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	)	**Case No. EO-2018-0092**
Its Customer Savings Plan	)	

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

Respectfully submitted,

Hampton Williams,

Public Counsel
Mo. Bar No. 65633

TABLE OF CONTENTS

Chairman's Index

Public Counsel has organized its brief in compliance with the Commission's *Order Setting Procedural Schedule and Other Procedural Requirements* directing parties file briefs in accordance with the list of issues. At the close of the evidentiary hearing[1] in this case Chairman Hall requested the parties to respond to specific issues. Public Counsel offers this additional index to direct the Commission:

1. Components in Report and Order
    a. Factual Findings
        i. Is it reasonable for Empire to acquire and operate an additional 600 MW of wind farms? ***See Pages 33-60***
        ii. Is it reasonable for Empire to execute the financial components of the Stipulated plan, i.e., tax equity financing? ***See Pages 26-28 & 43-46***

    b. Legal Determinations
        i. Allow Empire to book expenses of the additional 600 MW of wind farms to plant-in-service with a 3.3% depreciation rate? ***See Pages 11-33***
        ii. Grant Empire a variance from the Affiliate Transactions Rule? ***See Pages 64-66***

2. Briefing Issues, Lawfulness of the Commission finding it reasonable in its R&O for Empire to:
    a. Acquire and operate an additional 600 MW of wind farms. ***See Pages 11-33***
    b. Execute the financial components of the Stipulated plan.***See Pages 26-28 & 43-46***
    c. Incur costs to comply with the EPA's coal combustion residuals rule. ***See Page 28***
    d. Retire Asbury. ***See Pages 29-31***

3. If the Commission rejects parts of the Stipulation, can, or should, the Commission order Empire to comply with portions of it, to wit:
    a. The April 2019 rate moratorium. ***See Page 56***
    b. The provisions related to the Tax Cut and Jobs Act of 2017. ***See Page 62***

[1] EO-2018-0092 From 5/11/18 hearing at about 7:17 into hearing

Executive Summary

A. Commission Jurisdiction

The Commission lacks the jurisdiction to grant the relief requested in Empire's application and in the Non-Unanimous Stipulation and Agreement (Stipulation and Agreement).[2] For that reason, the Commission cannot reach the merits and must dismiss this case. The Commission only has the jurisdiction given to it by statute.[3] That jurisdiction does not include issuing advisory opinions.[4]

B. 600 MW of New Wind Farms

While the Commission has the power to order a utility to provide safe and adequate service once that utility has committed to providing service to the public in a geographic area,[5] as to the construction of new electricity generating resources, the Commission must determine whether the new electricity generating resources are "necessary or convenient," if they are to be sited in Missouri.[6] In this proceeding, the Commission does not have jurisdiction to find, as the signatories to the Stipulation and Agreement requests, "that given the information presented in Case No. EO-

---

[2] All references are to the April 24, 2018, non-unanimous stipulation and agreement as amended on May 7, 2018.

[3] *State ex rel. Mogas Pipeline LLC v. Mo. PSC*, 366 S.W.3d 493 (Mo. 2012); *In re Ameren Transmission Co. v. PSC of Mo.*, 523 S.W.3d 21, (Mo. App. 2017) LEXIS 244, 2017 WL 1149139.

[4] *State ex rel. Laclede Gas Co. v. PSC*, 392 S.W.3d 24 (Mo. App. 2012) ; *In the Matter of Great Plains Energy, Inc.'s Acquisition of Westar Energy, Inc., and Related Matters*, Case No. EM-2016-0324, *Order Denying Motion for Reconsideration*, June 29, 2016.

[5] *State ex rel. Ozark Power & Water Co. v. Pub. Serv. Com.*, 287 Mo. 522, 229 S.W. 782 (1921) ; § 393.130.1, RSMo.

[6] *State ex rel. Cass Cty. v. PSC*, 259 S.W.3d 544 (Mo. App. 2008) ; § 393.170, RSMo.

2018-0092, and considering that [Empire] must make decisions prospectively, rather than in reliance on hindsight, the decision to acquire up to 600 MWs of Wind Projects under the terms of this Stipulation is reasonable."[7]

In addition, the proposed construction of 600 Megawatt of excess wind assets is not proposed or needed to meet federal or state renewable requirements, laws or regulations.

C. Tax Equity Financing

The Commission's authority with regard to public electric utility debt is found in §§ 393.180 and 393.200, RSMo.[8] It entails authorizing issuances of equity and long-term debt. The statutes do not contemplate creative financing structures, such as authorizing public utilities to co-invest in holding companies that own subsidiary companies with wind farms so that the non-utility co-investor can take advantage of tax credits. The Commission does not have jurisdiction to make any such finding.

D. EPA Coal Combustion Rule Compliance

While the Commission has jurisdiction to assure that a public utility such as Empire provides safe and adequate service,[9] the Office of the Public Counsel is aware of no Commission jurisdiction to advise a public utility of how it should comply with federal law, such as the EPA's coal combustion residuals rules.[10] The Commission does not have jurisdiction to find, as the signatories to the Stipulation and Agreement recommend, "that the decision to comply with the

[7] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, p. 5, ¶ 14.e.

[8] *In re Laclede Gas Company's Verified Application*, 526 S.W.3d 245 (Mo. App. 2017) .

[9] § 393.130.1, RSMo.

[10] 40 C.F.R. Parts 257 & 261.

Environmental Protection Agency's coal combustion residuals rules and effluent limitation guidelines (the "CCR investment") for Asbury, under the terms of this Stipulation, is reasonable, given the information presented in Case No. EO-2018-0092, and considering that [Empire] must make decisions prospectively, rather than in reliance on hindsight."[11] Presently, there is no contested issue before the Commission to decide regarding Empire investing to keep Asbury in compliance with the EPA's CCR rules; therefore, for that reason alone, any such Commission finding at this time would be advisory and unlawful.

E. Asbury Power Plant

While the Commission has the power to decide whether to allow a utility such as Empire to dispose of utility property being used to serve its customers,[12] the Commission does not have express authority over utility decisions to retire property, nor is that authority necessarily implied. Either by entering into the Stipulation and Agreement or by not opposing it, Empire, the other signatories and the Sierra Club are no longer advocating that Empire should retire Asbury at this time; therefore, for that reason alone, any such Commission finding at this time would be advisory and unlawful. Further, no one is disputing that Empire is providing safe and adequate service and no one is complaining that Empire does not have safe, adequate and efficient equipment.

Argument

Empire and the parties to the Stipulation and Agreement have changed their positions and now are requesting that the Commission issue an order with the following relief:

[11] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, p. 12, ¶ 19.b.

[12] § 393.190.1, RSMo.

a. That any agreements to purchase wind farms totaling up to 600 MW of nameplate capacity must include a requirement that before Empire, or its affiliate, acquires the wind farm(s) certain criteria must be met[13];

b. That Empire must file notice in Case No. EO-2018-0092 and provide copies of each wind farm purchase agreement to the Signatories within 30 days of execution[14];

c. That Empire's decision to acquire up to 600 MWs of wind farms under the terms of the Stipulation and Agreement is "reasonable"[15];

d. That Empire record its wind assets in FERC Accounts 341 through 346 using a composite 3.33% depreciation rate for all wind farm assets and other related assets in the appropriate FERC account using the deprecation rate the Commission ordered for that account in Case No. ER-2016-0023, starting as of when the assets are placed in service, until changed by Commission order[16];

e. That, if enough information is available, Empire shall study the wind farm assets in its next depreciation study[17];

f. That Empire's decision to comply with the EPA's coal combustion residuals rules and effluent limitation guidelines for Asbury is "reasonable"[18];

g. That, in the future, Empire may reconsider whether to continue to operate Asbury[19];

---

[13] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, pp. 4-5, ¶ 14.b.

[14] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, p. 5, ¶ 14.c.

[15] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, p. 5, ¶ 14.e.

[16] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, pp. 5-6, ¶ 14.f.i.

[17] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, p. 6, ¶ 14.f.i.i.

[18] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, p. 12, ¶ 19.b.

[19] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, p. 12-13, ¶ 19.d.

h. That certain parties have access to records of Empire and certain of its affiliates for the purposes of ensuring compliance with Commission Rule 4 CSR 240-20.015 and the terms of the Stipulation and Agreement[20];

i. That the Commission grant Empire relief from complying with the Commission's affiliate transactions rule 4 CSR 240-20.015(2)(A), and (3), for pricing under certain contractual arrangements with affiliates under the Stipulation and Agreement[21]; and

j. That the Commission authorize Empire "to take such other action as are necessary to implement the terms [of the April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018]."[22]

While the relief requested has changed, the joint list of issues has not. That list follows.

JOINT LIST OF ISSUES

1. THE COMMISSION DOES NOT HAVE AUTHORITY TO GRANT EMPIRE'S REQUESTS

The terms of the Stipulation and Agreement provide for pre-approval for the treatment of costs not yet incurred. Courts have found that the Commission's principal interest is to serve and protect ratepayers[23] and that the Commission cannot commit itself to predetermine an issue that may expose ratepayers to adjustments because of varying conditions over time. [24] In WA-97-46,

---

[20] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, p. 32, ¶ 21.

[21] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, pp. 13-14, ¶ 22

[22] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, pp. 16-17, wherefore clause.

[23] *State ex rel. Crown Coach Co. v. Pub. Serv. Comm'n*, 238 Mo.App. 287, 179 S.W.2d 123, 126 (1944)

[24] *State ex rel. Capital City Water Co. v. Public Service Commission*, 850 S.W.2d 903 (Mo.App. W.D. 1993), *State ex rel. Chicago, Rock Island & Pacific Railroad Co.*, 312 S.W.2d at 796. ("The Commission's principal interest is to serve and protect ratepayers,[24] and as a result, the Commission **cannot commit itself to a position that,** because of varying conditions and occurrences over time, **may require adjustment to protect the ratepayers**.") (Emphasis added)

the Commission, citing Court opinions, stated, "Authority exists supporting the position that the Commission *may not* legally take any further action regarding the pre-approval of the proposed project."[25] For these reasons and others, the Commission should deny the application and the Stipulation and Agreement.

A. The Commission Has Long-Articulated a Policy Against Predetermination or Preapproval of Projects

The Commission has a well-articulated position *against* pre-approval or pre-

[25] *In re Missouri- American Water Co.*, Case No. WA-97-46, *Report and Order* (Mo. P.S.C. 1997)

determination of costs.[26] [27] [28] [29] [30] [31] [32] [33] |

In EO-92-250, the Commission identified four concerns with preapproval:

"The first problem is the potential for the shifting of technology and demand risks from the shareholders to the ratepayers. The second problem is the significant

---

[26] *See* ER-2012-0174; ER-2012-0175, the Commission stating "[a]nd that predetermination--a ruling on facts that have not occurred--is what makes a "tracker" different from an accounting authority order under USoA's plain language. Thus, "items related to the effects of" future transmission cost increases are not current and, therefore, are not extraordinary." 2013 Mo. PSC LEXIS 30, *45.

[27] GT-2003-0032. "**The Commission agrees that approving a particular ratemaking treatment before considering all relevant factors is inadvisable, and may even be unlawful…**A natural gas distribution utility has a continuing obligation to act in an almost-fiduciary role on behalf of its customers when arranging for gas purchasing and transportation. And the Commission has a continuing obligation to investigate utility actions and ensure the utility is acting consistently with its duty to its customers." 2003 Mo. PSC LEXIS 1013.

[28] EO-2005-0329. 2005 Mo. PSC LEXIS 1025, *55. KCP&L "regulatory plan" for Iatan 2.

[29] GC-2006-0180. "Any review of Southern Missouri Gas' gas purchasing and hedging plans by Staff and Public Counsel are not to be construed as pre-approval of those plans." 2006 Mo. PSC LEXIS 429, *3

[30] EO-92-250. "The Commission, though, also recognizes the problems inherent in preapproval. As noted by the NRRI report, there are four problems with preapproval or a periodic review process of a utility's decisions. The first problem is the potential for the shifting of technology and demand risks from the shareholders to the ratepayers. The second problem is the significant resources preapproval or periodic approval would require of the Commission. The third problem, as stated earlier, is, preapproval is likely to lock the utility into the plan approved by the Commission. The fourth problem is that, once approved, a utility may have less incentive to closely scrutinize its costs. The NRRI report recommends that rather than engage in preapproval or periodic approval of utility decisions, state commissions issue clear guidelines detailing the Commission's regulatory approach toward CAAA compliance. This approach, the report states, would tend to reduce regulatory risk without the potential of shifting technological and demand risks to ratepayers.

[31] WC—77-222. "But it is the utility which bears the ultimate responsibility for quality and cost of service, and **this Commission will not undertake to evaluate and thereupon essentially predetermine design characteristics and material selection for a respective utility**. To do so would be to undertake management responsibilities. The Commission's responsibility in this area is appropriately exercised on individual complaint or in the rate setting process, in the event that it can be proven that the company has abused its management prerogatives. 23 Mo. P.S.C. (N.S.) 303, **307. (Emphasis added)

[32] *See* GR-96-285. "MGE argues that not only did the Company rely on this accounting authority order for ***preapproval*** of the 10.54 percent carrying cost rate, but that, implicitly, the financial community at large must be able to rely upon accounting authority orders. (Ex. 61, p. 7). The Commission finds that MGE has taken the application of accounting authority orders well beyond their intended purpose. Accounting authority orders allow utilities to book certain expenses in certain ways." 1997 Mo. PSC LEXIS 10, *69

[33] *See* TO-86-53. "The Commission considers SWB's request for clarification concerning the term "newly constructed building" to be a request for the Commission to change its decision on this issue and should have been filed as a motion for rehearing. The Commission will not adopt SWB's proposed "clarification". The Commission has determined it need not address SWB's other requests for clarification since the Report And Order is clear as to the Commission's decision or the clarifications are requests for preapproval of actions which the Commission will address when presented in future cases." 1988 Mo. PSC LEXIS 10, *5, 6

> resources preapproval … would require of the Commission. The third problem, preapproval is likely to lock the utility into the plan approved by the Commission. The fourth problem is that, once approved, a utility may have less incentive to closely scrutinize its costs."[34]

The same concerns articulated by the Commission 25 years ago are present in this case. First, approval *will* result in ratepayers being held cost-liable in subsequent proceedings. MECG witness Greg Meyer estimates a rate increase of 12%-17% assuming the Empire's projection.[35] OPC witness John Riley argues that Empire's scenarios will actually cost ratepayers an additional $318.67 million over ten-years,[36] a figure not included in Mr. Meyer's analysis.

Second, there is insufficient reliable information to make a determination. In addition to the shortcomings of Empire's computer modeling that will be discussed later, there are no contracts for either construction or operation of these assets,[37] but the Commission is still being asked to approve the project. There are also no contracts between the Empire and the private-equity partner, yet the Commission is being asked to approve the request.[38] This is the fundamental problem with preapproval; resources have been devoted towards this case to model costs that would otherwise be known if the actual contracts existed.

Third, preapproval of this plan to build wind will lock Empire into specific terms. By investing in unnecessary projects, the amount of shareholder and debt holder capital available to

---

[34] *In the matter of the application of Kansas City Power & Light Company for review of its Phase I Compliance Plan and other activities under the Clean Air Act*, Case No. EO-92-250, *Order*, 1 Mo. P.S.C. 3d 359 (Aug. 26, 1992). In this case, the Commission denied Kansas City Power & Light Company's request for preapproval for decisions and elections concerning compliance with the Clean Air Act Amendment of 1990.

[35] Ex. No. 351, Supporting Affidavit of MECG witness Greg Meyer, Pg 7 Para 19.

[36] Ex. No. 217, Document Showing Estimate.

[37] Tr. 5: 334, ln. 1-4

[38] Tr. 5: 436, ln. 12-13.

the utility is crowded out, which may prevent or delay projects that are necessary to safe and adequate service.[39]

Fourth, the utility will have less incentive to closely scrutinize its costs. Without contracts, the cost of construction cannot be evaluated. The only projection before the Commission are Empire's estimates, but there are not even provisions in the Stipulation and Agreement that guarantee Empire's estimates. Where costs exceed Empire's estimates, those will fall squarely on ratepayers. Empire has already exhibited a willingness to expose ratepayers to unnecessary costs in this application. Take, for example, its proposal to prematurely close Asbury and earn its full return of and on the asset. In 2014, the Empire invested $124 million to *extend* the operational life of the asset from 2030 to 2035.[40] Less than four years later, under Empire's initial application, Empire sought regulatory treatment from ratepayers for prematurely shuttered asset.

As OPC witness Geoff Marke testifies in his direct testimony, before it acquired Empire, "Algonquin/Liberty had clearly identified Empire as an opportunity for significant capital investment in renewable generation, driven in large part by pending federal regulatory compliance in the form of the Clean Power Plan ("CPP")."[41] Algonquin/Liberty paid a 21% premium to acquire Empire.[42] Because it gets the opportunity for not only a return of, but also a return on plant investment, Empire has every incentive to increase its plant investment to

[39] Ex. 206, Rebuttal Testimony of Dr. Geoff Marke, Pg. 5, ln. 1-7.

[40] Ex. No. 203, OPC witness John A. Robinett Surrebuttal, Pg 7 Lns. 25-32

[41] Ex. No. 206, OPC witness Geoff Marke rebuttal testimony p. 11, ll. 18-21.

[42] Ex. No. 206, OPC witness Geoff Marke rebuttal testimony p. 16, l. 11.

increase its cash flow from its customers to increase cash distributions to its ultimate parent Algonquin, regardless of whether the company requires the additional investment to provide safe and adequate service.

Every policy concern articulated by the '92 Commission case regarding the hazards of considering program preapproval are evident in this proceeding. Unless Empire bears some kind of risk regarding the prospective prudency evaluation of its present action, it has little incentive to scrutinize its own costs.

As its initial application and the Stipulation and Agreement seek preapproval or predetermination of cost recovery, the Commission does not have the authority to grant the Empire's request. This recommendation is in conformance with a long line of Commission decisions. For these reasons, the Commission must deny Empire's requested relief.

B. The Commission Does Not Have Jurisdiction to Make Management Decisions

Courts have found that the Commission does not have authority to take over the general management of any utility or to dictate the manner in which the company shall conduct its business.[43] In *Harline v. Public Service Commission*, the Courts identified that the exercise of the management of the utility is a property right that the Commission does not have jurisdiction over.[44] The Courts stated, **"**The powers of regulation delegated to the Commission … do not, however, clothe the Commission with the general power of management incident to ownership.

[43] See *State ex rel. Laclede Gas Co. v. PSC*, 600 S.W.2d 222, 228 (Mo. 1980); State ex rel. PSC v. Bonacker, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995).

[44] *State ex rel. Kansas City v. Public Service Commission of Missouri*, 301 Mo. 179, 257 S.W. 462.

The utility retains the lawful right to manage its own affairs and conduct its business as it may choose…"[45]

In this case, Empire is asking the Commission to make a management decision as to whether it should or should not build excess wind farms, enter a tax equity financing agreement, and continue to operate the Asbury plant. Empire's Board of Director's has not voted on either the initial application or the Stipulation and Agreement.[46] Until Empire actually has approval from its own governing body to proceed with a plan, the Commission should not supplant Empire's board.

Empire has asserted its corporate management discretion as a defense against incurring tens of millions of dollars in natural gas hedging losses on five-year contracts. In that proceeding, the fact that millions of dollars in hedging losses were incurred and passed through the Fuel Adjustment Clause was not in dispute – OPC, Staff and the Company agreed losses occurred. In that case, Empire argued, "Empire's management decisions are just that – decisions of Empire's management, and they should not be taken away from the company and placed in the hands of the Commission or OPC."[47] When convenient, Empire will assert managerial discretion as a defense to protect its shareholders from ratepayers: however, in this case, Empire is asking the Commission to make a management decision to protect the interests of shareholders at the expense of ratepayers.

---

[45] *State ex rel. Harline v. Public Service Com*., 343 S.W.2d 177, 181-182, 1960 Mo. App. LEXIS 411, *9-11

[46] Empire witness Blake Mertens, Tr. 5:359-360.

[47] *In the Matter of the Sixth Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of The Empire District Electric Company*, EO-2017-0065, *Empire's Initial Post-Hearing Brief* (Oct. 16, 2017)

C. The Commission Cannot Issue Advisory Opinions

If the Commission cannot issue direct orders pre-approving an action, could the Commission entertain the application as a hypothetical to be relied upon by the Company before the next general rate proceeding? No.

The Public Service Commission Act was enacted to protect the public from public utility overreach, and any benefit to the utility is incidental.[48] Since its creation in 1913, the scope of the Commission's role with regard to public utilities has changed due to changes in the Public Service Commission Act and other statutes, generally expanding that role.[49] However, the Commission's jurisdiction is still limited to that given to it by statute.[50] That jurisdiction does not include issuing advisory opinions.[51]

"An advisory opinion is a 'nonbinding statement by a court of its interpretation of the law on a matter submitted for that purposes.'" State v. Burgin, 203 S.W.3d 713, 717 (Mo. Ct. App. E.D. 2006) (quoting Black's Law Dictionary 1125 (8th ed. 2004)). "Advisory opinions have been described as those which are based on hypothetical situations and are not necessary for the resolution of the case before the court." *Id*.

---

[48] "Let it be conceded that the act establishing the Public Service Commission, defining its powers and prescribing its duties is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental." *State ex rel. Elec. Co. v. Atkinson*, 275 Mo. 325, 337; 204 S.W. 897, 899 (1918).

[49] For example the Missouri Energy Efficiency Investment Act.

[50] *State ex rel. Mogas Pipeline LLC v. Mo. PSC*, 366 S.W.3d 493 (Mo. 2012); *In re Ameren Transmission Co. v. PSC of Mo*., 523 S.W.3d 21, (Mo. App. 2017) LEXIS 244, 2017 WL 1149139.

[51] *State ex rel. Laclede Gas Co. v. PSC*, 392 S.W.3d 24 (Mo. App. 2012); *In the Matter of Great Plains Energy, Inc.'s Acquisition of Westar Energy, Inc., and Related Matters*, Case No. EM-2016-0324, *Order Denying Motion for Reconsideration*, June 29, 2016.

The Commission[52] expressly and explicitly recognized on page five of its June 29, 2016, *Order Denying Motion for Reconsideration* in *In the Matter of Great Plains Energy, Inc.'s Acquisition of Westar Energy, Inc., and Related Matters*, Case No. EM-2016-0324, Missouri courts have made clear that the Commission has no jurisdiction to issue advisory opinions:

> Fifth, though by no measure least in importance, the courts have instructed the Commission to issue no advisory opinion. An advisory opinion results when a tribunal purports to make a legal determination outside the procedure legally prescribed for making such determination.
>
> > Like other administrative agencies, the Commission is not authorized to issue advisory opinions. The Commission, the circuit court, and this court should not render advisory opinions. "The function of each is to resolve disputes properly presented by real parties in interest with existing adversary positions." The Commission was restricted to determining the complaint before it, and it should not be issuing decisions with "no practical effect and that are only advisory as to future, hypothetical situations." "The petition must present a 'real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory or hypothetical situation.'"

Quoting from *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of State of Missouri*, 392 S.W.3d 24, 38 (Mo. App., W.D. 2012) (citations omitted). The Commission issued that order in a case it opened for its Staff's investigation of Great Plains Energy, Inc.'s pending acquisition of Westar. Great Plains Energy Inc. requested rehearing when the Commission declined to decide whether it had jurisdiction over Great Plains Energy Inc.'s acquisition of Westar, nothing more.[53] In the court case the Commission quoted, *State ex rel. Laclede Gas Co.*, the court was reviewing the

---

[52] At the time Commissioner Hall was Chairman, and the other Commissioners were Stoll, Kenney, Rupp and Coleman. With the exception that Silvey has replaced Stoll, the current Chairman and Commissioners.

[53] Case No. EM-2016-0324, *Great Plains Energy Incorporated's Verified Motion for Reconsideration*, p. 2, ¶ 4, filed June 10, 2016.

Commission's dismissal of Laclede's counterclaim in a complaint case initiated by the Commission's Staff seeking a Commission "finding that Laclede violated [a Commission-approved Stipulation and Agreement] by representing that it did not have possession of [an affiliate's] business information."[54] In its counterclaim Laclede alleged that the Commission's staff "had violated the [Commission's] affiliate transaction rules and [Laclede's cost allocation manual] by asserting disallowances against Laclede based on a pricing standard that was contrary to the pricing standards in the Commission's affiliate transaction rules and [Laclede's cost allocation manual]."[55] The court agreed with the Commission that whether its staff had violated the Commission's affiliate transactions rule or Laclede's cost allocation manual were issues to be decided in Laclede's actual purchased gas cost adjustment cases, not the complaint case.[56]

In at least one instance where the legislature intended that an agency—the Missouri Ethics Commission—have the power to issue advisory opinions, it did so explicitly.[57] No such circumstance exists for the Commission.

The terms of the Stipulation and Agreement ask the Commission to determine that the acquisition of 600 MW of wind assets are reasonable,[58] and for the Commission to approve of the

---

[54] *State ex rel. Laclede Gas Co.*, 392 S.W.3d at 30.

[55] *Id.*

[56] *Id.* at 38-39.

[57] "Upon written request for an advisory opinion received by the commission, and if the commission determines that the person requesting the opinion would be directly affected by the application of law to the facts presented by the requesting person, the commission shall issue a written opinion advising the person who made the request, in response to the person's particular request, regarding any issue that the commission can receive a complaint on pursuant to section 105.957. The commission may decline to issue a written opinion by a vote of four members and shall provide to the requesting person the reason for the refusal in writing. . . . ." § 105.955.16(1), RSMo.

[58] Stipulation Pg 5

subsidiary and tax equity financing venture for the construction of 600 MW of extraneous wind,[59] to find prudent and authorize recovery of costs associated with compliance with the coal combustion residuals rules,[60] to grant waivers from affiliate rules for companies that do not exist, and to set a depreciation rate on assets that are unknown.[61]

This Commission does not have jurisdiction to issue advisory opinions on Empire's plans to build 600 MW of New Wind Farms, enter into tax equity financing arrangements, comply with the EPA's coal combustion residuals rules, retire Asbury, or any of the other relief Empire seeks in this case.

D. Empire Has Failed to Apply for a Certificate of Convenience and Necessity to Construct 600 MW of New Wind Farms

Any approval by the Commission of Empire's plan would be an impermissible advisory opinion. Empire's application and the Stipulation and Agreement recommends, "that the Commission find…the decision to acquire up to 600 MWs of Wind Projects under the terms of this Stipulation is reasonable."[62] Missouri law uses a different standard for determining reasonableness than Empire argues. Specifically, the Commission should rely on § 393.170, RSMo. regarding certificates of convenience and necessity,[63] and §§ 393.180 and 393.200, RSMo., regarding issuances of stock and debt.., the Commission is capable of exercising its oversight of electrical corporation's investment in new generating facilities without issuing

[59] Stipulation Pg 4

[60] Stipulation Pg 12

[61] Stipulation Pg. 5

[62] *Id.*

[63] *State ex rel. Cass Cty. v. PSC*, 259 S.W.3d 544 (Mo. App. 2008); *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005).

advisory opinions, *i.e.*, advisory opinions on investment in new generating facilities are not implied by necessity. None of the statutes Empire relies on in its application for Commission authority to grant it relief in this case—§§ 396.250, 393.140 and 393.240, RSMo.—specifically authorize the Commission to grant Empire the relief it seeks, and there is no necessity to imply the Commission has that authority.

The Missouri Western District Court of Appeals construed § 393.170, RSMo., in *State ex rel. Cass County. v. Public Service Commission*, 259 S.W.3d 544 (Mo. App. 2008). There it held that before an electrical corporation begins construction of a new generating plant, it first must obtain from the Commission a certificate of convenience and necessity to build that specific plant at a specific site. Therefore, a post-construction certificate to build the generating plant is a nullity. The Missouri Western District Court of Appeals recently construed §§ 393.180 and 393.200, RSMo. in *In re Laclede Gas Company's Verified Application*, 526 S.W.3d 245 (Mo. App. 2017) . There the court held that to obtain Commission authorization to issue long-term debt, a public utility must "demonstrate that [the] long-term financing [is] 'necessary' or 'reasonably required.'"[64]

In this case, Empire is seeking preapproval of its plan by requesting Commission findings of "reasonableness," not to protect the public, but to protect Empire. If Empire intends to build wind farms sited in Missouri, it can present its plan to build 600 MW of wind farms in furtherance

[64] *In re Laclede Gas Company's Verified Application*, 526 S.W.3d at 253.

of obtaining a certificate[65] from the Commission to build that part of the 600 MW of wind farms it plans to physically locate within the state of Missouri.[66]

Here Empire is presenting its request to approve that part of the plan in Stipulation and Agreement to build 600 MW of wind farms by finding it to be "reasonable." Fundamentally, the plan is for Empire and a non-affiliate indirect co-owner, through affiliates, to build and own 600 MW, or slightly less, of wind farms. The non-affiliate indirect co-owner is to get a return of and a return on its investment through production tax credits, accelerated depreciation and cash distributions. Empire is to get a return of and a return on its indirect investment through including that investment in Empire's rate base used for setting Empire's cost of service in future Empire general rate cases. Empire's revenues from those wind farms are to be included in determining Empire's revenue requirement and Empire anticipates that differences in them are to flow through Empire's fuel adjustment clause as off-system sales revenues.

Empire has not changed its preferred plan. Empire's witnesses Blake Mertens, employed by Liberty Utilities Service Corp. as Vice President Operations—Electric at The Empire District Electric Company,[67] and Christopher D. Krygier, employed by Liberty Utilities Service Corp. as Director of Rates and Regulatory Affairs to Liberty Utilities Central Region, both testified on the

[65] § 393.170, RSMo.; *State ex rel. Cass Cty. v. PSC*, 259 S.W.3d 544 (Mo. App. 2008); *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005).

[66] ** [redacted] .** Ex. 4C, Affidavit of Christopher D. Krygier in Support of Non-Unanimous Stipulation and Agreement, p. 3, ¶ 3.

[67] Ex. No. 9, Empire witness Blake Mertens Direct Testimony, p. 3.

second day of the evidentiary hearing—May 10, 2018—that Empire has not changed its preferred plan,[68] highlighting Empire's lack of commitment to the plan in Stipulation and Agreement.

The Commission should reject a plan that lacks authorization from Empire's Board of Directors. In the record before the Commission, Empire's evidence of the wind farms is limited to a copy of its *Instructions to Bidders* issued to eleven developers on October 16, 2017,[69] a narrative update from Empire witness Timothy N. Wilson in his surrebuttal testimony prepared March 13, 2018, that ten developers responded, that Empire, with the assistance of Burns and McDonnell developed criteria for evaluating the responses,[70] and through live testimony that contract negotiations are underway for the wind farms with a goal of having contracts by the end of May 2018.[71] Not having contracts, Empire's witness Blake Mertens,[72] testified that Empire also does not have authorization from its Board of Directors required for it to execute such contracts.[73]

If Empire builds wind farms in Missouri for which Empire intends to recover its investment through retail rates, Empire will need a certificate of convenience and necessity, and this is not the case in which the Commission can grant that certificate for Empire to move forward to execute the plan laid out in the Stipulation and Agreement. When questioned on the need for Empire to obtain

[68] Empire witness Blake Mertens, Tr. 5: 369-70 Empire witness Christopher D. Krygier, Tr. 5; 545-47.

[69] Ex. No. 19, Direct testimony of Empire witness Timothy N. Wilson, p. 3, and Confidential Direct Attachment TNW-1.

[70] Ex. No. 20.

[71] Empire witness Blake Mertens, Tr. 5:360; Empire witness Timothy N. Wilson, Tr. 5:502-503.

[72] Ex. No. 9, Empire witness Blake Mertens Direct Testimony, p. 3.

[73] Empire witness Blake Mertens, Tr. 5:359-360.

Commission approval in this case during the hearing, Empire's witness Christopher D. Krygier evaded:

> Q. (By Mr. Williams) What is Empire's current preferred plan?
>
> **A. (Mr. Krygier) It is Plan 5 from the 2016 triennial IRP.**
>
> Q. Why hasn't Empire gone ahead and changed its preferred plan in light -- since it has entered into the stipulation -- stipulated plan in this case?
>
> **A. I believe I referred in my direct testimony, page 15, starting on line 11 through page 16, essentially, we're waiting -- we would make a change in the preferred plan if the Commission grants the relief that we're requesting.**
>
> **So we're ultimately -- we're waiting for if the Commission approves it**.
>
> Q. Why are you waiting for Commission approval?
>
> **A. I think what would happen if the Commission ultimately did not approve the plan that we've requested, we would have to go back and -- and think through what our options are and what the next steps are.**
>
> Q. Well, is Commission approval required?
>
> **A. Required for what?**
>
> Q. For Empire's plan to build 600 megawatts of wind.
>
> A. **I think that's part of the relief that we're contemplating here. And that's why we filed the application and ultimately reached the non-unanimous stipulation. So we're looking for, as we talked about before the last two days, that the plan reasonable is to proceed with.**
>
> Q. Well, I understand you're asking the Commission for that.
>
> **A Yeah.**
>
> Q. Does Empire believe it's required to obtain that authorization or finding from this Commission at this point in time?
>
> **A While I'm not an attorney and there might be some legal aspects to that, and I think our perspective is it's a significant undertaking and that's why we've brought the plan to the Commission for consideration.[74]**

[74] Tr. 5: 545-47.

Rather than bringing "the plan to the Commission for [its] consideration" as Empire argues, Empire turns a deaf ear to Missouri law – and to the Commission-in that Empire fails to do what is required "to begin construction of an electric plant." Missouri law clearly sets forth that no electrical corporation shall begin construction of an electric plant "without first having obtained the permission and approval of the commission."[75] The Commission can only grant the permission and approval after "due hearing" and after determining "that such construction or such exercise of the right, privilege or franchise is necessary and convenient for the public service."[76] Empire made no such request. The Commission has promulgated rules titled, "Filing Requirements for Electric Utility Applications for Certificates of Convenience and Necessity."[77] Empire has made no such filing. The Commission's practice in certificate cases it to evaluate evidence on the "tartan criteria", which are: "(1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest."[78] Consideration of these factors have not been argued by the Company in this case, or evaluated by Staff. Rather than being mindful of Commission resources and of Missouri law, Empire seeks "a fact finding that directionally the company is moving the right direction."[79] For these reasons, Empire has taken

[75] Section 393.170.1.

[76] Section 393.170.3.

[77] 4 CSR § 240-3.105.

[78] *In the matter of the application of Tartan Energy Company, L.C.*, Case No. GA-94-127, 1994 Mo. PSC LEXIS 26, at *17-26.

[79] Tr. 3, Pg. 24, Ln. 16-18.

the *wrong direction* under Missouri law, and OPC asks this Commission to deny Empire's request.

E. The Commission Does Not Have Express Authority to Authorize the Proposed Tax Equity Financing Scheme

The Commission's jurisdiction with regard to public utility financing arrangements is found in §§ 393.180 and 393.200, RSMo., which address public utility issuances of stock and debt. These statutes do not address the type of public utility co-investment that Empire presents here, which involves holding companies that own companies with wind farms to take advantage of tax equity financing.

Like its evidence regarding the 600 MW of wind farms, Empire's evidence surrounding its proposed tax equity financing is insubstantial. What is in evidence is that Empire anticipates that some as yet unidentified entity(ies) — **[redacted]**[80]—will invest in the construction of the wind farms to reap a profit on that investment through production tax credits, accelerated depreciation and cash. Empire attempts to provide some substance to its financing plans by asserting it would only enter into a structure where Empire and the investor would enter into a separate entity partnership which in turn would wholly own the entities that actually own the wind farms consistent with the following parameters:[81]

1. The investor would make 45-60% of the total wind farm investment.
2. The investor must have a credit rating of A-/A3 or better.

[80] Ex. No. 12C, Empire witness Todd Mooney Surrebuttal Testimony, Attachment TM-1C.

[81] Ex. No. 11, Empire witness Todd Mooney Direct Testimony, pp. 13-14.

3. During the first ten years, the investor would receive 99% of the production tax credits generated by the wind farms and 99% of the holding company taxable income.
4. During the first five years, the investor would receive no partnership cash distributions, but in years 6-10 it would receive 25-50% of them and 5-10% thereafter.
5. If the wind farms generate more production tax credits than a threshold, then the investor will contribute between 0-2% of the capital cost of the wind farm per year.
6. Empire would make 35-50% of the total wind farm investment.
7. During the first ten years, Empire would receive 1% of the production tax credits generated by the wind farms and 1% of the holding company taxable income.
8. During the first five years, Empire would receive 100% of the partnership cash distributions, but in years 6-10 it would receive 50-75% of them and 90-95% thereafter.
9. After ten years, Empire would have the option of buying out the investor for 100% of the fair market value of its ownership interest.

Despite those assurances, in Stipulation and Agreement, Empire has agreed to different investor capital contribution percentage ranges.[82] Similar to not having authorization from its Board of Directors to enter into contracts to build wind farms, Empire does not have the required authorization from its Board of Directors to enter into the contemplated investor tax equity financing arrangements.[83] Empire does not need any Commission authorization to execute the tax equity financing in the plan laid out in the Stipulation and Agreement. However, the Commission would naturally maintain authority over the prudence of any such agreement in a subsequent rate

[82] They are now ** [redacted] **

[83] Empire witness Todd Mooney, Tr. 5:460.

case. The Stipulation and Agreement subverts that authority by soliciting the Commission's predetermination on the financing scheme before any contracts have been executed.

F. The Commission Does Not Express Authority Ordering EPA Coal Combustion Rule Compliance

According to the evidence, the EPA's coal combustion residuals rules[84] would expose Empire to being sued by third parties if it does not comply with those rules by April 2019.[85] Empire, and the signatories to the Stipulation and Agreement, "recommend that the Commission find, that the decision to comply with the EPA's coal combustion residuals rules and effluent limitation guidelines (the "CCR investment") for Asbury, under the terms of this Stipulation, is reasonable…"[86]

The Commission has no express authority to make such a finding, and such authority need not be implied for the Commission to carry out its statutory powers. It would be unreasonable for Empire not to comply with the law; therefore, it needs to continually evaluate whether to comply with the CCR rules, either by investing to keep Asbury in compliance or by retiring Asbury. Like most of the parties in this case, it is OPC's position that, at least as long as Empire continues to recover its investment in Asbury from retail customers, Empire should continue to operate Asbury so long as (1) the revenues attributable to it in SPP exceed the costs of operating Asbury, *i.e.*, as long as it is likely to have future net positive margins, or (2) Asbury is cost-effective for purposes of adequate generating resource capacity. By not opposing the Stipulation and Agreement, even

[84] 40 C.F.R. Parts 257 & 261.

[85] Ex. No. 9, Empire witness Blake Mertens Direct, pg. 14.

[86] April 24, 2018, non-unanimous stipulation and agreement as amended May 7, 2018, pg. 12, ¶ 19.b.

the Sierra Club is no longer challenging that at this time Empire should make investments to continue to operate Asbury lawfully. Presently, there is no contested issue before the Commission to decide regarding Empire investing to keep Asbury in compliance with the EPA's CCR rules; therefore, for that reason alone any such Commission finding at this time would be advisory and unlawful.

G. Any Commission Finding Regarding the Retirement of Asbury Would Be a Prohibited Advisory Opinion

While the Commission has the power to decide whether to allow a utility such as Empire to dispose of utility property being used to serve its customers,[87] with exception of the powers to require utilities satisfy their obligation to provide safe and adequate service,[88] and upon complaint or its own motion require that they have safe, adequate and efficient equipment,[89] the Commission does not have express authority over utility decisions to retire property, nor is that authority necessarily implied. Either by entering into the Stipulation and Agreement or not opposing it, Empire, the other signatories and the Sierra Club are no longer advocating that Empire should retire Asbury at this time; therefore, any Commission finding regarding the retirement of Asbury at this time would be advisory, and unlawful. Further, no one is disputing that Empire is providing safe and adequate service and no one is complaining that Empire does not have safe, adequate and efficient equipment.

[87] § 393.190.1, RSMo.

[88] § 393.130.1, RSMo.

[89] § 393.140(5), RSMo.

i. **The Commission Does Not Have Authority to Order the Recovery of the Remaining Depreciation Balance for Asbury**

While the Stipulation and Agreement contemplates keeping Asbury operating, Empire's initial *Application* sought to recover the remaining depreciation balance of the Asbury Coal Generation Facility. In a corresponding condition in the Stipulation and Agreement, the signatories agree not to contest, and recommend, the recovery of outstanding depreciation costs relating to costs of compliance with the CCR rule, even upon the premature closure of the Asbury plant.[90] The Application's request and the Stipulation and Agreement's recommendation on the treatment of those costs after the premature closure of Asbury are unlawful.

The Missouri Supreme Court does not permit continued rate base treatment for generation assets after the plant is no longer in use. In *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, the Court stated:

> The abandonment of property which is never replaced, but is superseded by another instrumentality, as gas lamps by electric lights, or by another agency or company, is an extraordinary supersession. Its loss is "one of the hazards of the game," just as the extraordinary increase in values following the war was an unexpected gain . . . . It follows that the abandoned property, lights, service mains, and the like should not be considered for the purpose of determining the annual depreciation reserve."[91]

In the *Application*, the Empire sought rate base treatment for the outstanding depreciation life of Asbury. In the Stipulation and Agreement, parties recommend that the Commission to approve Empire's recovery of and on the Asbury asset and costs associated with compliance with

[90] Stipulation and Agreement, Pg.12

[91] 329 Mo. 918, 941, 47 S.W.2d 102, 111 (1931).

the CCR rule "in the event that Asbury is subsequently retired prior to the full depreciation of the CCR Investment."[92] The law would not permit either. The company will be permitted to recover its outstanding depreciation so long as Asbury is operating.

H. The Commission Has Authority to Set Depreciation Rates for Utility Property – Since Empire Will Not Own the Wind Assets, the Commission Should Not Approve the Depreciation Rate

The Stipulation and Agreement recommends that the Commission authorize Empire to record its depreciable wind assets to FERC Account 341 through 346 and utilize a composite 3.33% depreciation rate. Section 393.240.2, RSMo., provides the Commission the authority to, after a hearing, set depreciation rates for properties of the public utility. The Commission has recognized its limitations to *change or modify* existing depreciation rates without examining all deprecation rates in a full depreciation study, as such an isolated adjustment may constitute single-issue ratemaking.[93] However, where a new type of asset for which a depreciation rate is placed into service, the Commission has set new depreciation rates to be reviewed in a subsequent case with all other factors.[94] Notably, in cases where the Commission has set a depreciation rate for a new asset, (1) the asset is owned by the utility company, and (2) it is used an useful.

Empire will not own the wind assets. Empire admits "[t]he physical wind assets will be 100% owned by Wind Project Co.(s)," which is the subsidiary of Wind Hold Co.(s).[95] Neither

---

[92] Stipulation and Agreement, Pg.12

[93] In the Matter of Laclede Gas Company's Application to Establish Depreciation Rates for Enterprise Computer Software Systems GO-2012-0363 2012 Mo. PSC LEXIS 978, *13 October 13, 2012,

[94] *Id.*

[95] Mantle Affidavit LMM-1 pg 84.

are contemplated to be regulated utilities. The Wind Hold Co.(s) or Wind Project Co.(s) are not legal entities. No effort been made to prepare draft articles of incorporation, by-laws, registrations, or other documentation effectuating the lawful operation of the entities.[96] The Commission's jurisdiction extends only to properties owned by the utility, and therefore should not grant this request.[97] In *Kansas City Power & Light*, the utility sought a depreciation rate related to expenses arising from the construction of new highway overpass owned by the State of Missouri.[98] Staff argued that "[t]he expense relates to real property belonging to someone other than applicants. Therefore, in lieu of depreciation, amortization is the appropriate treatment."[99] The Commission ordered the account to be *amortized* and not *depreciated*, because another entity owned the real property. As applied to this case, it is possible that any funds contributed by Empire would be classified as an expense and amortized instead of depreciated. Therefore, a depreciation rate should not be determined in this proceeding.

Second, in cases where new depreciation rates are set for new assets, some measure of in-service activity is identified by the Commission. In *Laclede Gas Company*, the Commission found that its computer enterprise software system was being placed in service.[100] In this case, Empire does not even have a Certificate of Convenience and Necessity to begin construction.

---

[96] Mantle Affidavit LMM-1 pg 86.

[97] Section 393.240 identifies the Commission may fix depreciation rates for "several classes of property of such corporation, person or public utility." While the plain language contemplates a possessory interest over the property to which rates are applied; in the event the Commission sought to set rates for non-regulated corporations, because Wind Hold Co.(s) and Wind Project Co.(s) are neither a corporation nor a person, as no effort to legal formulate the entities, the Commission is unable to determine depreciation rates in this proceeding.

[98] *In The Matter of the Application of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for the Issuance of a Depreciation Authority Order relating to their Electrical Operations*, EO-2012-0340, *Report and Order* (Jul. 7, 2012).

[99] *Id.*

[100] *In the Matter of Laclede Gas Company's Application to Establish Depreciation Rates for Enterprise Computer Software Systems*, GO-2012-0363, *Report and Order* (Oct. 13, 2012).

The application is premature, and the Commission will have opportunities at later dates to make the determination. Without having the benefit of knowing what wind assets will be installed, such as a contract with the developer, the Commission cannot know in fact what assets are being constructed. Finally, no harm will be incurred if the Commission does not identify a depreciation rate in this proceeding.

I. The Commission Should Deny the Application and Stipulation and Agreement on Jurisdictional Grounds

The Commission determine that is does not have the authority to grant preapproval or predetermination, as many Commissions in the past have identified, and cannot issue an advisory opinion, sought by Empire in the Stipulation and Agreement and the Application. As such, both should be denied. If the Commission denied the application on jurisdictional grounds, such an order would not have to speak to prudency of the construction of excess wind or the operation of Asbury. The Company would be free to exercise its own self-determination in either the construction of Wind Assets in CCN applications or the operation of Asbury.

2. THE COMMISSION SHOULD NOT GRANT ANY OF EMPIRE'S REQUESTS

In addition to the Commission's lack of jurisdiction to grant relief in this case, there are many reasons why the Commission should not grant any of Empire's requests. Empire is seeking for the Commission to find that executing its plan is better for the public than not executing it; basically the same standard Missouri courts have described for granting certificates of convenience

and necessity.[101] However, this case is not a CCN case. No certificate has been requested. Therefore, any opinion to that end would be advisory.

The standard asserted by the applicants for consideration is "reasonableness"; however, no such standard is applicable in these circumstance of preapproval or predetermination. Even under its propounded standard, Empire still bears the burden of proof under section 386.430, RSMo. The burden of proof must be met by a preponderance of the evidence.[102]

"Preponderance" is defined, in part, as "superiority in weight." Cook Tractor Co., Inc. v. Dir. of Revenue, 187 S.W.3d 870, 873 (Mo. banc 2006). *See also* Black's Law Dictionary, 6th Edition (1990) defining "preponderance of the evidence," in part, as "greater weight of evidence, or evidence which is more credible and convincing to the mind. . . . The word 'preponderance' means something more than 'weight'; it denotes a superiority of weight, or outweighing." The preponderance of the evidence standard requires the fact-finder to weigh conflicting evidence. *See* In re Coffman, 225 S.W. 3d 439, 444 (Mo. 2007). For Empire to succeed in this case, the Commission must determine that the weight of the evidence submitted by the Application, in this case Empire's modeling scenarios, is more likely to occur than not. If the Commission believes that Empire's modeling, is insufficient to a 50.1% certainty, then the Commission cannot find in favor of the Application.

Further, in this proceeding, Empire does not receive the benefit of any presumption of prudency for its application or its evidence under this application, as the recovery of specific

---

[101] "[A]n additional service would be an improvement justifying its cost." *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n,* 848 S.W.2d 593, 597-98 (Mo. App. 1993) citing *State ex rel. Beaufort Transfer Co. v. Clark,* 504 S.W.2d at 219.

[102] *AG Processing, Inc. v. KCP&L Greater Mo. Operations Co*., 432 S.W.3d 226 (Mo. App. 2014),

costs is not before the Commission in this proceeding, and a presumption of prudence only applies to expenditures.[103]

A. Empire's Modeling Cannot Reasonably Be Relied Upon

Through the course of this proceeding, Staff and Public Counsel identified a catalog of false presumptions, errors and omissions Empire asserted to support its initial Application.[104] After the stipulation was filed, Public Counsel noted that many of the assumptions and omissions are still present, and therefore the modeling is an insufficient basis to determine the findings. It is critical to note that while Staff and MECG filed affidavits in favor of the Stipulation and Agreement, no party performed an independent analysis of Empire's numbers.

i. Empire's Modeling Shows a Net Operating Loss of $318 Million

Even assuming the production revenues from Empire's modeling are achieved, in some scenarios, the project still loses money. OPC witness John Riley submitted evidence analyzing the four scenarios attached to the Stipulation and Agreement,[105] assuming operational costs that Empire presented to the parties in November 2017 factored down to accommodate the difference in generation proposed in the initial application and the Stipulation and Agreement,[106] and assuming a equity contribution split of 49% for Empire and 51% for the tax equity partner,[107] as opposed to the 44% capital equity contribution assumed by Empire. Mr. Riley testifies that

[103] *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. 2013)

[104] Ex. No. 102, John A. Rogers Rebuttal, Pg. 4.

[105] Tr. 7, Pg.818, Ln. 4

[106] Tr. 7, Pg. 820, ln 6-7

[107] Tr. 7, Pg. 819 ln 1-2. **[redacted]**

ratepayers would be exposed to $319 million of additional costs. Even Empire's witness Mr. Holmes acknowledged the impact of shifting the tax equity contribution allocation, exclusive of the other considerations made by Mr. Riley, in years 2024 and 2025 would produce revenue losses.[108] Empire's argument against Mr. Riley is to take exception to the *degree* to which losses occur; and not against the proposition put forth by Mr. Riley that under the revenue scenarios propounded by the Company, and applying the tax equity allocation to Empire provided under the Stipulation and Agreement, Empire's modeling shows revenue deficiencies.

ii. **The Company's Modeling Omits Known Costs**

Upon review of the Stipulation and Agreement terms and associated work papers,[109] OPC has identified a number of omissions to Empire's cost and revenue estimates that will negatively impact customers. What the company is offering to prove its claim that its plan will result in lower customer bills is a comparison between the calculated present value of revenue requirement ("PVRR") as estimated by the Strategic Planning Module.[110] This module assumes a static future, meaning that no additional costs other than those contemplated in the construction and operation of the wind project are considered.[111] To rely on this modeling assumes a static future. A future in which SPP is not inundated with wind investments, in which negative prices never exist, where no market rules are made and energy prices increase exponentially.

---

[108] Tr. 7, Pg. 901 19-903 ln 6.

[109] Contrary to the Commission's initial order in this proceeding, the work papers that detailed the figures in the Non-Unanimous Stipulation and Agreement were not provided to OPC, until a data request response including such spreadsheets were circulated. Mantle Affidavit, Pg. 7. OPC was foreclosed from conducting official discovery on the underlying documents. OPC brought this circumstance to the Commission, and its request for relief (additional time and opportunity to conduct discovery on the documents) was denied.

[110] Ex. No. 6, Empire witness James McMahon Direct, Pg. 11, line 15

[111] Ex. No. 211, OPC witness Dr. Geoff Marke Affidavit, Pg 2

Dramatic changes in the modeling assumptions have already occurred during the pendency of this proceeding. For example, changes to model input prices to the Fall 2017 ABB market prices reduced the 10 year PVRR of the current preferred resource plan by $59 million.[112] The 10 year PVRR of Empire's current preferred plan has changed by $320 million from the modelling results Empire provided when it filed this case through the last modelling results Empire provided to OPC.[113] This should give the Commission pause in relying on this modeling as a basis to determine customer savings.

a. Empire Failed to Model Net Salvage Costs for Wind Assets

At the conclusion of the operational life of the wind assets, the wind assets will have a salvage value or a cost of removal. A depreciation expense is calculated to determine an assets net salvage, as gross salvage less cost of removal.[114] Empire's modeling currently identifies that expense at zero.[115] While OPC is not certain at this time what the value of the steel will be when the turbines are retired,[116] OPC is certain that it will cost something to remove turbines, and it is unreasonable to exclude a known cost.

---

[112] Ex. No. 208, OPC witness Lena Mantle Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Pg. 7-8.

[113] Ex. No. 208, OPC witness Lena Mantle Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Pg. 8.

[114] Ex. No. 209, OPC witness John A. Robinett Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Pg. 2.

[115] *Id.*

[116] *Id.*.

b. Empire Failed to Model any Retirements After 2038-2048

The 30-year plan related to the Stipulation and Agreement does not assume any retirements after 2038 through 2048. Empire's 2016 depreciation study identified five generation facilities that are estimated to retire between the years of 2038 and 2048.[117] This equates to the retirement of 279 MW of power that were not modeled as part of Empire's thirty year plan.[118] Additionally, no addition of generation was modeled to offset these projected retirements described in the depreciation study.[119] Each of these would have affected the present value revenue requirement of the Stipulation and Agreement. Empire has already stated that the Wind Hold Co. will not be selling any energy to Empire from the 600 MW wind assets[120], which means there are additional costs pertaining to five plant retirements and potential additional costs with replacements that are not included in Empire's modeling.[121]

c. Empire Failed to Properly Model Performance Degradation

Empire's model failed to properly account for performance degradation, i.e. the reduction of generation output over time. This circumstance is Exhibit No. 513, the chart prepared by Berkley Lab shows wide variability of performance and steady reduction for wind asset capacity factors over a seventeen year timespan. Instead of a curve, Empire "levelized" the amount.

---

[117] *Id*. at 1-2.

[118] *Id*.

[119] *Id*.

[120] Ex. No. 208, OPC witness Lena Mantle Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Pg 5.

[121] Ex. No. 209, OPC witness John A. Robinett Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Pg. 1-2.

Degradation is not a factor that can be appropriately averaged, as doing so distorts the capacity factor, and consequently the ability to generate revenues, over the lifespan of the asset.[122]

d. Empire's Modeling Assumes an Annual Reduction in Revenue Requirement

In both its initial Application and the Stipulation and Agreement, Empire's model assumes that its customers will receive the benefit from the annual deprecation reduction in rate base. By adjusting the calculation to Empire's average rate case period, the savings to customers were cut by $103 million dollars, 1/3 of Empire's initial customer savings claim.[123] Without a means to realize an annual reduction in rate base, such as annual rate cases, the model does not accurately portray Empire's revenue requirement set in rates, and thus overstates its purported customer savings.

e. Empire's Modeling Failed to Include Legally Required Solar Investment

As Public Counsel witness Dr. Marke stated in his affidavit critiquing Figure 3 of Empire witness McMahon's affidavit, Dr. Marke noted Mr. McMahon's failure to identify solar investments additions in the Stipulation and Agreement modeling column.[124] At hearing, Mr. McMahon contested Dr. Marke's characterization, stating, "I don't believe that's true that every plan includes solar in the next 20 years."[125] Pursuant to Section 393.1030.1, RSMo., and Commission Rule 4 CSR 240.20.100(1)(R), establishes Renewable Energy Standards that

---

[122] Tr. 7 Pg. 788, ln 17 -789 ln 7.

[123] [123] Ex. No. 208, OPC witness Lena Mantle Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Pg 6.

[124] Exhibit No. 211, OPC witness Dr. Geoff Marke Affidavit, Pg. 4.

[125] Tr. 3, Pg. 186-187

mandate investment in solar assets by electric utilities. These costs were admittedly omitted from Empire's calculations. Empire's modeling fails to identify a known cost related to construction of mandated solar assets.

iii. Empire's Modeling for SPP Market Revenues are Insufficient

One of the most crucial undetermined factors is the forecasting of the Southwest Power Pool Regional Transmission Organization ("SPP") market prices. Empire's customers only benefit from Empire's plan if SPP market revenues from selling wind energy from the wind generation exceeds the costs Empire's plan imposes on them.[126] Empire has modeled that the SPP market prices for wind will more than double in 20 years. However, the SPP integrated marketplace has existed only since March 2014, and historically shows declining prices for wind.[127] Empire has not included any negative market prices in its modeling, although negative prices have occurred in the SPP market even with production tax credits. Unless SPP changes its market rules, the effect of negative prices should continue.[128] Based on Empire's 20-year modeling, a 5% to 7% decline in its forecasted average SPP market prices reduces revenues in its plan by 14%, or $44 million.[129] Similarly, a 20% to 25% decline in its forecasted average SPP market prices reduces revenues in its plan by 60%, or $194 million.[130] Simply put, Empire's assumptions of future SPP market prices are not reliable to justify Empire building new wind

[126] Ex. No. 200, OPC witness Lena Mantle Rebuttal Testimony, Pg.. 4, ln. 5-10.

[127] Ex. No. 200, OPC witness Lena Mantle Rebuttal Testimony Pg. 7, ln. 13 – Pg. 8, ln. 11.

[128] Ex. No. 200, OPC witness Lena Mantle Rebuttal Testimony Pg 8, ln. 16 – p. 9, l. 29.

[129] Ex. No. 200, OPC witness Lena Mantle Rebuttal Testimony Pg 14, ln. 1-8; Ex. No. 7, Empire witness James McMahon surrebuttal testimony Pg. 27, ln 18 – Pg. 28, ln. 3.

[130] Ex. No. 7, Empire witness James McMahon surrebuttal testimony p. 27, ll. 16-18.

generation and are contrary to actual market performance, particularly when Empire owns more than sufficient generating capacity now to reliably and economically serve its 172,000 electric customers.[131] Moreover, the modeling Empire propounds appears contradictory to actual market figures.

a. Empire's Modeling Assumes an Unrealistically Low-threshold for Additional Wind Projects on the SPP and Assumes No Additional Construction Beyond 2020

The relationship between supply and demand is an important factor in all markets. =SPP has already set new wind generation records in 2018, and more wind projects are proposed to come online. This raises the concern that there may not be enough demand for the excess wind energy, absent new markets or consumers.[132]

Empire's "high wind" scenario only assumes an additional 6.5 GW of additional wind from 94 potential projects.[133] There is not a reasonable projection. Empire's analysis excludes their own project, two projects presented to the Commission in GPE/Westar merger and the 2 GW AEP Windcatcher project in Oklahoma that will be built into the SPP.[134] If just these four projects come online, it would represent 3 GW of wind energy; meaning the likelihood of 94 potential projects would exceed the 6.5 GW threshold would greatly increase. Additionally, Empire's modeling recklessly assumes there will be no additional wind generation built after 2020.[135] As more wind assets are built onto the SPP and are available for purchase, it is less

---

[131] Ex. No. 3, Empire witness Christopher Krygier direct testimony Pg. 5, Ln. 6.

[132] Ex. No. 211, OPC witness Dr. Geoff Marke Affidavit, Pg 5

[133] *Id*. at Pg 6

[134] *Id*.

[135] *Id*.

likely that the price of wind will dramatically increase to the degree contemplated by Empire, and thus fewer revenues will be generated from the project.

b. Empire's Modeling Does Not Consider Negative Pricing

MECG witness Mr. Meyer testified that, "[n]egative prices result when there is more power in the market than is needed to serve the load. Generation that continues to produce power during negative price periods actually pay the SPP."[136] The SPP market monitoring unit published its *Quarterly State of the Market Report – Fall 2017*, wherein it stated "the prolific growth of wind generation in the 1 SPP market, the number of intervals with negative prices continues to increase… On a year-to-year basis, the total percentage of negative price intervals in the real-time market has increased from 2.6 percent in 2015, to 3.5 percent in 2016, and to 7.0 percent in 2017 (through November)."[137] Mr. Meyer states, "[t]he current levels of wind in the SPP has caused a significant increase in negative prices. Negative prices result when there is more power in the market than is needed to serve the load. Generation that continues to produce power during negative price periods ***actually pay*** the SPP."[138] As Mr. Meyer explains, "due to the presence of the [production tax credits ("PTCs")], and recognizing that PTCs are paid on the basis of MWh's generated, owners of wind generation are willing to pay negative prices to SPP in order to maximize the value of the PTC."[139] Empire's modeling is insufficient because it did not include any hours of negative pricing.[140] Empire should have at least assumed the market

[136] Ex. No. 350, MECG witness Greg Meyer's Rebuttal Testimony, Pg.19

[137] Ex. No. 200, OPC witness Lena Mantle's Rebuttal Testimony, Pg 7

[138] Ex. No. 350, MECG witness Greg Meyer's Rebuttal Testimony, Pg 16, ln. 8-11.

[139] Ex. No. 350, MECG witness Greg Meyer's Rebuttal Testimony, Pg 16, Ln. 11-14

[140] Ex. No. 200, OPC witness Lena Mantle's Rebuttal Testimony, Pg.9

monitor's annual averages; and the result of the omission is an overstatement of projected revenues.

c. Empire's Modeling Does Not Consider Costs Related to Curtailment

Curtailment can occur when market prices fall below the variable cost of operation, such as negative pricing. As testified to by OPC witness Lena Mantle, "The fact that the forecasted market prices included no negative prices meant there would be no curtailing of the wind. The model would model wind being generated at all times."[141] Where curtailment occurs, revenues cannot be generated, and Empire failed to model negative pricing and appropriately weigh the revenue impact of curtailment render Empire's modeling unreliable.

Furthermore, potential market rule changes so that SPP can refuse take the energy from the wind generator's wind turbines could impact Empire's ability, or any owner, to sell wind generation.[142] This authority would allow SPP to curtail the output of wind farms. Such a proposal was narrowly voted down at the most recent SPP Markets and Operations Policy Committee, with a subsequent revote to likely occur this July.[143] Such a rule revision would likely reduce Wind Co.'s revenues from the SPP used to offset Empire's revenue requirement.[144]

In addition, any curtailment would reduce the amount of production tax credits that the tax equity partner would receive,[145] because production tax credits are paid on the basis of MWh's

---

[141] Tr. 7 790, ln 21-25

[142] Ex. No. 200, OPC witness Lena Mantle's Rebuttal Testimony, Pg.9

[143] Ex. No. 211, OPC witness Dr. Geoff Marke Affidavit, Pg 5

[144] Ex. No. 200, OPC witness Lena Mantle's Rebuttal Testimony, 9

[145] Ex. No. 201, OPC witness Lena Mantle's Surrebuttal Testimony, Pg. 9

generated.[146] Payments to the tax equity partner(s) in years six through ten are dependent on the PTCs received in years one through five.[147] If a turbine is not permitted to dispatch and fewer production tax credits in years one through five acquired, then Empire will make additional payments to its tax equity partner(s) in years six through ten.[148] This in turn reduces the cost-effectiveness of the plan to the customers, who will see this increased payment in their rates.

At the hearing, Empire witness Mr. Mooney testified that, while Empire has not executed an agreement with a tax equity partner, it would agree to a provision that would prevent payments a tax equity partner for economic curtailments, such as those cited in the City of Independence case.[149] However, since the tax equity partner would be co-owner of the Wind Hold Co(s). and Wind Project Co(s)., remuneration would not have to be paid between Empire and the tax equity partner, but between Empire and the Wind Project Co(s). That is the contemplated function of the hedging agreement, "whereby EDE will pay to or receive from the Wind Project Co. the difference between the market price and a fixed hedge price and receive all Renewable Energy Credits from the Wind Project Co. **to the extent necessary to secure tax equity financing for the Wind Project Co(s)**." (Emphasis added)

The risk of curtailment, and the failure of Empire to model such a circumstance, likely overstates Empire's ability to achieve its projected revenue.

---

[146] Ex. No. 350, MECG witness Greg Meyer's Rebuttal Testimony, Pg. 16, Lns.11-14

[147] Ex. No. 201, OPC witness Lena Mantle's Surrebuttal Testimony.

[148] Id.

[149] Tr. 5, Pg. 436

iv. The Stipulation and Agreement **[redacted]**

From the outset of this proceeding, Empire portrayed the company's capital contribution as "approximately 40%".[150] However, the Stipulation and Agreement has shifted Empire's obligatory equity contribution **[redacted]**. Any increase to the equity amount held by Empire would raise the revenue requirement, meaning that costs to ratepayers would increase over Empire's projections.[151] At the hearing, it was generally calculated that Empire assumed a capital contribution split of 44% provided by Empire and 56% provided by the tax equity partner.[152] Empire has failed to produce evidence to support **[redacted]** This additional cost to ratepayers has been omitted from Empire's cost-savings projections, though it is contemplated under the Stipulation and Agreement.

Empire's modeling does not consider the circumstance of Empire reaching its maximum equity contribution limit under the Stipulation and Agreement. **[redacted]**

[150] *Application*, Pg. 6: ¶ 9

[151] Tr. 7, Pg. 819, ln. 8-19.

[152] Ex. No. 8, Empire witness James McMahon's affidavit

[153] Tr. 6, Pg.451 ln 10-19.

[redacted][54] ** The fact that this circumstance would be permitted by the Stipulation and Agreement, yet Empire nor any signatory produced evidence to model the impacts of that occurrence shows that there is insufficient evidence to support the claim.

a. Tax Equity Partner(s) Receives Greater Guarantees of Benefits Than Ratepayers

The Stipulation and Agreement is not focused on ratepayers, including a number of terms such as recovery of tax equity partner's investment in this project and return on that investment,[155] the retention 99% of production tax credits and taxable income allocations for the first ten years,[156] and an option to sell at the "flip-date" its portion at fair market value.[157] Perhaps most concerning in the contemplated arrangement is fixed-price hedge Empire will be permitted to enter with Wind Project Co. under the Stipulation and Agreement.[158] This is a ratepayer guarantee that Wind Project Co.(s) will receive the expected price per MWh for the initial ten years of this agreement.[159] The Tax Equity partner receives cash payments from Wind Project Co.(s) in years six through ten. The amounts of those payments are dependent on the under collection of Production Tax Credits the tax equity partner has received prior to year six. These guarantees made to the undetermined equity partner far exceed the protections afforded to ratepayers, which are capped at half of the first $70 million in losses.

---

[154] Tr. 8, Pg. 82723-24. Ex. No. 511-C.

[155] Stipulation and Agreement, Pg. 10

[156] *Id.*

[157] Ex. No. 208, OPC witness Lena Mantle's Affidavit, Attachment LMM-1, Pg 96

[158] Stipulation and Agreement, Pg. 11, ln. 4-5.

[159] Ex. No. 210, OPC witness John Riley's Affidavit Pg. 3

Further, Empire has stated its intent to book the net cost/revenue of the hedges in account # 555 – Purchased Power.[160] However, Empire has stated that neither Wind Hold Co.(s) or Wind Project Co.(s) will sell wind to Empire.[161] FERC Account 555 states, "This account shall include the cost at point of receipt by the utility of electricity purchased for resale." Empire is not purchasing electricity from the subsidiaries, nor has Empire asserted it will enter an interconnection or pooling agreement, nor has Empire provided the Commission copies of said agreements. It would be unreasonable for the Commission to approve the plan in the absence of such information.

v. Empire's modeling does not contemplate **[redacted]**

[redacted] The terms of the Stipulation and Agreement are likely to reduce revenues from the wind resources by more than 25% because of the **[redacted]**.[164]

[160] Ex. No. 208, OPC witness Lena Mantle's Affidavit, Attachment LMM-1, Pg. 97.

[161] *Id.* at Pg. 87.

[162] Ex. No. 211, OPC witness Dr. Geoff Marke's Affidavit, Pg. 11-13.

[163] *Id.* at 13.

[164] Ex. No. 208, OPC witness Lena Mantle's Affidavit, pg. 8.

vi. Empire Does Not Require Additional Energy, Capacity or Regulatory Compliance Necessitating the Addition of 600 MW of Wind

There is no utility purpose, or need, for additional energy or capacity to provide safe and adequate service. In EO-2005-0329, in consideration of the construction of a coal-fired baseload plant at Iatan 2, the Commission concluded "that there is a reasonably projected need for additional baseload capacity in the year 2010" and gave weight to evidence identifying that a "need" for additional capacity existed where a utility would be unable to meet its capacity margin. Similarly, if the Commission is going to evaluate any portion of this application, it should consider the fact that this additional generation is not needed to meet Empire's energy demand, capacity requirements or regulatory requirements. As such, the plan is not reasonable because it is not intended to achieve a regulated-utility purpose.

It is uncontroverted that Empire presently owns or obtains from purchased power agreements more than sufficient energy and capacity to serve its customers. Empire's generating resources have a total capacity of 1,712 MW and Empire's historical all-time peak is 1,211 MW as of January 2018.[165] Before then it was 1,199 MW set in approximately 2007, and Empire's winter and summer peaks have hovered around 1,200 MW for roughly the past decade.[166] Empire

[165] Empire witness Blake Mertens Tr. 5: 301-02, 342.

[166] Empire witness Blake Mertens Tr. 5: 343-44; Ex. No. 200, OPC witness Lena Mantle's Rebuttal Testimony Pg.. 17, table; Ex. No. 9, Empire witness Blake Mertens Direct Testimony, Pg.. 13, ln. 13, Pg. 16, ln. 13, Pg. 17, ln. 6-7; Ex. No. 202, OPC witness John Robinett's Rebuttal Testimony Pg. 1, ln. 13-18.

presently also has a good mix of resources. The following table shows Empire's current generation mix and how much it contributed to Empire's 2016 electrical energy:[167]

Source	Total capacity	Energy contribution
Coal-fired	**28%**	**47%**
Combined cycle	34%	37%
Combustion turbine	22%	2%
Wind	**15%**	**13%**
Hydro	1%	1%

This graph shows the present value of maintaining coal-generation, in that Empire is relying on coal-fired generation, like Asbury, to meet its energy demands.

The following table shows how Empire's plan would change that mix by 2022:[168]

Source	Total capacity	Estimated energy contribution
Coal-fired	**12%**	**21%**
Combined cycle	25%	26%
Combustion turbine	16%	2%
Wind	**46%**	**51%**

[167] Ex. No. 200, OPC witness Lena Mantle's Rebuttal Testimony, Pg. 16, ln. 1 chart.

[168] *Id* at p. 16, ln. 10 chart.

Hydro	1%	0%

Relying this much on wind resources is problematic because, unlike coal and natural gas-fired, and hydro generation, electricity is generated from wind only when the wind blows.[169]

Also, while Empire's peak load is forecasted to increase less than 2% between 2016 and 2022, with Empire's proposed plan, its total nominal capacity would increase by 35% and its energy generation would increase by 37%,[170] while its SPP accredited capacity would decrease, likely by about 80 MW.[171]

Missouri has renewable energy resource requirements that electric corporations must meet. Empire already meets these requirements through PPAs for all of the generation from the 150 Megawatt Elk River Wind Farm and the 105 Megawatt Meridian Way Wind Farm, both located in Kansas. These PPAs provide well in excess of the non-solar renewable requirements that Empire must meet with respect to its Missouri load.[172] The proposed construction of 600 Megawatt of excess wind assets is not proposed or needed to meet federal or state renewable requirements, laws or regulations.

Since there is no need for the construction, the plan should not be determined reasonable.

---

[169] *Id*. at Pg.15, ln. 15-17.

[170] *Id*. at Pg. 17, ll. 10-13.

[171] 198 MW (Asbury SPP accredited) - 120 MW (15% of nominal 800 MW wind) = 78 MW.

[172] See, for example, Empire's 2017 Annual Renewable Energy Compliance Plan (April 2017), filed with the Missouri Public Service Commission.

vii. The Addition of 600 MW of Wind Would Inflict an Economic Waste

The addition of 600 MW of wind would inflict an economic waste on ratepayers, as the wind is not necessary to serve any energy needs of customers, or capacity requirements and environmental regulation compliance for Empire. The Courts have identified that a purpose of the Commission is to prevent economic waste.[173] [174] [175] The Commission articulated this purpose recently in its Electric Vehicle Charging cases[176]; the purpose is to promote the public good from unnecessary burdens to the public, and to ensure the public is protected and utility actions do not incur economic waste. Since there is no need for the construction, the plan would

[173] "[An] understanding of the Commission's organic act, the statutes establishing the Commission and its mission, which illuminate the economic environment. *State ex rel. Gulf Transport Co. v. Public Service Commission*, 658 S.W.2d 448, 456 (Mo. App. 1983) … The Commission was established to **prevent [the] unnecessary duplication of service** on the theory that such over-crowding of the field will **eventually be a** … The Commission was established to **prevent [the] unnecessary duplication of service** on the theory that such over-crowding of the field will **eventually be a burden on the public**. *State ex rel. City of Sikeston v. Public Service Commission of Missouri*, 336 Mo. 985, 997, 82 S.W.2d 105, 109 (1935). These laws are based on a policy to substitute regulated monopoly for destructive competition in order to protect the public. *State ex rel. Elec. Co. of Missouri v. Atkinson*, 275 Mo. 325, 204 S.W. 897, 899 (1918). However, it [regulation] is designed as a practical system to promote the public good, and the facts of each case must be considered in applying it. *Id.* There may be situations where competition could serve a useful public purpose if the public is protected and it does not result in economic waste." *State ex rel. City of Sikeston v. Public Service Commission of Missouri*, 336 Mo. 985, 998, 82 S.W.2d 105, 110 (1935).

[174] In some cases, the type of economic destruction the Commission sought to prevent or mitigate came from the economic waste from multiple competitive utility services operating in the same locality. **People's Tel. Exchange v. Public Service Com.**, 239 Mo. App. 166 (1945). Court affirmed PSC denial of CCN to telephone company operating an unregulated rural mutual exchange because it would compete as a public utility with an existing regulated urban public utility telephone company.
State ex rel. Electric Co. v. Atkinson, 275 Mo. 325, 204 S. W. 897 (1918). Court affirmed PSC allowing electric public utility owning power supply to compete with electric public utility that did not own its power source where rates were substantially lower.

[175] In some cases, the type of economic destruction the Commission sought to prevent or mitigate came from the economic waste from multiple competitive utility services operating in the same locality. **State ex rel. KCP&L Greater Mo. Operations Co. v. Mo. PSC**, 408 S.W.3d 153 (Mo. App. 2013). Court affirmed PSC disallowance of transmission costs because plant location in Mississippi was imprudent.
State ex rel. Union Electric Co. v. Public Service Com., 765 S.W.2d 618 (Mo. App. 1988) Court affirmed PSC's disallowance of utility's investment in cancelled nuclear generating unit.

[176] Ameren: ET-2016-0246, *Report and Order*, Pg 10-11; KCPL ER-2016-0285, *Report and Order*, Pg 45-46.

unnecessarily inflict additional costs on ratepayers. As such, the Commission should determine the application to be unreasonable.

B. The Costs of the Additional Wind Generation to Ratepayers are Substantial

Everyone agrees that the wind project will increase rates. Empire's original case and their stipulated case results in substantial costs to ratepayers. In the original case, OPC was able to determine costs based on the Empire's workpapers, which provided that "Empire's revenue requirement increase attributable to the wind generation in 2020 is $133 million…[or an increase of approximately 26%]."[177] "This equates to an increase to a residential customer using 1,000 kWh a month of $37.38 a month in the summer months and $34.84 a month in the non-summer months, for a total annual increase of $428.24."[178] Although the increase in revenues would be offset by revenues that Empire receives from energy it sells on the SPP market, "the magnitude of that revenue is very uncertain, and would not be known until it is actually received."[179] Because Empire's plan changes cost assumptions under the terms of the non-unanimous agreement, new projections were required.

With the new projections resulting from the stipulation, everyone still agrees that rates would increase if the project goes forward. OPC believes customers could see an increase in rates up to 23% in the near-term.[180] Empire emphasizes their opinion that the consequence of 600

---

[177] Ex. No. 201, OPC Witness Lena Mantle's Surrebuttal Testimony Pg. 7, Lns. 14-15.

[178] *Id.*

[179] *Id.* at Pg. 8, Ln. 1-4.

[180] Ex. No. 208, OPC witness Lena Mantle's Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, ¶ 21

MW may only result in a 3.4% increase as a direct result of the wind project.[181] However, even 3.4% is a substantial increase for a project that is not necessary to meet load requirements.[182]

In addition, this Commission should be cautious about Empire's rate impact projections because Empire relies on its own guesswork about future revenue forecasts. OPC witness Lena Mantle warned, "Mr. Meyer included the revenues Empire modelled that it would receive from the wind project" in calculating his 12% increase.[183] On Mr. Meyer's assumptions, the rate increase required to cover revenue requirement from this project will be $196.67 per customer, per year.[184] If the speculative wind revenue is not included, "the typical customer's bill would increase 23% or approximately $31 a month for a total of $377 beginning in 2021."[185] Ms. Mantle also explained, "[i]f the wind project revenue modelled is just half of what Empire projects, the rate increase would be 17%, corresponding to increasing the bills of the typical residential customer by approximately $23 a month or $279 annually."[186] Importantly, "whether it be 12% or 23%," the increase is "for capital investments that Empire does not need to serve its customers."[187]

---

[181] Tr. 3, Pgs. 45-46, Lns. 16-20 and 5-7.

[182] Ex. No. 6, Empire witness James McMahon's Direct Testimony, Attachment JM-2, Pg. 31 (or Pg. 34 of 44) ("it was determined that load is not an uncertain factor for purposes of the analysis.")

[183] Ex. No. 208, OPC witness Lena Mantle's Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Paragraph 20

[184] Ex. No. 208, OPC witness Lena Mantle's Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Paragraph 19

[185] Ex. No. 208, OPC witness Lena Mantle's Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Paragraph 20

[186] Ex. No. 208, OPC witness Lena Mantle's Affidavit in Opposition of the Non-Unanimous Stipulation and Agreement, Paragraph 20

[187] Ex. No. 208, OPC witness Lena Mantle's Affidavit inOpposition of the Non-Unanimous Stipulation and Agreement, Paragraph 21

As previously noted, the costs to ratepayers is not limited to what Empire projects its rates might be in its next rate case. In addition to crowding out of investment opportunities, [188] the Commission should also consider the magnitude of this proposal in the context of Empire's rate base. Under Empire's original proposal, Empire asked for "Commission permission both to increase its rate base by $700 million and retain in rate base the net value of its Asbury plant after it is retired, i.e., no longer used and useful."[189] The context of that proposal will result in "almost doubling Empire's rate base."[190] The Stipulation and Agreement results in a similarly large impact on rate base. Because Empire's plan still is not fully formed and because they have not settled what amount the tax equity partner will contribute, rate base could increase by $510 million- or possibly [redacted]**[191] These rate base additions are not necessary to provide safe and adequate service, and the effect of approving this project would compound the existing burden on customers. Indeed, customers of Empire are already facing very high rates. The chart below shows the dramatic increases in electric rates over the past decade.

[188] Ex. No. 206, OPC witness Dr. Geoff Marke's Rebuttal Testimony, Pg. 5, Lns. 1-7 ("Exposing Empire's ratepayers to volatile rate increases based on speculative managerial decisions that are dependent, in part, on an SPP market that is increasingly shedding its base load generation will make every future, necessary regulatory cost required to provide safe and reliable service all the more difficult, which will in turn, impact Empire's shareholders as well.").

[189] Ex. No. 204, OPC witness John Riley Rebuttal Testimony Pg. 3, Lns. 11-15.

[190] Ex. No. 201, OPC witness Lena Mantle's Surrebuttal Testimony, Pg. 3, Ln. 17

[191] Ex. No. 218 - JSR-1 Corrected; Ex. No. 511, City of Joplin Hearing Exhibit.

Table 1: Empire rate case history 2007-2016

Case Number	Dollar Value	Percent Increase
ER-2006-0315	$29,300,000	9.96%
ER-2008-0093	$22,040,395	6.70%
ER-2010-0130	$46,800,000	13.90%
ER-2011-0004	$18,685,000	4.70%
ER-2012-0345	$27,500,000	6.85%
ER-2014-0351	$17,125,000	3.88%
ER-2016-0023	$20,400,000	4.46%
Total Dollars	$181,850,395	
Total Compounded Increase		62.23%

[192]

The facts are that ratepayers "have experienced a compounded increase in rates of 62.23% over the past ten years before Liberty acquired Empire in 2016 as show in Table 1."[193] These rate increases are attributable to the fact that Empire "invested a lot in supply-side generation."[194] The primary drivers of the rate increases were investing in "Riverton, the combined cycle, but also the Asbury upgrade."[195] Therefore, the context of this wind project is important to consider because Empire is now proposing to increase rates for additional supply-side generation. Empire's proposal is not equitable to ratepayers, and it is not needed to provide

[192] Ex. No. 206, Rebuttal Testimony of OPC Witness Geoff Marke, Pg. 9, Lns. 7-8, Table 1.

[193] Ex. No. 206, Rebuttal Testimony of OPC Witness Geoff Marke, Pg. 9, Lns. 5-6.

[194] Tr. 7: Pg. 847, Ln. 22-23.

[195] Tr. 7: Pg. 847, Ln. 20-22.

safe and adequate service. For these reasons, the Commission must not find this project to be reasonable.

i. The Net Detriment Sharing Mechanism is Insufficient to Protect Ratepayers

The terms of the Stipulation and Agreement provide that Empire, after incurring a $2 million loss threshold to be paid by ratepayers, will match losses from the Wind Project over the first 10 years up to $35 million.[196] No such cap exists for Empire's ratepayers. If Empire's modeling assumptions prove to be incorrect, the piecemeal mechanisms in place surrounding this incomplete application create substantial risks that ratepayers will be exposed to.[197] According to calculations performed from Empire's modeling, OPC witness John Riley testifies that cap will be exceeded by 2022, [198] or **[redacted]**[199] This provision is wholly inadequate to protect ratepayers from emergent costs and from this proposal.

ii. The Rate Case Moratorium Provision Provides No Additional Value to Customers

As part of the Stipulation and Agreement, Empire agrees that it shall not file tariffs seeking to implement a general rate case prior to April 1, 2019. When asked if the Stipulation and Agreement were denied when Empire would seek a rate case, Empire witness Christopher Krygier stated "[r]egardless of whether or not the Stipulation is approved, Empire is required by

---

[196] Ex. No. 210, OPC witness John Riley's Affidavit, Pg. 6.

[197] Ex. No. 211, OPC witness Dr. Geoff Marke's Affidavit, Pg. 7.

[198] Tr. 7: Pg. 822, ln. 21-22.

[199] Tr. 8: Pg. 828, ln. 3-4.

statute to file a general rate case by October 2019 (approximately) for rates effective September 2020…Approval of the Stipulation is not anticipated to remove any need for a rate increase."[200] This agreement affords little value to ratepayers, as the anticipated rate proceeding in April 2019, if this application were to be approved, will likely include costs associated with this unnecessary project.

iii. The Stipulation and Agreement Does Not Accomplish Renewable Energy Access to Corporate Customers

As part of the Stipulation and Agreement, Empire has agreed, as part of its next rate case, to propose a "green tariff" option to corporations that wish to demonstrate compliance with self-imposed sustainability commitments.[201] First, the result of this application will not establish a green tariff. The commitment to propose such a mechanism in a future proceeding offers little value to customers, as any party could propose such a term in the next general rate case. Denying the Stipulation and Agreement would not prevent any party, including the Company or MECG, from proposing such a tariff in the next general rate case.

iv. The Ratepayer Protections in the Stipulation and Agreement are Inferior to Terms in the AEP Windcatcher Settlement

The customer guarantees articulated in a contemporaneous proceeding in regarding the application of the AEP Windcatcher project before the Oklahoma Corporation Commission include terms that protect the interests of ratepayers well beyond the net detriment sharing mechanism in the Stipulation and Agreement. The AEP project provides benefits that include net capacity factor, off-system sales margins, caps on ratepayer exposure to project investments,

[200] Ex. No. 211, OPC witness Dr. Geoff Marke's Affidavit, Pgs.17-18.

[201] *Id.*

a make-whole provision, and more. The make-whole provision operates in way that if net benefits are not achieved, the company will create a regulatory liability to compensate customers.[202] The net detriment sharing mechanism that is the subject of the Stipulation and Agreement falls short of providing protections against the variety of costs ratepayers will be exposed to should this plan proceed. Missouri ratepayers should not be exposed to so many unknown costs, and the Stipulation and Agreement provides inadequate protections.

v. The Stipulation and Agreement Does Not Identify a Mechanism Sharing Wind Revenues

Despite the representations made that ratepayers would enjoy the benefits of excess wind sales revenues, nothing in the Stipulation and Agreement proposes such a mechanism. In support of its initial application, Empire witness Christopher Krygier testifies in his surrebuttal testimony that Empire intends that the modeled change in revenue requirement due to increased revenues from the wind projects would flow through Empire's fuel adjustment clause. While the agreement is deficient on terms related to ratepayers realizing lower rates through wind sales revenues, the agreement is explicit as to how and when Empire can book *costs* to ratepayers.[203]

Though it is not contemplated in the filing by the signatories, OPC expressed concern as to how Empire intended to pass revenue proceeds to customers. [204] Without an identifiable lawful

---

[202] *Id* at Pg. 8-9.

[203] Ex. No. 4, Empire witness Christopher Krygier's Affidavit, Pg. 2, Para 7

[204] In a colloquy between Chairman Hall and OPC witness Ms. Lena Mantle, the Chairman inquired as to why a fuel adjustment clause mechanism would be an inappropriate mechanism in this case to flow revenues from the sales of these wind projects through to customers, in comparison with Ameren Missouri's fuel adjustment clause. Ms. Mantle acknowledged existing mechanisms authorized by the Commission in her testimony do include revenues from off-system sales. Affidavit pg. 5. What Empire is presenting is such a substantive deviation from the Ameren FAC that they are not analogies. First, Empire's application is not made under section 386.266, and therefore any opinion expressed on the matter by the Commission would be advisory and prohibited. Second, Empire would not be receiving the revenues from SPP for energy generated by the wind projects. Mantle Affidavit, Pg. 5. The

means to pass revenues to ratepayers, even if the circumstance contemplated in Empire's modeling were to occur, much of any "savings" would not be realized by customers.

C. Empire's Modeling Is Insufficient to Support its Claim of Ratepayer Savings

This case is premised on the assertion that the construction of the 600 MW of wind will, over time, generate sufficient revenues to cover its cost, and to generate net savings for customers. Empire asserts cost and revenue modeling to substantiate its claim. However, OPC has raised serious concerns regarding omissions of known costs and failure of Empire's modeling to incorporate known downward pressures, like negative pricing, in its revenue calculations. With greater costs and less revenue, Empire's proposition seems unlikely to produce its purported results.

If Empire has understated its cost or overstated its revenue, what risk does the company have? $35 million dollars. The only certainty guaranteed in this agreement is not the ratepayers' savings; it is the extent to which Empire is liable for its business decision, and it is only approximately 3% of the total cost of the project. However, the benefits Empire will receive are tremendous; a dramatic increase in rate base and its rate of return on top of that.

---

revenues generated from the SPP will go to Wind Co.(s) and the costs would be incurred by the Wind Co.(s). *Id.* The plain language of section 386.266 contemplate costs incurred by the electrical corporation. The section is silent with respect to revenues. However, neither costs nor revenues from other companies are identified as permissible funds to be included in a fuel adjustment clause. Third, the FAC only pertains to prudently incurred costs. Empire's proposed wind asset serves no utility-purpose, i.e. there is no need for asset. As such, the investment is imprudent because the cost is not prudently incurred, and ratepayers should not be held liable for *any* costs or possible benefits produced from the wind assets. Finally, what the Company portrays as "customer-savings" in some years are cost offsets that cannot be realized through an FAC. For example, Empire's modeling assumes an annual reduction in rate base, or depreciation loss, as a "customer savings." The only way a customer can realize that savings is if the rate base is actually reduced, which can be accomplished through a general rate proceeding, but not an FAC. These characteristics fundamentally differ from Ameren's FAC which was properly filed, the assets are wholly-owned by the company, the revenues pertain to actual off-system sales, the FAC is not used alternative means to calculate rate base, and excess assets were prudently constructed at the time to meet customer demand; not for the express purpose of selling onto the market.

In 2016, Algonquin/Liberty acquired Empire District Electric Company for a 21% premium.[205] Prior to the approval of acquisition, on an Algonquin Power & Utilities First Quarter 2016 Results Earnings Call, CEO Ian Robertson said, "And as I've often articulated, one of the huge benefits of bringing Empire into the Algonquin portfolio is that, we will call it the headroom. It's occasioned by that in terms of being able to grow the IPP business.[206] IPP stands for Independent Power Producer. Mr. Robertson continued to say, "our real objective is to make sure that one plus one equals more than two in terms of being able to find growth opportunities. We've talked about them in the past, this idea of greening the Empire portfolio."[207]

This application is an effort to build new generation to expand rate base. Were a utility to build superfluous generation and seek rate recovery, the Commission would have justification to disallow such unnecessary costs as imprudent. Just because a utility asks permission for a reasonableness finding before it builds superfluous generation should not alter the Commission's logic. For the aforementioned reasons, the Commission should find Empire's request unreasonable and its evidence insufficient.

3. WHAT REQUIREMENTS SHOULD BE APPLIED TO THE ASBURY REGULATORY ASSET?

This issue was not argued at the hearing as the Stipulation and Agreement contemplates the continued operation of the Asbury Facility. The signatories to the Stipulation and Agreement have agreed that if the Asbury unit is shut down before full recovery of the CCR investment, the signatories will not object to Empire getting return on and of the environmental

---

[205] Ex. No. 206, OPC witness Dr. Geoff Marke's Rebuttal Testimony, Pg. 16.

[206] *Id.* at 12-13.

[207] *Id.* at 12-13.

investment costs to comply with the CCR rule, if the unit is retired before full recovery.[208] Such an account would violate State ex rel. City of St. Louis v. Public Service Com'n of Missouri, which does not permit continued rate base treatment for generation assets that have been abandoned.[209] Therefore, no requirements such should be identified at this time.

4. SHOULD EMPIRE BE REQUIRED TO MAKE ANY ADDITIONAL FILINGS IN RELATION TO THE CSP? IF SO, WHAT FILINGS?

The Commission should deny this application and the Stipulation and Agreement. To effectuate the requests the company seeks would require certificate of convenience and necessity filings. Empire should be permitted to seek such certificates of its own volition, and the Commission should not order additional filings.

5. SHOULD THE COMMISSION IMPOSE ANY REQUIREMENTS IN REGARD TO TAX EQUITY FINANCING? IF SO, WHAT REQUIREMENTS?

Not in this case. The Commission cannot and should not approve the Stipulation and Agreement.

6. WHAT CONDITIONS, IF ANY, SHOULD BE APPLIED TO THE ASBURY EMPLOYEES?

This issue was not argued at the hearing as the Stipulation and Agreement contemplates the continued operation of the Asbury Facility.

7. SHOULD THE COMMISSION REQUIRE CONDITIONS RELATED TO ANY IMPACTS ON LOCAL PROPERTY TAXES? IF SO, WHAT CONDITIONS?

---

[208] Ex. No., 213, John Robinett's Affidavit, Pg. 2.

[209] *City of St. Louis*, 329 Mo. 918, 941, 47 S.W.2d 102, 111 (1931).

This issue was not argued at the hearing the Stipulation and Agreement contemplates the continued operation of the Asbury Facility.

8. SHOULD THERE BE ANY REQUIREMENTS ASSOCIATED WITH THE TAX CUTS AND JOBS ACT OF 2017? IF SO, WHAT REQUIREMENTS?

Not in this case. The Commission cannot and should not approve the Stipulation and Agreement, as it does not comport with the requirements of SB 564 and would deprive ratepayers of the benefit of the regulatory asset accounts from January 1, 2018, through the effective date of the new rates. On May 16, 2018, SS#5 SB 564 was truly agreed and finally passed by the Legislature. The legislation contains an emergency clause to enact section 393.137 upon approval.[210] The bill was delivered to the Governor on May 30, 2018.[211]

The legislation directs that the Commission shall undertake proceedings to adjust rates to reflect the effects of the 2017 Tax Cut and Jobs Act, and establish regulatory asset deferral accounts for the period of January 1, 2018 through the effect date of the new rates.[212] Importantly, the statute contemplates how the Commission should address the over collection of excess revenues related to the federal tax cuts. This specific instruction precludes the Commission from taking alternative actions or approving methodologies to address the federal tax cuts that do not comport with the treatment proscribed by the statute.

The Stipulation and Agreement fails to provide a rate reduction "within ninety days of the effective date" of the bill. The legislation requires a rate reduction within that time frame;

---

[210] 25, 1-4 26 5-7

[211] Even absent a signature, and unless there is a veto, the legislation will become law pursuant to Mo. Const. Art. III, § 31.

[212] SS#5 SB 564, Page 8, Line 12-20

assuming the Governor does not sign the legislation or veto, the bill would take effect June 29, 2018. Ninety days from June 29 would be September 26, 2018. The Stipulation contemplates an effective date of new rates to be October 1. The Commission cannot approve the term of the Stipulation, as it will not comply with the language of the bill.

The Stipulation and Agreement does establish a regulatory asset account to defer the excess accrual of revenues related to federal income taxes from January 1, 2018, to the effective date of the new rates, and to be included in the revenue requirement a subsequent rate case. Should the Commission deny the Stipulation and Agreement, the Commission will grant the exact same relief through a rate proceeding contemplated in section 393.137. This term provides no additional benefit to ratepayers that will not already be proscribed under law.

Because the terms of the agreement will fail to take effect as proscribed under 393.137, the Commission cannot approve the Stipulation and Agreement.

9. SHOULD THERE BE ANY REQUIREMENTS ASSOCIATED WITH POTENTIAL IMPACTS OF THE WIND PROJECTS ON WILDLIFE? IF SO, WHAT REQUIREMENTS?

The Commission should not set wildlife protections for the wind projects at this time since a CCN should be filed so the Commission can consider issues pertaining to site-selection. Also, were a contract to exist between the developer and the company, and the company were to definitively identify where and how much wind is to be built, this issue would be more tangible.

If wind farms result in fatalities of vulnerable or protected animal populations, Empire may be liable for financial penalties and potential enforced curtailment of generation, which in turn could raise future prudency concerns. Dr. Geoff Marke testified to a variety of pre- and

post-site selection criteria intended to avoid those risks. [213] However, as the Commission should not approve the Stipulation and Agreement, the consideration of pre- and post- site selection is unnecessary at this time.

10. SHOULD THE COMMISSION GRANT WAIVERS OF ITS AFFILIATE TRANSACTION RULES FOR THE AFFILIATE AGREEMENTS ASSOCIATED WITH THE CSP?

No. The good cause threshold to permit the waiver has not been met, and in fact, the entities contemplated in the waiver do not exist. In the Stipulation and Agreement, the signatories recommend the Commission grant Empire a variance of specific sections of the affiliate transaction rule from–4 CSR 240-20.015(2)(A) and (3).[214]

a. Empire Has Not Asserted Good Cause for Waiver

4 CSR 240-2.060(4) provides that waivers and variances from Commission rules for good cause. A party requesting a waiver of a Commission rule to provide complete justification setting out good cause for granting the waiver. Good cause "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law."[215] To constitute good cause, the reason or legal excuse given "must be real not imaginary, substantial

[213] Geoff Marke Affidavit pg 14 and 15

[214] Rule 4 CSR 240-20.015(2)(A) requires the utility to provide compensation for a service from an affiliate to the lesser of fully distributed cost or market cost and to receive compensation from an affiliate at the greater of fully distributed cost or market value. Rule 4 CSR 240-20.015(3) sets out the evidentiary standards for affiliate transactions.

[215] *Black's Law Dictionary* 692 (6th ed. 1990). *See also* Graham v. State, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. *See, e.g., Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.")

not trifling, and reasonable not whimsical."[216] And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.[217]

From the outset of the application, Empire has failed to argue facts and circumstances sufficient to support waiver of the Commission's rules. In its direct testimony, Empire merely requested the Commission authorize affiliate transactions to the extent required in order to implement the Customer Savings Plan on the basis that contracts *may* be executed between Empire and subsidiary companies.[218]

There is an insufficient basis to grant the request because copies of the alleged contracts or any explanation as to the nature of the terms of the contract has not been made into the record. Furthermore, the companies contemplated by the waiver request do not exist, and are therefore imaginary. According to Empire's response to OPC data request 13 provided on May 2, 2018, Empire does not have final or draft articles of incorporation, by-laws, corporate registrations, or any other documentation related to the organization and operation of Wind Hold Co. and Wind Project Co(s).[219] In addition, there are no restrictions on what the Wind Hold Co. and Wind Project Co(s) may become in the future.[220] The Commission should not grant a blanket variance without good cause and customer protections.

---

[216] *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).

[217] *See generally Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

[218] Ex. No. 2, Empire witness Christopher D. Krygier's Direct Testimony, Pg. 9, lns. 4-6.

[219] Ex. No. 208, OPC witness Lena Mantle's Affidavit, Attachment LMM-1 Pg. 86.

[220] *Id*. at Pg. 10

Empire has not provided the complete justification setting out good cause for relief required by rule 4 CSR 240-2.060(4); therefore, the Commission cannot grant Empire the relief it seeks.

Conclusion

Would you commit to purchase a vehicle if were still paying off the car you owned and you did not know the make/model of what you were purchasing, were uncertain of its location, were uncertain of its actual price, and on the condition that you would agree to indemnify and make whole the sales and financing offices in the event they do not meet their sales quotas?[221] Certainly not. Ratepayers should not be placed in such a position.

This case, from start to finish, has proven awkward. Awkward in determining the Applicants request, or lack thereof. Awkward in the determination of costs of contracts, which are not executed, and projected revenues, which are not substantiated. Awkward in the apparent lack of scrutiny by the signatories of the Stipulation and Agreement to the figures propounded by Empire.[222] Awkward in the presentation of an agreement to which the signatories appeared uncertain of its force and effect. At its essence, this case seeks a decisional prudence determination from the Commission regarding utility resource planning for assets that are not intended to serve a utility's customers, nor will be owned by the utility.

The effect of this case will be to allow a utility to leverage its customers as a surety against a private lender. This case represents a departure from regulatory compact so

[221] The failure in the analogy is presumably the purchaser gets a car. In this case, for the hundreds of millions of dollar spent, the customer receive the same service at an inflated cost.

[222] Of the 23 data requests submitted to Staff regarding the Stipulation and Agreement, 17 responses directed OPC to Empire's response and 9 responses regarding how the market mechanism worked, what price Empire's customers would be paying the TE partner, and how these costs were to be recorded, etc., Staff responded that it did not have firsthand information necessary to respond. Ex. No. 208, OPC witness Lena Mantle's Affidavit, Pg. 6.

fundamental that, as Public Counsel has argued, it is unlawful. To be absolutely clear; this proceeding is not similar to the Iatan II proceeding because the Applicant has failed to argue, and thus prove, a need for additional energy, capacity or regulatory compliance to necessitate the addition of extraneous generation assets.

Since the Company so confident as to risk the money of its ratepayers on the basis of its modeling, one wonders why it would not complete the project on its own and reserve the full measure of its purported benefits, and risks, for its shareholders. Unless, of course, those purported benefits and the underlying modeling are not as certain as the Company has characterized.

The lawful recourse for the Commission in this proceeding is to deny the application and the *Stipulation and Agreement*.

WHEREFORE, the Office of the Public Counsel advocates that the Commission deny the application and the *Stipulation and Agreement*.

Respectfully submitted,

/s/ Hampton Williams
Hampton Williams
Missouri Bar No. 65633
Public Counsel

PO Box 2230
Jefferson City, MO 65102
P: (573) 751-4857
F: (573) 751-5562

ATTORNEY FOR THE OFFICE
OF THE PUBLIC COUNSEL

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail on May 31, 2018 to all counsel of record.

/s/ Hampton Williams