BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of The Empire District Electric Company for a Certificate of Convenience and Necessity Related to its Customer Savings Plan	))))	Case No. EA-2019-0010

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel (OPC) and applies to the Commission to rehear this case because the Commission's June 19, 2019, *Report and Order* is unlawful, unjust, and unreasonable[1] as follows:

1. The issues OPC raised in this case are based upon the fundamental principle that in a competitive market a viable business will recover its costs to provide the goods or services it is selling plus a reasonable profit, but no more. This is a principle that state public utility regulation is designed to emulate. It is also the principle that underlies the U.S. Supreme Court's statement in *Smyth v. Ames*[2] OPC quoted in its initial brief. Appropriate modification of that quote for this case follows: "What [The Empire District Electric Company ("Empire")] is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of [the electric services] than the [electric] services rendered by [Empire] are reasonably worth."[3]

2. On June 28, 2019, the Western District Court of Appeals issued an opinion where it held recent revisions to the Commission's rule for applications for certificates of convenience

[1] Section 386.500, RSMo. See also Section 386.515, RSMo.
[2] *Smyth v. Ames*, 169 U.S. 466 (1898).
[3] Id. at 547.

and necessity were unlawful. In that opinion the Court said the following, which confirms that cost-minimization principle is fundamental to issuing certificates of convenience and necessity:

> Section 393.170 was enacted to address market concerns unique to utilities, namely that overcrowding in the field is detrimental to rate paying customers, but allowing a utility to hold a monopoly is equally problematic. See *State ex rel. City of Sikeston v. Pub. Serv. Comm'n*, 82 S.W.2d 105, 110 (Mo. 1935) ("The Public Service Commission Law was intended to prevent overcrowding of the field in any city or area and thus restrain cut-throat competition upon the theory that it is destructive, and that the ultimate result is that the public must pay for that destruction."); see also *State ex rel. Barker v. Kan. City Gas Co.*, 163 S.W. 854, 857-58 (Mo. 1913) (The policy behind the Public Utilities Act recognizes "certain generally accepted economic principles," such as a public utility "is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; [and] that state regulation takes the place of and stands for competition[.]").
>
> Section 393.170 addresses these concerns by requiring PSC authorization before a utility begins business in the state or before an established utility moves into a new territory. See *City of Sikeston*, 82 S.W.2d at 110 (To "prevent overcrowding of the field," the PSC "was given the authority to pass upon the question of public necessity and convenience for any new or additional company to begin business anywhere in the state, or for an established company to enter new territory."); see also *Harline*, 343 S.W.2d at 182 (characterizing the PSC's powers under section 393.170 as: "to pass upon the question of public necessity and convenience (1) for any new company or additional company to begin business anywhere in the state, or (2) for an established company to enter new territory." (citing *Peoples Tel. Exch. v. Pub. Serv. Comm'n*, 186 S.W.2d 531, 538 (Mo. App. 1945))). The PSC was given these powers "in 1913 by the enactment of present Section 393.170, which has since remained in effect, without change." *Harline*, 343 S.W.2d at 182. Beginning business in a new territory within the state thus requires an area certificate as contemplated by section 393.170.2. However, even with an area certificate, the General Assembly saw fit to require an electric utility to secure an additional CCN before beginning construction of an electric plant. § 393.170.1; *Stopaquila.org*, 180 S.W.3d at 34. And the General Assembly directed the PSC to determine, as a condition of issuing any such line certificate, whether "such construction . . . is necessary or convenient for the public service." § 393.170.3.
>
> With respect to energy generating plants, "necessity" refers to whether existing generating plants are sufficient to meet anticipated future demands, and to whether the cost to increase generating capacity can be justified. See, e.g., *In re Application of KCP&L Greater Mo. Operations Co. for Permission & Approval of a Certificate of Pub. Convenience & Necessity Authorizing It to Construct, Install, Own, Operate, Maintain & Otherwise Control & Manage Solar*

> *Generation Facilities in W. Mo*., 515 S.W.3d 754, 759-60 (Mo. App. W.D. 2016) (holding that "necessity" includes whether additional service would be important to public convenience and at a justifiable cost). Thus, a utility is prohibited by section 393.170.1 from beginning construction of an energy generating plant unless and until the PSC has determined pursuant to section 393.170.3 that the energy generating facility is necessary and convenient to meet the present and future energy consumption needs of those within the utility's certificated area, at a cost that can be justified. See, *e.g., State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n of Mo.*, 848 S.W.2d 593, 597-98 (Mo. App. W.D. 1993) (holding that "necessary or convenient for public service" contemplates avoiding duplication of service, and where the need for the improvement to serve the public interest justifies the cost of the improvement).[4] (Footnote omitted).

3. Even if Empire closed its 200 MW Asbury coal plant today it would *still* have sufficient energy generating capacity to serve its customers for the next ten years without adding these wind projects. Empire's purpose and intention for building these wind farms is to create a revenue stream from the sales into the Southwest Power Pool ("SPP") markets of the wind energy they generate, not to provide electrical capacity or energy for its customers, at least for the next ten years,.

4. From the perspective of an investor in Algonquin Power & Utilities Corp., the purpose of these projects is to bring additional profits to Empire's ultimate parent, Algonquin Power & Utilities Corp. Achieving those additional profits, however, requires Empire to expose its Missouri customers to the reasonable possibility these projects will never reward these customers for their involuntary "investment," *i.e.*, what they pay for these projects through Empire electric rates.

5. By its *Report and Order* the Commission essentially guarantees both Empire and its tax equity partners profits from these projects, while Empire's Missouri retail customers

[4] In the Matter of the Amendment of the Commission's Rule Regarding Applications for Certificates of Convenience and Necessity; Kansas City Power and Light and KCP&L Greater Missouri Operations Company v. Missouri Public Service Commission and Dogwood Energy, No. WD82182, June 28, 2019, *Slip. Op*. pp. 13-14.

receive no guarantee that Empire will ever need the projects for Empire to provide them with electric service, that the projects will ever benefit them economically, or that these projects will ever result in any other generating plant(s) closing. The only guarantee for Empire's Missouri retail customers is that through paying their electric bills they will ensure that Empire and its joint tax equity investors recover their entire about $1.2 billion investment in the wind projects plus profit on that investment; wind projects that will not provide those customers with electric service for the next ten years.

6. While Empire and its joint tax equity investors anticipate recovering some of their investment and profits through SPP revenues and production tax credits. SPP revenues from the wind projects are subject to the ups and down of the SPP energy markets, and production tax credits are only created when the wind blows and creates electricity. Empire intends that its Missouri retail customers bear all of the risk of the extent to which these revenues and tax credits materialize, and Empire's own forecasts are that its Missouri retail customer rates will increase due to the wind projects within the next ten years. In contrast, Empire intends that Algonquin (ultimately) and the tax equity partner investors get essentially have a regulatory guarantee that they will not only get their investments returned, but also profits on those profits. The attractiveness of investing in these wind projects is easy to see from the perspectives of Empire and its joint tax equity investors; for Empire's retail customers, however, the benefits to them that Empire claims are premised entirely upon market forces, natural forces, and Empire's overly optimistic and outdated economic analysis.

7. As OPC emphasized in its opening statement, OPC is not opposed to wind capacity or energy *per se*. However, OPC is opposed to exposing the public who do and will take retail electric service from Empire from paying for electric generating capacity that Empire

does not require to meet the present and future energy consumption needs of those within its certificated area when the cost for that capacity cannot be justified. More bluntly, the OPC is opposed to forcing Empire's retail customers to pay for generating capacity that is not used to provide them with electric service, and using those customers to bankroll half of an investment that *strongly* favors the investors—Empire and its tax equity partners. If and when Empire *needs* additional generation to serve its customers *that* would be the appropriate time to propose new wind generation. This simply is not the right time for Empire to be adding 600 MWs of new capacity at an investment cost of about $1.2 billion.

8. In paragraph no. 58 on page 22 of its *Report and Order* the Commission recognized that Empire does not have the need for these projects required by § 393.170.1, RSMo, by its finding, "Empire does not have an 'immediate' capacity need for the power generated by the Wind Projects and would be able meet its future anticipated load without its wind contracts or the power from the Wind Projects." Therefore, with this finding, and without a finding that these wind project are less costly than any of Empire's current supply-side resources that are not excess capacity that these projects would displace, the Commission can neither lawfully nor reasonably conclude that these wind farms are necessary and convenient, *i.e.*, that they are an improvement that justifies their cost to Empire's retail electric customers. The Commission has not found these wind projects would displace more costly resources in Empire's existing supply-side portfolio that Empire requires to provide safe and reliable electric service to its retail customers.

9. In its *Report and Order* the Commission relies on Missouri's Renewable Energy Standard[5] and Missouri Energy Efficiency Investment Act[6] to support its statement, "It is the

[5] Section 393.1020, RSMo.
[6] Section 393.1074, RSMo.

public policy of this state to diversify the energy supply through the support of renewable and alternative energy sources."[7] The stated goal of the Missouri Energy Efficiency Investment Act of 2009[8] is the "achieving all cost-effective demand-side savings,"[9] *i.e.*, to reduce retail customer electricity usage. That goal is consistent with affordability—to encourage reductions in customer usage rather than adding supply-side generating resources when doing so is cost-effective. Promoting energy adequacy and affordability are identified as primary state policies in the 2015 Missouri Comprehensive State Energy Plan.[10]

10. Similarly, the plain language of § 393.135, RSMo from 1976—"Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on . . . any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and *used for service*, is unjust and unreasonable, and is prohibited"[11]—is consistent with affordability; retail customers do not pay for plant that is not used to serve them. Additionally, the concept of used and useful—that retail customers do not pay for electric plant before it is used to provide them with electric service-even when expanded to include construction work-in-progress—is also consistent with affordability.

The Commission found, "Empire does not have an 'immediate' capacity need for the power generated by the Wind Projects and would be able meet its future anticipated load without its wind contracts or the power from the Wind Projects." Therefore, it would violate the primary state policy of affordability for Empire to collect any amounts from its retail electric customers for these wind projects until Empire needs the capacity of the wind projects to serve those

[7] See Report and Order, p. 32, ¶ G.
[8] Amended in 2013 and 2017.
[9] Section 393.1075.4, RSMo.
[10] 2015 Missouri Comprehensive State Energy Plan, p. 4.
[11] Emphasis added.

customers. Stated differently, it violates the affordability policy of the State of Missouri if Empire and its tax equity partners start recovering their investment and return on investment in the wind projects from Empire's retail customers before the projects benefit those customers' electrical service.

11. The Commission's finding that "receiv[ing] the full production tax credits . . . will reduce the effective capital cost of the Wind Projects by at least half" is unsupported by the record. The Commission cites to the following statement in Mr. McMahon's surrebuttal testimony for its finding: "The full production tax credit incentive is ***expected*** to reduce the effective capital cost of the Empire wind projects by more than half."[12] (Emphasis added). An expectation is not definitive.

Further, Mr. McMahon's statement only makes sense when viewed from Empire's perspective, not from an Empire retail electric customer's perspective. This is because the total capital cost of the wind projects is about $1.2 billion, regardless of who invests in them. Empire intends to jointly invest in the wind projects with one or more tax equity partners, and has only provided a range for their relative investments—Empire ** ** of the initial capital; tax equity partners the balance.[13] Therefore, at this time, Empire expects the capital cost to it to ultimately solely own the wind projects is on the order of $600 million. However, Empire's plan, which is a condition of the certificates, is that its retail electric customers will assure that, to the extent wind project production tax credits and SPP revenues flowed to its tax equity partner(s) do not provide them with both the return of and return on their investment (as yet unknown) they require, then Empire's customer's rates will be increased to provide the

[12] Exhibit 8, McMahon Surrebuttal, p. 7.
[13] Ex. 13HC, Non-Unanimous Stipulation and Agreement, p. 6.

difference. Stated differently, not only will Empire's customers pay in rates for Empire's investment in the wind projects, they will assure through their rates that Empire's tax equity partner(s) realize both the return of and a return on their investment(s) in the wind projects. It is only if the sum of the production tax credits and the SPP revenues that flow to Empire's tax equity partners meet or exceed their investment plus a return on their investment that the effective capital cost to Empire's retail customers becomes Empire's capital investment.

12. The Commission's finding that "This timing[, now,] allows Empire the ability to acquire significant renewable energy resources at a 50% savings due to the availability of production tax credits in a way that is projected to deliver significant savings to its customers," is erroneous, and may reflect the Commission's misunderstanding and overstatement of the benefits of tax equity financing. As pointed out in the preceding paragraph, the total capital cost of the wind projects is about $1.2 billion, regardless of who invests in them. How much of that $1.2 billion Empire will invest and how much its tax equity partners will invest falls within a highly confidential range, but each may or may not invest more or less than 50% of the total $1.2 billion; therefore, the Commission cannot find Empire can acquire the wind projects at a 50% savings. Further, a Commission finding of a 50% savings due to production tax credits is discounting the value to Empire of production tax credits, the value to Empire of accelerated depreciation, the reduction in Empire's SPP wind project revenues due to Empire's tax equity partner(s) receiving a portion of them, and, most, importantly, that Empire's retail customers are to guarantee through their rates that Empire's tax equity partner(s) realize both a full return of and return on its/their investment(s).

13. Part and parcel of Empire's plan is that its customers pay in rates for Empire's investment in the wind projects, and that they assure through their rates that Empire's tax equity partner(s) realize both the return of and a return on their investment(s) in the wind projects.

14. In the conditions section under decision in its *Report and Order* the Commission states on page 49, "Paragraph 21 of the Non-Unanimous Stipulation and Agreement includes a Market Price Protection Mechanism with, among other terms, a $52.5 million cap on customer losses over the first 10 years of the Wind Projects (the time it is expected to take for the tax equity partners to recoup their investments)." This is either an erroneous or poorly worded characterization of the Market Price Protection Mechanism cap. The $52.5 million cap is a limit on Empire's exposure, not its retail customers' exposure. In that mechanism Empire guarantees to share net losses over the first ten years equally with its retail customers up to a total of $105 million, *i.e.*, Empire guarantees to bear up to $52.5 million of the net losses. If the net losses exceed $105 million over that ten years then Empire's retail customers bear 100% of those net losses that exceed $105 million. To the extent the Commission relied on a misunderstanding of to whom the Market Price Protection Mechanism $52.5 million cap applies when deciding to grant Empire conditional certificates for the wind projects, the grants of those certificates are unjust and unreasonable.

15. In its *Report and Order* on page 50 the Commission conflates two of the OPC's separate and distinct arguments for why Empire cannot recover its costs for these wind projects in rates and, therefore, the Commission cannot certificate them as follows:

> According to Public Counsel, because the power from those projects is not needed, the Wind Projects will never be considered "used and useful" in providing electric service to its customers. Thus, Public Counsel argued that because the Wind Projects will not be "used and useful," the anti-construction work in progress ("CWIP") statute, Section 393.135, RSMo, will prevent Empire from recovering the costs of the Wind Projects in rates.

The first of the OPC's two separate and distinct arguments is based on the statutory language of §393.135, RSMo. In its initial brief, the OPC presented the core of its argument as follows:

> Section 393.135, RSMo., does not explicitly address the circumstance where an electric utility seeks to recover from its ratepaying customers its investment in generating plant with output devoted entirely to its wholesale activities, *i.e.*, the utility's ratepaying customers pay for the costs of a plant the output of which is used to serve the public, but not them. However, given that the focus of the voter initiative is on utility cost recovery from the utility's retail customers, it is reasonable to interpret that "used for service" must include service to those from whom the costs are recovered, *i.e.*, the electric utility's retail customers.

The argument then is that because Empire is building the wind projects to sell into the SPP market at wholesale, not to provide safe and reliable electric service to its retail customers, §393.135, RSMo., bars Empire from recovering its investment in the wind projects from its retail customers and the Commission from certificating them. The OPC's argument based on §393.135, RSMo., is a plain meaning of the statute, not, as the Commission states, the concept of "used and useful."

The second of the OPC's two separate and distinct arguments is based on the concept of "used and useful." As the OPC explained on page six of its initial brief:

> The fundamental concept of used and useful is an encapsulation of the concepts the U.S. Supreme Court stated in *Smyth v. Ames*, *i.e.*, that a utility's customers should not pay for the utility's investment in plant or profit on that investment unless the investment is useful for and actually used to provide utility service to them—here electrical service used by the utility's customers. However, when applying that concept, the Commission, primarily based on perceived lower customer cost impacts, had expansively included construction work-in-progress and investment in facilities designed for anticipated future increases in load in rate base. (Footnotes omitted).

As the OPC argued on page 12 of that brief under the heading USED AND USEFUL:

> Empire is not even suggesting that the energy from or capacity of these wind projects is for providing its customers safe and adequate electric service, or that they are required by law to satisfy the Missouri renewable energy standard, or any other law. From a

> regulatory and economic perspective, as unneeded excess capacity, these wind projects could do nothing more than unnecessarily increase Empire's customers' rates.

Because, based on §393.135, RSMo., and separately on the concept of "used and useful," it is unlawful for the costs of these wind projects to be recovered from Empire's retail customers through Commission-set rates, it is unlawful for the Commission to certificate them, and the Commission's *Report and Order* issuing Empire certificates of convenience and necessity for the wind projects is unlawful.

16. The Commission's following statement in the Decision section of its *Report and Order* is not supported by the evidence: "Empire sells all of its generated power on the SPP market, thus, the sales of 60% additional capacity over what is expiring in the current wind generation contracts would flow back to customers through Empire's fuel adjustment clause." As planned it will be one or more subsidiaries that Empire jointly owns with one or tax equity partners that will sell into the SPP the energy generated by the wind projects and received the revenues. It is to then distribute its income less costs between Empire and the tax equity partner(s). Those income distributions are not SPP revenues, although they are derived from SPP revenues. Further, it is 95% of the net revenues from SPP sales that flow through Empire's FAC.

17. In response to the OPC's proposal that the Commission allow the wind projects to be included in Empire's rate base, but not allow Empire to recover either return of or return on the wind projects during Hedging Period as defined in the Non-Unanimous Stipulation and Agreement, the Commission, on page 51 of its Report and Order, stated, "The Commission finds it inappropriate to make ratemaking decisions, such as whether Empire should be allowed to earn a return on the investments, during these certificate of convenience and necessity proceedings.

Rather, all ratemaking determinations will be made in a rate case where all factors can be considered to determine “just and reasonable” rates.”

The OPC does not dispute that ratemaking decisions belong in rate cases, but, as the OPC argued on pages five-six of its reply brief, the Commission must consider the future as part of a comprehensive review when evaluating requests for certificates, and rate impacts are a part of the future the Commission must consider when performing its comprehensive review in this case to decide whether the wind projects are necessary and convenient. Despite its correct statement that this is not the case in which the Commission should be determining ratemaking, the Commission unlawfully has made the following ratemaking orders in its *Report and Order*:

Ordered paragraph 6.l.: A Wind Project will be excluded from Empire’s rate base used for setting Empire general distribution rates if the Wind Project does not satisfy the in-service criteria for that Wind Project before the end of the true-up period.

Ordered paragraph 6.o. State and wholesale jurisdictional cost allocation for Missouri ratemaking. For Missouri ratemaking purposes, the Wind Project capital investments and costs will be allocated between Missouri and the other states in which Empire provides electric service using typical state and wholesale jurisdictional allocators. Only the Wind Project capital investments and expenses allocated to the Missouri state jurisdiction may be included in Empire’s cost of service for setting rates in Missouri.

Ordered paragraph 6.p. Market Price Protection Mechanism. The market price protection mechanism, as described more fully in Appendix B to the *Non-Unanimous Stipulation and Agreement*, and attached hereto, shall be implemented. In general terms, that mechanism seeks to provide for the sharing of risk between customers and shareholders associated with the

possibility of reduced market prices and wind production associated with the Wind Projects. Such mechanism reflects the possibility that all Wind Projects may not be included in Empire rates in the same rate case. As such, the mechanism shall go into effect on the first day of the month after the effective date of rates in which a Wind Project is first placed into rates and shall remain in effect for 10 years following the effective date of rates resulting from the first general rate case in which all Wind Projects are included in rates.

WHEREFORE, for the grounds set forth above, the OPC respectfully applies to the Commission to rehear this case.

Respectfully,

/s/ Nathan Williams

Nathan Williams
Chief Deputy Public Counsel
Missouri Bar No. 35512

Office of the Public Counsel
Post Office Box 2230
Jefferson City, MO 65102
(573) 526-4975 (Voice)
(573) 751-5562 (FAX)
Nathan.Williams@ded.mo.gov

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 28th day of June 2019.

/s/ Nathan Williams