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

RESPONSE OF THE EMPIRE DISTRICT ELECTRIC COMPANY TO EARTH ISLAND INSTITUTE d/b/a/ RENEW MISSOURI'S FILING IN OPPOSITION TO EMPIRE'S REQUEST FOR WAIVER OR VARIANCE FROM 4 CSR 240 20.100(7)(B)1.F AND MOTION FOR EXPEDITED TREATMENT

The Empire District Electric Company ("Empire" or "the Company"), through its undersigned counsel, hereby makes the following response to the *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* ("Opposition"), which Earth Island Institute d/b/a Renew Missouri ("Renew Missouri") filed on April 23, 2013[1]:

1. Renew Missouri's Opposition offers three reasons for denying Empire's request for a waiver or variance. First, Renew Missouri claims that the Company's *2013 Annual Renewable Energy Standard Compliance Plan* ("Compliance Plan"), which was filed on April 15, 2013, does not satisfy the requirements of 4 CSR 240-20.100(7)(B)1.F.[2] Second, Renew Missouri claims that Empire's request for a waiver or variance fails to establish good cause for the relief the Company requested, as required by 4 CSR 240-20.100(10).[3] Finally, Renew Missouri argues that granting Empire a waiver or variance would fail to satisfy the "many purposes" which the Commission intended to satisfy when it adopted 4 CSR 240-20.100(5).[4] As Empire will show *infra*, each of these three reasons is either contrary to the facts related in the Company's request for a waiver, contrary to applicable law, or both.

[1] Although the introductory paragraph of Renew Missouri's filing states that the filing is being made "on behalf of itself and the organizations listed below," the pleading does not identify any organization other that Renew Missouri. Renew Missouri also is the only party that is identified in the filing counsel's signature block.
[2] Opposition, ¶¶ 5-9.
[3] *Id*., ¶¶ 10-27.
[4] *Id*., ¶¶ 28-32.

I. Although Empire Believes Its Retail Rate Impact Explanation Fully Satisfies the Requirements of 4 CSR 240-20.100(7)(B)1.F, Should the Commission Conclude Otherwise a Waiver or Variance is the Appropriate Remedy.

2. As noted in its request for a waiver or variance, Empire believes the description of the retail rate impact found in the Compliance Plan fully satisfies the requirements of 4 CSR 240-20.100(7)(B)1.F. because that rule simply requires the Company to include in its annual compliance plan filings "[a] detailed explanation of the calculation of the RES retail impact limit calculated in accordance with section (5) of this rule," which "should include the pertinent information for the planning interval which is included in the RES compliance plan." The explanation in Empire's Compliance Plan does that.

3. Renew Missouri's contention that Empire must also include a "RES Retail Rate Impact Limitation Calculation"[5] is not supported by the plain language of either sections (5) or (7)(B)1.F of the Commission's rule. In fact, because Empire's Compliance Plan does not include any proposal to add incremental renewable energy resources during the 2013-2015 plan period, no specific calculation of the retail rate impact based on a comparison of renewable vs. non-renewable-based generation is even required. This is clear from the following language found in the concluding sentence of section (5)(B): "The comparison of renewable and non-renewable energy resources shall be conducted only when the electric utility proposes to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources."

4. The retail rate impact explanation found in Empire's Compliance Plan fully satisfies all provisions of the applicable rule. Consequently, the Company does not believe a waiver or variance is necessary. But because in Case No. EO-2012-0336 the Commission Staff alleged the retail rate impact explanation that Empire provided as part of its 2012 compliance plan – which is substantially similar to the explanation found in the current Compliance Plan – did not fully satisfy the technical requirements of the Commission's rules, the Company, in an abundance of caution, opted to request a waiver or variance in this case to determine whether the Commission believes such action is either necessary or desirable.

[5] *See, e.g., Id.*, ¶ 1.

5. If the Commission determines that Empire's retail rate impact description is sufficient or that a waiver or variance is not necessary, then the Commission can dismiss or deny the Company's request for one of those reasons. If, on the other hand, the Commission concludes that the rule contemplates a more fulsome description of the retail rate impact than is provided in Empire's Compliance Plan, the Commission can grant or deny the request as it sees fit. Regardless, a request for a waiver or variance is the appropriate vehicle to bring these issues to the Commission's attention so that they can be timely resolved.

6. If the Commission determines such action is necessary, there are at least two compelling reasons why Empire's request for a waiver or variance should be granted in this case. Foremost among those is the fact that a lengthier explanation of the retail rate impact would serve no material purpose. That's the conclusion the Commission Staff reached when it reviewed Empire's compliance plan in Case No. EO-2012-0336. In its written report in that case Staff stated that because the Company's compliance costs for the 2012-2014 plan period were significantly below the one percent retail rate impact limit, a more extensive explanation of that impact "literally serves no purpose."[6] If, however, the Commission disagreed with this assessment, Staff noted that the RES rule allows for waivers or variances and recommended that Empire be granted such relief.[7] But, for whatever reason, the Commission's final order in that case did not address either the question of whether the Company's retail rate impact description was deficient, or whether a waiver was necessary or desirable.

7. As shown in the Compliance Plan filed in the current case, for the 2013-2015 plan period Empire's compliance costs continue to be well below the one percent retail rate impact limit. Under such circumstances, the Commission Staff's prior conclusion that a lengthier explanation of the retail rate impact "literally serves no purposes" remains true.

8. But there is a second, equally compelling reason why the Commission should address Empire's request for a waiver or variance in the current case: Reaching a decision regarding whether the

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[6] *Staff Report on Company's RES Compliance Plan,* Case No. EO-2012-0336, ¶ 8.
[7] *Id*.

Company's retail rate impact explanation complies with the Commission's rules will allow Empire to make necessary changes to its Compliance Plan prior to the Commission's final order in this case. That, in turn, will avoid the uncertainty that resulted from the final order in Case No. EO-2012-0336, which contributed to the formal complaint that was filed in Case No. EC-2013-0382. That complaint alleges that the retail rate impact description in Empire's previous compliance plan fails to satisfy the requirements of law, and seeks sanctions and penalties from the Company for that alleged violation.

II. Empire's Request for a Waiver or Variance Satisfies the "Good Cause Shown" Requirement of 4 CSR 240-20.100(10).

9. Empire's request for a waiver or variance argues that "good cause" exists to grant that request because a longer and more detailed explanation won't change the ultimate fact that the Company's compliance expenditures for the 2013-2015 plan period will continue to be but a miniscule fraction of the one percent retail rate impact limit.[8]

10. In its Opposition, Renew Missouri asserts (i) that the fact the Company's compliance expenses are minimal "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 [retail rate impact] Calculation,"[9] and (ii) that the lack of a detailed retail rate impact calculation would frustrate "all purposes contemplated when the Commission promulgated its rules." Each of Renew Missouri's assertions is unfounded.

11. Renew Missouri's assertion that section (5) of the Commission's rules requires Empire to perform a retail rate impact calculation fails for at least two reasons. First, 4 CSR 240-20.100(7)(B)1.F, which refers to and incorporates section (5), simply requires "[a] detailed *explanation* of the retail rate impact calculation " (emphasis added). Nowhere in either section (5) or section (7)(B)1.F is Empire required to include in its Compliance Plan a detailed *calculation* of that impact. Second, as noted earlier in this response, the concluding sentence of section (5)(B) of the rule specifically states that the

[8] Empire's *Request for Waiver or Variance from 4 CSR 240-2-.100(7)(B)1.F and Motion for Expedited Treatment*, ¶ 9.

[9] Opposition, ¶ 13.

comparison of renewable and non-renewable energy resources – the retail rate impact calculation that Renew Missouri contends must be included in the Compliance Plan – is required "only when the electric utility proposes to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources." But Empire's Compliance Plan does not include any such additional incremental renewable generation; consequently, the Company is not required either to compare renewable and non-renewable resource portfolios or to make a retail rate impact calculation based on that comparison.

12. Renew Missouri's claim that the lack of a detailed retail rate impact calculation would frustrate "all purposes contemplated when the Commission promulgated its rules" also is unfounded. Although Renew Missouri's Opposition identifies six specific purposes that it claims 4 CSR 240-20.100(5) and (7)(B)1.F were designed to satisfy,[10] the pleading cites no statutory, rule, or decisional authority to support that claim. Consequently, it cannot – and should not – be assumed that the Commission intended that the rules governing the retail rate impact description were intended to satisfy any or all of the purposes or interests that are identified in Renew Missouri's filing.

13. Putting aside the fact that Renew Missouri's claim regarding the purposes for which the Commission adopted its rules remains unproven, the retail rate impact explanation found in Empire's Compliance Plan provides information that directly or indirectly addresses several of those alleged purposes. For example, the Compliance Plan's statement that the Company does not anticipate that its actions to comply with the RES will result in any retail rate impact though the 2012-2015 compliance plan period clearly, concisely, and openly informs all interested stakeholders – including renewable energy companies and Missouri businesses, net-metered customers, and the Commission itself – that Empire needs to make no additional investments or expenditures, and will pay no additional subsidies or rebates, to meet its renewable energy obligations under the RES.

[10] *Id.*, ¶ 29.

14. As for Renew Missouri's claim that Empire must provide a more detailed explanation to avoid future ambiguity as to how the retail rate impact will be calculated, the Company again points out that section 5(B) of the Commission's rule specifically exempts a utility from making a detailed comparison of the rate impact of renewable and non-renewable energy portfolios unless the utility proposes to add incremental renewable energy resources that are directly attributable to RES compliance. The Compliance Report makes clear that Empire qualifies for that exemption, so clearly the Commission's own rules don't contemplate or require the analysis Renew Missouri now claims is necessary.

15. Finally, it is hard to understand Renew Missouri's claim that a more detailed explanation of the retail rate impact is necessary to enable Empire to forecast its own investment and expense needs. The Compliance Report is itself evidence that the Company has been able to make those forecasts through the 2013-2015 compliance plan period, and there is no evidence that it cannot continue to make the same or similar projections beyond 2015. Empire, not Renew Missouri, is best qualified to know what information is necessary for the Company's own planning and projection purposes.

16. The Commission also should take note that Empire's request for a waiver or variance satisfies each of the "good cause" standards cited by Renew Missouri in paragraph 23 of its Opposition. The Company's argument – that a lengthier explanation of the retail rate impact is unnecessary because it won't change the ultimate facts that there will be no need for additional investments or significant additional expenditures on renewable energy and also that there will be no retail rate impact throughout the 2013-2015 compliance plan period – (i) satisfies the Black's Law Dictionary definition of "good cause" because it provides "a substantial reason amounting . . . to a legal excuse for failing to perform an act required by law"; (ii) is "real not imaginary, substantial not trifling, and reasonable not whimsical," as required by *Belle State Bank v. Indus. Comm'n.*, 547 S.W.2d 841, 846 (Mo. App. 1977); and (iii) is "factual" and "not just the mere conclusion of a party or his attorney," as prescribed in *Haynes v. Williams*, 522 S.W. 2d 623, 627 (Mo. App. 1975).

WHEREFORE, for all of the reasons stated above, Empire asks the Commission to (i) reject the arguments of Renew Missouri, as stated in its Opposition, and (ii) determine that the retail rate impact explanation contained in Empire's Compliance Plan fully satisfies the purpose(s) and requirements of 4 CSR 240-20.100(7)(B)1.F, or in the alternative, that just cause exists to grant Empire a waiver or variance from the rule and accept the explanation of the retail rate impact that is included in the Company's Compliance Plan.

Respectfully submitted,

/s/ L. Russell Mitten

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ATTORNEYS FOR
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served, via e-mail, the 30th day of April, 2013, on counsel for the Commission Staff, the Office of the Public Counsel, each party who has entered an appearance in Case No. EO-2013-0458, and each of the interested parties who filed written comments in Case No. EO-2012-0336.

/s/ L. Russell Mitten