BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of The Empire District Electric Company's Submission of its 2013 RES Compliance Plan	)))	Case No. EO-2013-0458

OPPOSITION TO THE EMPIRE DISTRICT ELECTRIC COMPANY'S REQUEST FOR WAIVER OR VARIANCE FROM 4 CSR 240-20.100(7)(B)1.F AND MOTION FOR EXPEDITED TREATMENT

COMES NOW Earth Island Institute d/b/a Renew Missouri ("Renew Missouri"), on behalf of itself and the organizations listed below, and for its Opposition to The Empire District Electric Company's Request for Waiver or Variance from 4 CSR 240-20.100(7)(B)1.F and Motion for Expedited Treatment, states as follows:

1. On Monday, April 15, 2013, The Empire District Electric Company ("Empire") filed its *2013 RES Compliance Plan* ("Compliance Plan"), as required by 4 CSR 204-20.100(7). The Compliance Plan did not include the RES Retail Rate Impact Limitation Calculation ("the Calculation"), which is required to be included by 4 CSR 240-20.100(7)(B)1.F and which is described in detail by 4 CSR 240-20.100(5).

2. Also on Monday, April 15, 2013, Empire filed an accompanying Request for Waiver or Variance from 4 CSR 240-20.100(7)(B)1.F and Motion for Expedited Treatment, which is now at issue in the above-styled case.

3. In its April 15, 2013 Request, Empire stated the following:

> Because, as previously stated, the Company believes the explanation of the retail rate impact that is included in its Compliance Plan filing fully satisfies the purpose of 4 CSR 240-20.100(7)(B)1.F, Empire does not believe a formal waiver or variance is necessary or should be required. But to avoid any further question regarding the sufficiency of the Company's filing in this case, Empire has opted to make this filing to formally place before the Commission for decision two issues. First, does the Company's explanation of the retail rate impact of its compliance efforts for the 2013 through 2015 compliance plan period satisfy the requirements of 4 CSR 240-20.100(7)(B)1.F? And second, if the Commission

> believes a formal waiver or variance of that rule is necessary or desirable, has Empire demonstrated just cause for such relief, as required by 4 CSR 240-20.100(10)?

4. Below, Renew Missouri addresses each of the two questions posed by Empire. First, Empire's short explanation for why it did not follow section 5 of the Commission's in its Compliance Plan satisfies neither the requirements nor the purposes of 4 CSR 240-10.100(7)(B)1.F. Second, Empire's request fails to establish the necessary "good cause" required by 4 CSR 240-20.100(10) to allow the Commission to grant a variance in this case. In addition, Renew Missouri identifies the many purposes that are served by requiring the Calculation to be performed in utilities' RES Compliance Plans. Renew Missouri and the below-listed parties respectfully urge the Commission to reject Empire's request for a variance from 4 CSR 240-20.100(7)(B)1.F for the reasons stated below.

I. Empire Has Not Satisfied the Requirements of 4 CSR 240-20.100(7)(B)1.F.

5. In its April 15, 2013 request, Empire claims that it satisfied the requirements of 4 CSR 240-20.100(7)(B)1.F by providing a short explanation of the "projected retail rate impact of the Company's RES compliance efforts for the 2012 through 2015 time period" in its Compliance Plan. The referenced explanation is found on pages 6-7 of Empire's Compliance Plan, and reads as follows:

> EDE does not anticipate any retail rate impact for the Compliance Plan period. Very minimal cost is directly attributable to EDE's current or anticipated RES compliance and all those costs are associated with (1) the registration of assets and RECs [Renewable Energy Credits] in the North American Renewables Registry and (2) costs associated with the retirement of RECs. Costs incurred for 2012 compliance totaled $77,293, and EDE does not anticipate filing for RES recovery associated with these costs as these costs already flow through EDE's fuel adjustment clause (FAC). EDE's current annual revenue requirement approved by the Commission in Case No. ER-2012-0345 is $429,171,799. One percent of that number is approximately $4.3 M, and EDE's expected cost of compliance is much less than that amount…. Although 4 CSR 240-20.100 (7)(B)1.F prescribes a detailed calculation of the retail rate impact on EDE's

> customers during the compliance plan period, because EDE does not anticipate any retail rate impact attributable to its compliance actions no useful purpose would be served by performing that calculation. Consequently, EDE believes the information provided in the preceding paragraph satisfies the purpose of the Commission's rules.

6. Empire's brief explanation is not remotely close to complying with 4 CSR 240-2.100(7)(B)1.F. Empire's own explanation admits that the Commission's rule requires a specific, detailed calculation, which Empire has made no attempt to perform. Furthermore, the above-quoted explanation reflects either a misunderstanding of or a wilful disregard for what the Calculation is and how the Commission has required it to be performed.

7. Empire's explanation can be summarized as follows: Empire has determined the costs of compliance with the RES for calendar year 2012, and has reasoned that this number is less than 1% of Empire's current annual revenue requirement. Such an explanation has absolutely nothing to do with the Calculation that the rules require to be performed in a utility's annual RES Compliance Plan. The Commission's rule makes no reference to 1% of a utility's current revenue requirement. Empire's explanation seems to be referring to a completely unrelated calculation that is not found in either the RES law or the Commission's rule.

8. The RES law requires that the Commission's rule compel utilities to perform a comparison of two scenarios: one RES-compliant scenario and one utilizing standard non-renewable generation. § 393.1030.2(1), RSMo. Accordingly, section 5 of the Commission's rule lays out in great detail exactly how the comparison between these two scenarios is to be done, and rule 4 CSR 240-20.100(7)(B)1.F requires the section 5 Calculation to be included in utilities' annual RES Compliance Plans. These provisions together function not only as the RES' cost containment mechanism, but also as a method by which to accurately measure the holistic effects of the RES from year to year. Section 5 has been the subject of much

disagreement and litigation since the enactment of the RES. (*See State ex rel. Missouri Energy Dev. Assn. v. Pub. Serv. Comm'n.*, 386 S.W.3d 165 (Mo. Ct. App. 2012), upholding the Commission's rule in its entirety).

9. Empire's Compliance Plan fails to comport with any part of section 5 of the Commission's rule, and it clearly violates 4 CSR 240-20.100(7)(B)1.F by failing to include the section 5 Calculation. Furthermore, Empire's short explanation fails to satisfy the Commission's rule, nor does it fulfill any of the purposes of section 5 (see part III below). Accordingly, the Commission should find that Empire's explanation in its Compliance Plan fails to satisfy 4 CSR 240-20.100(7)(B)1.F.

II. Empire Has Failed to Establish Sufficient Good Cause

10. Rule 4 CSR 240-20.100(10) provides: "upon written application, and after notice and an opportunity for hearing, the Commission may waive or grant a variance from a provision of this rule for good cause shown."

11. Empire's April 15, 2013 filing fails to establish the good cause necessary for the Commission to grant a waiver or variance from rule 4 CSR 240-20.100(7)(B)1.F.

12. For its reason why it should not be required to comply with the Commission's rule, Empire states in its April 15, 2013 Request:

> Because the Company developed or acquired its portfolio of renewable resources without regard to the RES, none of the costs associated with those resources is directly attributable to the RES. Therefore, as noted on page 7 of the Compliance Report, the only costs Empire incurs just to comply with the RES are (i) relatively insignificant administrative fees paid to the North American Renewables Registry for registration of Renewable Energy Credits ("REC's), and (ii) similarly insignificant costs associated with the retirement of RECs. For 2011, those fees and costs totaled just $63,170, and for 2012 the total increased slightly to $77,293. The Company currently recovers all of those fees and costs from customers through its fuel adjustment clause.

13. The fact that Empire considers none of its costs attributable to the RES does not remove Empire's obligation to comply with the Commission's rule, nor does it erase the need for Empire to perform the section 5 Calculation (see part III). The fact that Empire has spent no money on complying with the RES is relevant to the overarching question of whether Empire is in compliance with the law. This information should be communicated to the public in the way that the Commission envisioned: by performing every components of the Calculation as laid out by section 5 of the Commission's rule.

14. In its attempt to provide reasons for why it should be granted a variance, Empire also references the Staff Report on Company's RES Compliance Plan ("the Staff Report"), filed on May 29, 2012 in case no. EO-2013-0336. In its report, Staff acknowledged that Empire did not perform the Calculation as contemplated by the Commission's rule, but nevertheless Staff recommended that the Commission grant a variance from 4 CSR 240-20.100(7)(B)(1)F. (The Staff Report at 2).

15. The Staff Report offers insufficient good cause for why Empire should be granted a waiver or variance from rule 4 CSR 240-20.100(7)(B)1.F.

16. In paragraph 6 of the Staff Report, Staff states: "While the Company did include a RES retail impact limit calculation as required by 4 CSR 240-20.100(7)(B)1.F, it was not at the level of detail contemplated by the rule."

17. This statement is incomplete. Not only did Empire fail to include "…the level of detail contemplated by the rule…," Empire failed to perform any one of the 14 specific components of the Calculation that section 5 requires.

18. Staff's Report in paragraph 8 states: "…the calculation would serve no purpose in this instance." Again, in paragraph 8, Staff states: "…the detailed netting calculation literally serves no purpose."

19. First, it is unclear what Staff is referring to by "the detailed netting calculation." The Calculation described in section 5 involves a comparison of two scenarios: one RES-compliant scenario and another non-RES-compliant scenario using traditional generation. It is this Calculation that Empire has a legal duty to perform as part of its RES Compliance Plan.

20. Secondly, it is incorrect to state that the Calculation serves no purpose. The Calculation would serve all purposes contemplated when the Commission promulgated its rules, including purposes in addition to simply determining whether a utility has reached the 1% threshold (see part III below).

21. Furthermore, Staff's recommendation gives no explanation for what "instance" would be appropriate for the Commission to require the Calculation. Staff provides no rationale for why "this instance" is different than any other instance. Without further justification, Staff's recommendation cannot represent "good cause" for the Commission to grant a variance.

22. Finally, in paragraph 8 the Staff Report cites the provisions of Rule 4 CSR 240-20.100(10) and references additional sources detailing the meaning of "for good cause shown." Renew Missouri agrees with Staff's rationale; each component of Staff's rationale is highlighted below, with an explanation of why Empire fails each component.

23. As Staff points out, the RES rule contains no specific definition for the term "for good cause shown." Staff makes reference to Black's Law Dictionary, which says that "good cause shown" "…generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." (Black's Law Dictionary, 6th ed. 1990, p. 692). Staff

also asserts that, to constitute good cause, the reason or legal excuse given "…must be real not imaginary, substantial not trifling, and reasonable not whimsical." (See *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable)). Lastly, Staff observes that "…some legitimate factual showing is required, not just the mere conclusion of a party or his attorney." (See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975)).

24. Applying Staff's above methodology, it cannot be said that Empire has established "good cause." Empire has offered only a short explanation for why it did not include what the Commission's rule requires. This explanation includes reference to an unrelated calculation involving 1% of a utility's current revenue requirement; however, nowhere does it provide a "legal excuse" for why it could not include the section 5 Calculation.

25. It is impossible to characterize Empire's explanation as "real," "substantial," or "reasonable," given that it bears no relation to anything in the rule and does not explain why the required Calculation could not be performed. In fact, Empire's attempt to meet its legal burden with an unrelated calculation is much closer to an "imaginary," "trifling," and "whimsical" excuse.

26. In paragraph 9 of Empire's April 15, 2013 filing, Empire states: "The information included in the Company's current Compliance Plan is more than sufficient to explain the ultimate fact that Empire's RES compliance activities will have no retail rate impact on customers. And because a longer and more detailed explanation won't change that ultimate fact, it is hard to imagine how anyone could conclude that the explanation Empire provides in its Compliance Plan does not satisfy the purposes for which 4 CSR 240-20.100(7)(B)1.F was

adopted." These statements are not based on facts or on legal standards, nor do they serve as explanations for why the Calculation cannot be performed; rather, they resemble "the mere conclusions of a party or [its] attorney." As such, Empire fail to provide the justification necessary to constitute "good cause," according to the standards put forth in the Staff Report.

27. For the reasons stated above, Empire has failed to establish the good cause necessary to allow the Commission to grant Empire a waiver or variance from rule 4 CSR 240-20.100(7)(B)1.F in this case.

III. The Section 5 Calculation Serves Many Purposes

28. In its April 15, 2013 filing requesting a variance from 4 CSR 240-20.100(7)(B)1.F, Empire agreed with Staff's numerous statements that performing the Calculation would serve no purpose. In paragraph 9, Empire states: "The information included in the Company's current Compliance Plan is more than sufficient to explain the ultimate fact that Empire's RES compliance activities will have no retail rate impact on customers. And because a longer and more detailed explanation won't change that ultimate fact, it is hard to imagine how anyone could conclude that the explanation Empire provides in its Compliance Plan does not satisfy the purposes for which 4 CSR 240-20.100(7)(B)1.F was adopted."

29. Renew Missouri disputes the above conclusions of Empire, as well as the statements from Staff that claim the Calculation would serve no purpose. Requiring the Section 5 Calculation would serve several purposes beyond simply determining whether a utility has met the 1% retail rate impact threshold. These purposes include, but are not limited to:

a. The interests of the Commission and the various stakeholders in having in place a systematic and consistent methodology for accurately measuring the financial impact of the RES, which can then be compared seamlessly from year to year;

b. The ability of renewable energy companies and Missouri businesses to plan for future investments in renewable generation (or for the lack of such investments) occurring in Missouri in coming years;

c. The ability of net-metered customers and other consumers to know exactly how close their utility is to reaching the one percent (1%) cost threshold in future years;

d. The ability of utilities themselves to forecast their own investments, include such forecasts in their rate modeling, and recover such investments prudently;

e. The interests of openness and public disclosure, which are served by utilities performing the 14 specific components laid out by Section 5 of the Commission's rule.

f. The interest of establishing a routine of performing the Calculation in these early years of compliance, so that there is no dispute or ambiguity about how to perform it in later years, when the 1% threshold is more likely to be reached. This is especially true, given the considerable dispute over how to perform the Calculation and given that the courts have now conclusively upheld section 5 of the Commission's rule. (*See State ex rel. Missouri Energy Dev. Assn. v. Pub. Serv. Comm'n.*, 386 S.W.3d 165 (Mo. Ct. App. 2012).

30. Although this is the 3rd year in which utilities were required to perform the Calculation, not a single utility has done so, to date. It is important for the Commission to establish full compliance with its rule and full accountability for those who fail to comply.

31. Finally, Empire's claim that the Calculation would serve no purpose does nothing to demonstrate good cause for why it cannot comply with 4 CSR 240-20.100(7)(B)1.F. Annoyance and frustration at having to comply with a validly-promulgated rule is not an excuse for non-compliance.

32. In summary, Empire's April 15, 2013 Request for Waiver or Variance from Rule 4 CSR 240-20.100(7)(B)1.F and Motion for Expedited Treatment fails to establish the "good cause" necessary for the Commission to grant Empire a variance to 240-20.100(7)(B)1.F.

WHEREFORE, Renew Missouri respectfully requests that this Commission deny Empire's April 15, 2013 Request Waiver or Variance from Rule 4 CSR 240-20.100(7)(B)1.F and Motion for Expedited Treatment, and instead require Empire to complete the Calculation set forth by 4 CSR 240-20.100(5).

Respectfully submitted,

/s/ Andrew J. Linhares

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The below parties are in full agreement with the above document and have given Renew Missouri permission to file this document on behalf of their respective organizations:

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing have been transmitted via electronic mail to the service list of record and to counsel for Union Electric Company d/b/a Ameren Missouri on this 23rd day of April, 2013.

/s/ Andrew J. Linhares
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