

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of The Empire District)	
Electric Company's 2013 Triennial)	Case No. EO-2013-0547
Compliance Filing Pursuant to 4 CSR 240-22.)	

**DOGWOOD ENERGY, LLC'S
MOTION TO COMPEL RESPONSE TO DATA REQUESTS**

COMES NOW Dogwood Energy, LLC (“Dogwood”) pursuant to Rule 4 CSR 240-2.090 and moves the Commission to compel The Empire District Electric Company (“Empire”) to respond to Dogwood’s First Set of Data Requests. In support thereof, Dogwood states to the Commission:

1. On July 1, 2013 Empire submitted its 2013 Integrated Resource Plan for consideration by stakeholders and the Commission pursuant to Commission Rule 4 CSR 240-22.
2. On July 19, 2013 the Commission granted Dogwood's application to intervene as a party herein.
3. On December 2, 2013 Dogwood filed Comments herein pursuant to 4 CSR 240-22.
4. On December 2, 2013 Dogwood also served the attached First Set of Data Requests on Empire pursuant to 4 CSR 240-2.090.
5. On December 12, 2013 Empire served the attached objections on Dogwood.

6. Counsel for Dogwood and Empire conferred regarding the data requests and objections as required by 4 CSR 240-2.090(8)(A), but were not able to resolve the issues raised by Empire's objections.

7. Counsel for Dogwood and Empire conferred with the administrative law judge assigned to this matter on December 19, 2013 as required by 4 CSR 240-2.090(8)(B), but were not able to resolve the issues raised by Empire's objections.

8. Dogwood's data requests bear directly upon the deficiencies in Empire's 2013 IRP submittal that are identified in the comments Dogwood has filed herein. In its comments, Dogwood describes how Empire has stuck with the decision it initially made in 2010 to convert its Riverton Unit 12 generation plant in 2015-16 to combined cycle without addressing deficiencies in its planning process that have been identified continuously in comments, agreements and orders since January 3, 2011. Dogwood's comments further describe how Empire has failed to use minimization of the present worth of long-run utility costs as the primary selection criterion in choosing a preferred resource plan that includes this conversion project, thereby failing to meet the minimum standards and fundamental objectives of the Commission's IRP rules. Dogwood's comments show how Empire has continued to plan for conversion of Riverton Unit 12 without due regard for up to \$107,440,000 in up-front capital cost savings available under alternative arrangements and without advance approval of generation plant construction by the Commission as required by Section 393.170 RSMo.

9. The parties are supposed to work together to try to reach agreement on resolving these deficiencies pursuant to 4 CSR 240-22.080(9). If agreement cannot be reached, then the

Commission may hold a hearing to remedy the identified deficiencies pursuant to 4 CSR 240-22.080(10) and (16).

10. Empire objects to Dogwood's data requests, asserting that Dogwood and other stakeholders are not allowed to use data requests to obtain information by discovery in this IRP proceeding.

11. Like other stakeholders, Dogwood is a party herein by approved intervention, pursuant to 4 CSR 240-2.075 and 22.080(6). The IRP rules expressly provide that the Commission will allow stakeholders to intervene as parties, stating that "the commission will issue orders that establish an intervention deadline and provide for notice". (See 22.080(6)). Parties are authorized to conduct discovery in commission proceedings, including by use of data requests, pursuant to 4 CSR 240-2.090.

12. Empire's reference to Case No. EW 2013-0425 is not on point. In that case, no one was granted party status. Accordingly, the Commission held that discovery was not authorized. In contrast, in this proceeding Dogwood is an intervenor party with the authority to conduct discovery pursuant to rule 2.090.

13. The Commission's IRP rules contemplate robust participation by intervenor parties. Absent the opportunity for discovery, intervenors would be limited only to information that the utility self-servingly decides to make available, would not be able to fully explore the adequacy of utility submittals, would not be able to make informed decisions regarding potential remedies for identified deficiencies, and would not be able to adequately prepare for hearings.

14. Rule 2.090 authorizes intervenors in IRP proceedings to conduct discovery in preparation for hearings. While the Commission has some discretion under the IRP rules to

decide whether or not to conduct a hearing, it cannot resolve factual disputes regarding Empire's compliance with the IRP rules without holding a hearing and issuing findings of fact. (See *Final Order Regarding AmerenUE's 2008 IRP*, Case No. EO-2007-0409, p. 6 (2/19/09); see also *Order Regarding Motion for Reconsideration and Rehearing*, Case No. EO-2013-0538 (11/26/13). Because planning is generally a management function as Empire states in its objections, the Commission cannot impinge on such management rights by ordering changes in planning processes without conducting a contested case hearing as contemplated by the IRP rules (see 22.080(16)). Unlike other administrative agencies, PSC decisions that affect rights are not subject to judicial review by trial de novo pursuant to Section 536.150, but rather are only subject to judicial review of a PSC decision made on the record after hearing pursuant to Sections 386.510 and 386.515. See State ex rel Public Counsel v. PSC, 259 SW3d 23 (Mo App 2008). Hence, due process requires a hearing before the Commission when rights can be affected. See State ex rel Leggett v. Jensen, 318 SW2d 353 (Mo. 1958)(due process requires either an agency hearing or court hearing); Mo. Constitution, Article I, section 10, Article V, Section 18; US Constitution, amendment 14.

15. Thus, parties like Dogwood should be allowed to use discovery pursuant to 2.090 to become better informed as they attempt to work out remedies for deficiencies in utility planning and prepare for potential hearings regarding such deficiencies.

16. Empire also objects to Dogwood's data requests based on relevance. Empire asserts that the requests are irrelevant because they concern "Empire's past specific decisions with regard to the Riverton Unit 12 conversion project" rather than "Empires' planning process for the future".

17. Dogwood disputes Empire's assertion that the Riverton Unit 12 project is so far along that it must be considered a "past decision" rather than part of its future plans. Notwithstanding Empire's assertions about contractual commitments, some of the data requests explore just how far along matters have progressed as well as the actual contract provisions, which may, for example, include cancellation rights. (See DRs 6-7, 10-12). And in any event, because Empire has not obtained Commission approval for this generation construction project, any commitment would be void under Section 393.170. *See, e.g., State ex rel Cass County v. Public Service Commission*, 259 SW3d 544 (Mo. App. 2008). Unless and until the Commission approves the \$175,000,000 Riverton Unit 12 construction project, it remains only a proposal for regulatory purposes. Hence, the Commission should reject Empire's unsubstantiated argument that it is too late to examine planning for Riverton Unit 12 conversion.

18. Moreover, implementation decisions made by utilities reflect upon the adequacy of their planning processes, and remain relevant information to be considered by the Commission as it evaluates whether a utility has conducted planning that complies with the IRP rules. In particular, the rules contemplate an ongoing process of reassessment by a utility, rather than blind adherence to a preferred plan. (See 22.080(12)). The data requests seek information regarding Empire's ongoing reassessment of its plan to convert Riverton Unit 12 to combined cycle as it moved from its prior reports to the current triennial filing, such as its review of bids (DRs 1-9), the anticipated costs and contingencies (DRs 13-19), and related operating costs assumptions (DRs 21-22). Such information is reasonably calculated to lead to the discovery of relevant information to be used as Dogwood works with Empire and other stakeholders to try to address identified deficiencies and prepares for a potential hearing in this matter pursuant to the Commission's IRP rules.

19. Dogwood has been identifying deficiencies in Empire's planning regarding the conversion of Riverton Unit 12 to combined cycle since January 2011. At various points, without getting into the substance, the Commission has ordered Empire to address those deficiencies. While Empire has gone through the motions, it has remained committed to its plans since 2010. It has repeatedly avoided Commission scrutiny by "kicking the can down the road" to the next filing. Now it asserts it is too late for the Commission to examine the adequacy of its planning regarding this project. Dogwood asserts that it is not too late, and by discovery seeks information to use as it works with Empire and the other stakeholders under the IRP rules to seek remedies for planning deficiencies and to prepare for any hearings to be held herein

WHEREFORE, Dogwood requests that the Commission overrule Empire's objections and direct Empire to respond to Dogwood's First Set of Data Requests.

Respectfully submitted,

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

/s/ Carl J. Lumley

Carl J. Lumley, #32869
130 S. Bemiston, Suite 200
Clayton, Missouri 63105
(314) 725-8788
(314) 725-8789 (Fax)
clumley@lawfirmemail.com

Attorneys for Dogwood Energy, LLC

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was either mailed, faxed, or emailed this 27th day of December, 2013, to the persons listed on the below service list.

/s/ Carl J. Lumley

Missouri Public Service Commission
General Counsel Office
P.O. Box 360
200 Madison Street, Suite 800
Jefferson City, MO 65102
Staffcounselservice@psc.mo.gov

Office of the Public Counsel
Lewis Mills
P.O. Box 2230
200 Madison Street, Suite 650
Jefferson City, MO 65102
opcservice@ded.mo.gov

Empire District Electric Company, The
Dean L. Cooper
P.O. Box 456
312 East Capitol
Jefferson City, MO 65102
dcooper@brydonlaw.com

Nathan Williams
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Nathan.Williams@psc.mo.gov

Renew Missouri
Andrew J. Linhares
910 E. Broadway, Suite 205
Columbia, MO 65201
Andrew@renewmo.org

Midwest Energy User's Assoc.
Stuart Conrad
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Missouri Division of Energy
Jeremy D. Knee
221 West High
P.O. Box 899
Jefferson City, MO 65102
Jeremy.knee@ago.mo.gov

Missouri Joint Municipal Electric Utility Commission
Douglas Healy
939 Boonville, Suite A
Springfield, MOL 65801
doug@healylawoffices.com

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of The Empire District)	
Electric Company's 2013 Triennial)	Case No. EO-2013-0547
Compliance Filing Pursuant to 4 CSR 240-22.)	

**DOGWOOD ENERGY, LLC'S FIRST DATA REQUESTS TO
THE EMPIRE DISTRICT ELECTRIC COMPANY**

COMES NOW Dogwood Energy, LLC ("Dogwood") and submits its First Set of Data Requests to The Empire District Electric Company ("Empire") in this proceeding pursuant to the rules of the Missouri Public Service Commission ("PSC"):

1. Produce copies of all responses to the RFP that Empire issued for construction of the Riverton Unit 12 conversion project described in the integrated resource planning materials Empire has submitted to the PSC (herein the "Riverton Unit 12 conversion project").
2. When were the responses described in Data Request 1 received by Empire?
3. When were the responses described in Data Request 1 first reviewed by Empire?
4. Produce copies of bid tabulation(s) produced by Empire summarizing the responses described in Data Request 1.
5. Produce copies of evaluations and recommendations developed by Empire in connection with the process of selecting the successful bidder from the responses described in Data Request 1.
6. Identify who made the decision selecting the successful bidder from the responses described in Data Request 1.
7. When was the decision made selecting the successful bidder from the responses described in Data Request 1?
8. Who was the successful bidder selected by Empire from the responses described in Data Request 1?
9. Provide copies of any summaries of the process of negotiating the contract with the successful bidder identified in response to Data Request 8.
10. Produce a copy of the contract entered into by Empire for construction of the Riverton

Unit 12 conversion project.

11. When did Empire sign the contract described in Data Request 10?

12. When had all parties signed the contract described in Data Request 10?

13. Does the cost range of \$165,000,000 to \$175,000,000 stated on page 7 of Empire's 10-28-2013 MPSC Environmental Regulations Overview, Case No. EW-2012-0065 (Update), include any costs besides the cost of construction pursuant to the contract described in Data Request 10? If so, please identify and itemize all such component costs.

14. When did Empire first determine that the cost of the Riverton Unit 12 conversion project would be in the range of \$165,000,000 to \$175,000,000 rather than the estimate of \$125,300,000 provided in Empire's 2012-2029 IRP submitted to the PSC?

15. Can the cost of the Riverton Unit 12 conversion project exceed the range of \$165,000,000 to \$175,000,000? If so, identify the remaining variables that could cause such a result, provide current estimates of the probability and range of potential impact of each such variable, explain the manner in which such estimates were determined, and identify who determined such estimates.

16. Does Empire currently expect the cost of the Riverton Unit 12 conversion project will exceed the range of \$165,000,000 to \$175,000,000? If so, explain why.

17. Can the cost of the Riverton Unit 12 conversion project be less than the range of \$165,000,000 to \$175,000,000? If so, identify the remaining variables that could cause such a result, provide current estimates of the probability and range of potential impact of each such variable, explain the manner in which such estimates were determined, and identify who determined such estimates.

18. Does Empire currently expect the cost of the Riverton Unit 12 conversion project will be less than the range of \$165,000,000 to \$175,000,000? If so, explain why.

19. What are the variables that set the range of \$165,000,000 to \$175,000,000 for the Riverton Unit 12 conversion project? Provide current estimates of the probability and range of potential impact of each such variable, explain the manner in which such estimates were determined, and identify who determined such estimates.

20. Does Empire currently have an expectation as to a final cost of the Riverton Unit 12 conversion project within the range of \$165,000,000 to \$175,000,000? If so, identify that expected final cost, the basis for such expectation, and who determined it.

21. Provide the most current available information concerning the anticipated heat rate of Riverton Unit 12 after completion of the Riverton Unit 12 conversion project, including evaluation and explanation of probability of high, mid-range and low values.

22. Provide any and all natural gas price forecasts currently in use at Empire, and any and all such forecasts used at Empire within the past 12 months, for any resource planning, strategic planning, budgeting, power purchasing or sales, or any other business purpose. In addition, please explain the purposes and use of each such forecast, provide any reports developed utilizing and/or based on such forecasts, and provide any memoranda, emails or other written documentation evaluating the accuracy and/or reliability of each such forecast.

Respectfully submitted,

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

/s/ Carl J. Lumley

Carl J. Lumley, #32869
130 S. Bemiston, Suite 200
Clayton, Missouri 63105
(314) 725-8788
(314) 725-8789 (Fax)
clumley@lawfirmemail.com

Attorneys for Dogwood Energy, LLC

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was either mailed, faxed, or emailed this 2d day of December 2013, to counsel of record in this proceeding.

/s/ Carl J. Lumley

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION

DAVID V.G. BRYDON (1937-2012)
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
CHARLES E. SMARR
DEAN L. COOPER

312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-3847

dcooper@brydonlaw.com

BRIAN T. MCCARTNEY
DIANA C. CARTER
SCOTT A. HAMBLIN
JAMIE J. COX
L. RUSSELL MITTEN
ERIN L. WISEMAN

COUNSEL
GREGORY C. MITCHELL

December 12, 2013

Mr. Carl Lumley
Curtis, Heinz, Garrett & O'Keefe
130 S. Berniston, Suite 200
Clayton, MO 63105

**RE: The Empire District Electric Company's 2013 Triennial Compliance Filing
Pursuant to 4 CSR 240-22 – MoPSC File No. EO-2013-0547**

Dear Carl:

I am writing with regard to Dogwood Energy, LLC's First Set of Data Requests to The Empire District Electric Company served herein on December 2, 2013. Empire objects to these data requests as follows:

Empire objects to data requests 1-20 on the basis of relevance. The IRP rules establish a process to allow the Missouri Public Service Commission (the "Commission") to gather "information to allow it to determine whether the electric utility's IRP filing complies with the requirements" of the IRP rules. *Final Order Regarding AmerenUE's 2008 Integrated Resource Plan*, MoPSC Case No. EO-2007-0409, 2009 Mo. PSC LEXIS 531. As stated by the Commission in its order implementing the IRP rules, "the focus of the rules should appropriately be on the planning process itself rather than on the particular plans or decisions that result from the process." *Order of Rulemaking*, Missouri Register, Vol. 18, No. 1, Page 91 (January 4, 1993). Data requests 1-20 are not designed to illicit information to aid the Commission in determining whether or not Empire's IRP filing complies with the IRP rules, and they are not designed to illicit information regarding Empire's planning process for the future. Instead, these data requests seek irrelevant information with regard to Empire's past specific decisions with regard to the Riverton Unit 12 conversion project. As explained by the Commission in its *Order of Rulemaking*, "management flexibility . . . and planning decision-making should appropriately and wisely be left to each individual utility." Missouri Register, Vol. 18, No. 1, Page 84 (January 4, 1993).

Empire also objects to data requests 1-22 on the basis that data requests in general are not proper or appropriate for use in this proceeding by a stakeholder such as Dogwood Energy. *See Notice Regarding Data Requests*, MoPSC Case No. EW-2013-0425, March 27, 2013 ("The use

Mr. Carl Lumley
Curtis, Heinz, Garrett & O'Keefe
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of data requests in Commission cases is governed by Commission Rule 4 CSR 240-2.090(2). That rule states that '[p]arties may use data requests as a means for discovery.' The rule then goes on to describe how 'parties' to whom data requests are presented are to answer those requests." "Since this is not a contested case . . . , there is no legal basis for MIEC's service of data requests . . . "); *see also Final Order Regarding AmerenUE's 2008 IRP*, MoPSC Case No. EO-2007-0409, 2009 Mo. PSC LEXIS 531 (IRP proceedings are not contested cases).

If you have any questions regarding these objections, please do not hesitate to contact me.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By: 

Dean L. Cooper