again, Empire is seeking to evade the CCN process, in Section 393.170, RSMo. In *State ex rel. Utilities Consumers Council v. Public Service*

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[42] Staff's Initial Brief at 39-40.

[43] Empire's Initial Post-Hearing Brief at 8-9.

[44] See Initial Brief of OPC at 35-51.

[45] See Initial Brief of OPC at 52-58.

Commission,[46] the court explained in determining whether the Commission will issue a CCN, "the Commission must find that the nuclear facility is adequate to meet the needs of the public and is economical when compared with alternative sources of energy." In order to meet this "economical alternative" standard, the Company should have to show that it is more economical to own the wind projects than the alternative – obtaining wind through PPAs.[47] The record only shows an absence of consideration of this alternative by Empire. The Commission should reject the Non-Unanimous Stipulation on this basis.

WHEREFORE, the City of Joplin urges the Commission to dismiss Empire's Application and reject the Non-Unanimous Stipulation for all of the

[46] 562 S.W.2d 688, 699 (Mo. App. 1978).

[47] While Mr. Mertens suggested customers benefit because Empire is currently paying higher than market prices under existing PPAs (Tr. 394:5-7), this is only proof that Empire acted imprudently when entering such PPAs. There is nothing prohibiting Empire from entering a PPA which would contain a provision protecting Empire (and ratepayers) from being locked in to a higher than market rate. Mertens admitted PPAs would have better terms today than their existing PPAs. Tr. 394:608. Mertens also stated PPAs typically only have a term of 20 years. (Exhibit 9, Mertens Direct 9:14-18). He failed to explain why this is a detriment. Mertens was adamant that wind technology is ever-improving. (Exhibit 9, Mertens Direct 6-7). Would it not then be in customers' best interest to have the option, after twenty years, to contract with a wind project with the latest (and most efficient) technology? Mertens suggests that it would be better for customers to remain saddled with thirty-year-old turbines. This is nonsense.

reasons set forth in the Initial Post-Hearing Brief of the City of Joplin and set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were sent by email this 12th day of June, 2018, to the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Stephanie S. Bell