BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

EARTH ISLAND INSTITUTE d/b/a RENEW MISSOURI, et al.,	)	
Complainants,	)	
v.	)	Case No. EC-2013-0382
	)	[Consolidated with EC-2013-0379]
THE EMPIRE DISTRICT ELECTRIC COMPANY,	)	
Respondent.	)	

THE EMPIRE DISTRICT ELECTRIC COMPANY'S RESPONSE IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY DETERMINATION

COMES NOW Respondent The Empire District Electric Company ("Empire" or "Company"), by and through counsel, pursuant to Missouri Public Service Commission ("Commission") rule 4 CSR 240-2.117(1), and for its response in opposition to Complainants' motion for summary determination ("Motion") in the captioned matter, states as follows:

Admission or Denial of Movant's Factual Statements

No purpose would be served by providing a paragraph by paragraph rebuttal of the many numbered paragraphs in Complainants' Motion, most of which have nothing to do with Empire or its 2012 Compliance Plan or have no direct bearing on the allegations contained in the Complaint filed in Case No. EC-2013-0382. Empire's Motion for Summary Determination in this case filed on August 23rd states (1) that its 2012 Annual Renewable Energy Standard Compliance Plan ("Plan") covered the years 2012, 2013,

and 2014, (2) that its Plan did not include a comparison of the rate impact of renewable and non-renewable energy resources[1] and (3) that Empire did not propose to add incremental renewable energy resource generation attributable to the Renewable Energy Standard ("RES") compliance through the procurement or development of renewable energy resources during the planning interval covered by the Plan because the Company will fully meet the RES compliance requirements for that period with current purchase power contracts and its hydroelectric facility. To the best of Empire's knowledge and belief, those material facts are not in dispute. The only matter in dispute with respect to the Complainants' complaint against Empire (Case No. EC-2013-0382) is whether the Company is exempt from the requirement to include a retail rate impact calculation by virtue of language contained in subsection (5)(B) of Commission rule 4 CSR 240-20.100.

I. Technical deficiencies with Complainants' Motion

Empire contends that the Complainants' Motion does not comply with the technical requirements of the Commission's Summary Determination rule 4 CSR 240-2.117. In a number of locations, Complainants refer to the pre-filed rebuttal testimony of various witnesses for the Complainants and Respondents, including Empire's witness Timothy Wilson.[2] The testimony pre-filed in this case cannot be relied on for purposes of summary determination because it has not yet been offered or received into evidence. In fact, any pre-filed testimony is subject to amendment or correction at the time it may be offered into the record. Those filings are not, therefore, "testimony" as that term is

[1] It bears repeating that Empire did include an explanation that its minimal compliance costs of just over $63,000 attributable to REC registration fees would not come anywhere close to the approximately $4 million in expenditures that would be necessary to trigger the rate impact cap. *See*, Plan p. 7. As stated in numerous previous pleadings, Empire is of the view that the explanation it provided is more than sufficient in the circumstances to meet the objectives of the RES rule.

[2] See for example ¶10.b.

used in subsection (1)(C) of the rule. Additionally, the Complainants' Motion is not accompanied by elements of "discovery" or an "affidavit" upon which they rely to establish their allegations of undisputed material facts. Consequently, the Motion should be denied for non-compliance with the technical requirements of the Commission's rule.

II. Complainants' Motion must be denied (1) for failure to establish that there is no dispute as to any material fact, (2) for failure to show that they are entitled to relief as a matter of law as to all or any part of the case and (3) for failure to establish that summary determination in their favor would be in the public interest. [3]

A. Both Missouri law governing motions for summary judgment – the civil law equivalent of a motion for summary determination under 4 CSR 240-2.117 – and past decisions of the Commission recognize that in order to prevail a party seeking summary determination must establish both the absence of any genuine issue regarding any material fact necessary to establish the right to a legal judgment and the undisputed right to a judgment as a matter of law.[4] *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). Complainants' Motion does not satisfy either of these requirements because they have not established all facts relevant to a determination by the Commission

One question of fact is crucial to the complaint against Empire: that is, did the Company propose to add incremental renewable energy resource generation directly attributable to RES compliance during the planning period? The Motion does not even address this question. Complainants have not, therefore, met a key requirement of the Commission's summary determination rule, that is, that there is not dispute as to any material fact. On its face, the Motion is deficient and must be denied.

[3] Empire presents its response to the Motion in the event the Commission concludes that it complies with the technical requirements of 4 CSR 240-2.117.

[4] The Commission has recognized the similarities between Rule 74.04, MRCP, and 4 CSR 240-2.117 in numerous orders. For example, in *Unice Harris v. Southern Union Company d/b/a Missouri Gas Energy*, 2013 Mo. PSC LEXIS 275, [5] n. 4 (effective April 19, 2013), the Commission noted the two rules are "sufficiently similar . . . to make cases interpreting [Rule 74.04] helpful in understanding [the Commission's rule]."

B. Complainants are not entitled to relief as a matter of law

Complainants' Legal Memorandum in Support of its Motion does not address the Empire Complaint specifically until pages 10 and 11. There, Complainants engage in verbal and legal gymnastics claiming, apparently, that the rule does not say what it says.

Specifically, Complainants claim that (i) 4 CSR 240-20.100(7)(B)1.F "requires utilities to provide a detailed explanation of the [retail rate impact] calculation regardless of the provisions of section (5)(B)" and (ii) that the last sentence of subsection (5)(B) of the Commission's rule does not exempt Empire from the requirement to provide a calculation of the RES retail rate impact.[5] Complainants contend that "[t]he last sentence of (5)(B) has nothing to do with the actual section (5) 'calculation', except with respect to the timing of when the calculation must be performed." It does not, Complainants assert, address the "substantive provisions" of Sections (5)(A) and (B).

4 CSR 240-20.100(7)(B)1.F specifically states that the retail rate impact calculation is to be included in a RES compliance plan and is to be "calculated in accordance with section (5) of this rule." There is no basis for Complainants' that the cross-reference in (7)(B)1.F does not apply to all of section (5)(B) of the rule, because there is no language limiting the portions of section (5) that must be complied with. Moreover, section (7)(B)1.F does not establish an independent requirement to include a

[5] That sentence reads as follows:

> "The comparison of the rate impact of renewable and non-renewable energy resources shall be conducted only when the electric utility proposes to add incremental renewable energy resource generation direct attributable to RES compliance through the procurement or development of renewable energy resource."

detailed retail rate impact calculation. In fact, all that need be done to comply with section (7)(B)1.F is to comply with section (5).[6]

Further, Complainants claim that section (7)(B)1.F does not include section (5)(B) ignores the fact that section (5)(B) provides all the details as to how the retail rate impact calculation is to be made. Consequently, if, as Complainants' claim, that section can be ignored, what rules are left to govern the calculation?

The distinction offered by Complainants is baseless. The language of the rule unambiguously states that a rate impact calculation need be done ***only when*** the electric utility proposes to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources. All other utilities are exempt.

As noted above, Empire's Plan has not proposed to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources. As noted in Section, II.A., *supra*, Complainants have not addressed, much less disproved, this key fact. Because Empire has not proposed to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources during the years 2012, 2013 or 2014, it is not required by the Commission's rule to include the retail rate impact calculation as part of its Plan. Accordingly, Complainants are not entitled to relief as a matter of law.

[6] Complainants assert at page 10 of their legal memorandum that Mr. Wilson in his prefiled rebuttal testimony has "acknowledged that [Empire] did not meet the requirements of" (7)(B)1.F. To the extent references to unoffered and unadmitted exhibits are "testimony" within the meaning of the Commission's summary determination rule, this is a mischaracterization of his words which explain that the Company did not include the retail rate impact calculation *because Empire is exempted from doing so*.

C. Granting summary determination in favor of the Complainants would not be in the public interest

Complainants' public interest claims appear at the bottom of page 3 and the top of page 4 of its Legal Memorandum in Support of its Motion. Complainants assert that the public interest would be served by "open disclosure" of plans for renewable energy expenses and that the relief requested in the Motion "would serve the interest of hundreds of Missourians working in the solar industry today." Additionally, Complainants assert that the solar industry "needs the ability to accurately plan for future market conditions in order to run their businesses."

To grant the relief requested by Complainants (i.e., to direct Empire to prepare and include in its Plan the retail rate impact calculation) would effectively add a filing requirement not contemplated by the rule as written. Empire asserts that any argument that the Commission should ignore the section (5)(B) exemption in its rule, for public interest reasons or otherwise, is a prohibited collateral attack on the Commission's rulemaking order. *See*, 386.550 RSM0 2000.

As to Complainants' public interest assertions, they do not explain how a retail rate calculation by an electric utility that does not propose to add incremental renewable energy resource generation during the planning period serves any meaningful purpose. Further, Complainants mistake their insular business objectives as a public interest consideration. To the contrary, it is clear that the term "public interest" as used in the Public Service Commission Act and in the Commission's rules addresses the interests of the public at large, and not those of a particular industry or interest group. *See*, *State ex rel. PWSD No. 8 v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo. App. W.D. 1980). As noted in Empire's August 23rd Motion for Summary Determination, the retail

rate cap calculation is an important ratepayer protection - not a market research tool for wind or solar energy companies. Accordingly, Complainants have not shown that summary determination in their favor would be in the public interest.

Conclusion

Complainants have failed to demonstrate in their Motion that there is no dispute as to any material fact, that they are entitled to relief as a matter of law or that granting summary determination in favor of the Complainants would serve the public interest. As such, their Motion for Summary Determination must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic transmission to the following counsel of record on this 6th day of September, 2013.

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