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

STAFF'S INITIAL BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Initial Brief,* states herein as follows:

Introduction

The Empire District Electric Company filed its *Application* on October 31, 2017, requesting approval of its Customer Savings Plan ("CSP"), in which Empire planned to develop up to 800 MW of wind generation using federal tax incentives in conjunction with a tax equity partner, and retire its Asbury coal-fired unit prior to April 2019.[1] In its *Application,* Empire sought "regulatory validation of the Customer Savings Plan given the substantial expenditures involved and in light of the impact on the communities it serves, its customers, and its employees."[2] In a word, Empire seeks pre-approval of the CSP.

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[1] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (***Application of the Empire District Electric Company for Approval of its Customer Savings Plan and Application for Variance, and Motion for Waiver,*** filed October 31, 2017).

[2] *Id.* at p. 1. Page 2 of the *Application* spells out 5 specific items Empire asked the Commission to establish:

> (a) authorization to record its investment in, and the costs to operate, the Wind Projects as described in Empire Witness Mooney's Direct Testimony, including a finding that Empire's investment related to the Customer Savings Plan should not be excluded from Empire's rate base on the ground that that the decision to proceed with the Plan was not prudent; (b) authorization to create a regulatory asset for the undepreciated balance of the Asbury facility, as described in Empire Witness Sager's Direct Testimony, so that it may be considered for rate base treatment in subsequent rate cases; (c) approval of depreciation rates as described in Empire Witness Watson's testimony, so that depreciation can begin as soon as the assets are placed in service; (d) approval of the arrangements between Empire and affiliates necessary to implement the Customer Savings Plan, to the extent necessary; and, (e) issuance of an order that is effective by

The Parties filed three rounds of testimony based on this application before a non-unanimous stipulated agreement (*"Stipulation"*) was reached on April 24, 2018.[3] Five parties were able to reach resolution on all the issues to the case in a way that reasonably addressed the interests of the utility, consumer groups, and renewable energy advocates, and addresses issues related to Missouri economic development. The *Stipulation* was designed to address the concerns raised by all parties to the case, including those that oppose the *Stipulation*. Generally, the *Stipulation* provided for building wind projects, but lowering the amount of new wind resources from the original 800 MW to up to 600 MW, including a specific minimum build commitment for Missouri. It also provided for keeping Asbury open and added some terms related to the federal *Tax Cuts and Jobs Act of 2017* (*"TCJA"*), including a reduction in Empire's electricity rates effective October 1, 2018.

The Office of the Public Counsel ("OPC") objected to the *Stipulation* on April 26, 2018;[4] Joplin objected on May 2, 2018.[5] Pursuant to Commission Rule 4 CSR 240-2.115(2)(D), "A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing." The *Addendum* to the *Stipulation*

June 30, 2018, so that Empire can take advantage of a limited window of opportunity to bring these savings to customers.

[3] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (***Non-Unanimous Stipulation and Agreement,*** filed April 24, 2018) ("*Stipulation"*).

[4] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (***The Office of the Public Counsel's Objection to the Non-Unanimous Stipulation and Agreement Filed April 24, 2018,*** filed April 26, 2018).

[5] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (***The City Joplin's Objection to the Nonunanimous Stipulation and Agreement,*** filed May 2, 2018).

filed on May 7, 2018, while providing clarification, did not serve to convert the *Stipulation* into a unanimous stipulation and agreement.[6]

With that in mind, Staff urges the Commission to resolve all contested issues as provided in the *Stipulation.* This is the joint position of the signatory parties, including Empire, Staff, Missouri Energy Consumers Group ("MECG"), Renew Missouri, and the Missouri Division of Energy ("MoDOE").

--Kevin A. Thompson.

Argument

1. Does the Commission have authority to grant Empire's requests?

A. (1) Authorization to record its investment in, and the costs to operate, the Wind Projects as described in Empire Witness Mooney's Direct Testimony, (2) including a finding that Empire's investment related to the Customer Savings Plan ("CSP") should not be excluded from Empire's rate base on the ground that the decision to proceed with the Plan was not prudent;

B. Authorization to create a regulatory asset for the undepreciated balance of the Asbury facility, as described in Empire Witness Sager's Direct Testimony, so that it may be considered for rate base treatment in subsequent rate cases;

C. Approval of depreciation rates as described in Empire Witness Watson's testimony, so that depreciation can begin as soon as the assets are placed in service;

D. Approval of the arrangements between Empire and affiliates necessary to implement the Customer Savings Plan, to the extent necessary;

E. Issuance of an order that is effective by June 30, 2018, so that Empire can take advantage of a limited window of opportunity to bring these savings to customers; and

F. For such other and further relief as may be appropriate.

[6] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (***Addendum to Non-Unanimous Stipulation and Agreement,*** filed May 7, 2018) (*"Addendum"*).

Introduction:

The case before the Commission is complex and dense, presenting fact specific questions involving highly specialized modeling, predictions regarding market behavior, and a unique financing structure, as well as multifaceted issues regarding policy, the Commission's jurisdiction, the Commission's role in overseeing contract-like agreements among parties, among others. Answering these questions in this case and similar cases to come will involve a critical analysis of the Commission's role in regulation and a careful study of case law, but still allow for regulatory flexibility in confronting new and dynamic situations in an industry with rapidly evolving technology and conditions. Through the analysis presented below, in this case the Commission has the authority to find the construction of 600 MWs of wind and the decision not to close Asbury are reasonable, adopt the other provisions of the *Stipulation* as conditions, and grant the requested depreciation rate and the variances from the affiliate transaction rule.

The Commission has the authority to make findings of reasonableness:

Staff, after reviewing past Commission history, believes it is an open question if several past Commission decisions could be described as granting decisional pre-approval. If one is reluctant to go as far as to classify the cases cited below as standing for Commission's authority to grant decisional pre-approval, the less extreme (and controversial) finding of reasonableness is amply supported. Staff would note at the outset that the Commission has made a clear distinction between cases that request an illegal advisory opinion (discussed later) and requests for pre-approval. The Commission, when refusing to issue an advisory opinion, notes that it is prohibited

from issuing advisory opinions, and cites the relevant case law.[7] However, when declining to pre-approve an expense or decision, the Commission states a reluctance to pre-approve, but makes no statements regarding a statutory prohibition or negative case law that prohibited the Commission from doing so. For instance, in a case in which a complainant and intervenor requested the Commission to pre-approve the construction practices of a water utility, the Commission declined to assert such authority, stating:

> 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.[8]

In Staff's review of relevant statutory authority and case law, there is nothing that explicitly prohibits the Commission from making a finding of reasonableness, or the more firm finding of decisional pre-approval. In fact, ***State ex rel. AG Processing Inc. v. Public Serv. Comm'n***[9] if not outright mandating that the Commission make a finding of reasonableness for necessary and essential issues before it, at the very least requires the Commission to evaluate the reasonableness in rendering its decisions. The Commission, in the case before it, failed to address the acquisition premium issue, asserting it was a rate case issue, not an acquisition case issue.[10] The Court found the

[7] Typically ***Akin v. Dir. of Revenue,*** 934 S.W.2d 295, 298 (Mo. banc 1996) or ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of State,*** 392 S.W.3d 24, 38 (Mo. App. 2012), which will be discussed further.

[8] ***Matter of Mason-Cassilly, Inc.,*** 23 Mo. P.S.C. (N.S.) 303 (Nov. 30, 1979).

[9] 120 S.W.3d 732 (Mo. banc 2003).

[10] *Id.*

Commission erred in failing to decide a necessary and essential issue.[11] The Court held the Commission needed to decide the reasonableness of the acquisition premium in deciding whether the proposed acquisition was detrimental to the public, even if rate recovery of the acquisition premium is a rate case issue.[12] The Court stated

> the fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable.[13]

In other words, even if the ultimate evaluation of the prudency of an item will be determined in a subsequent case, the Commission is obliged to determine if the utility's decision (in the instant cases, agreeing to an acquisition premium or building a wind farm) is a reasonable course of action. ***AG Processing*** seems to stand for the proposition that the Commission cannot punt reviewing the reasonableness of issues that impact the public interest to future cases. The case also clearly distinguishes between the determination of reasonableness and ratemaking determinations. This distinction is vitally important, as a determination of reasonableness does not have a bearing on what ultimately is allowed in rate base. Before a project is placed into rate base, an overall prudency determination must be made that evaluates costs, management decisions in construction and operations, technology choices, among other items. Only after this evaluation in a ratemaking case will any costs for a project, regardless of a pre-determination of reasonableness, be included in rate base.

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[11] *Id.*

[12] *Id.*

[13] *Id.*

Prior Commission decisions have also made findings regarding the reasonableness of decisions made by utilities, while leaving costs and other prudency-related matters to subsequent cases. The most closely analogous case, outside of the regulatory plans, discussed later, is a 1997 Missouri American Water Company ("MAWC") application for a certificate for convenience and necessity ("CCN") to construct a well field and transmission pipeline, as well as for approval of financing.[14] In its application, MAWC requested pre-approval of a proposed treatment facility, to which the transmission pipeline would attach.[15]

The Commission was hesitant to explicitly pre-approve the treatment facility, stating, "The Commission finds that pre-approval of the actual costs incurred and the management of construction of the proposed project would upset this balance."[16] Instead, the Commission made a finding of reasonableness, stating "However, based on the extensive evidence presented, the Commission finds that the proposed project, consisting of the facilities for a new groundwater source of supply and treatment at a remote site, is a reasonable alternative."[17] This is the finding the signatories request in the present case. The signatories simply would like a similar report and order that finds the decision to construct 600 MWs of wind and to keep Asbury open is reasonable.

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[14] ***In the Matter of the Application of Missouri American Water Company for a Certificate of Convenience and Necessity to Lease, Operate, Control, Manage and Maintain a New Source of Supply in Andrew County, Missouri*****,** Case No. WA-97-46, consolidated with ***In the Matter of the Application of Missouri American Water Company for Authority to Enter into and Perform in Accordance with the Terms of a Facility Lease Agreement for the Purpose of Financing the Construction and Operation of a Well Field, a Treatment Facility and Associated Transmission Water Pipelines in its St. Joseph, Missouri Service Area, to Mortgage the Leasehold Property and to Enter into and Perform in Accordance with Related Agreements*****,** Case No. WF-97-241 (***Report and Order,*** issued October 9, 1997) page 5.

[15] *Id.*

[16] *Id.* at page 10.

[17] *Id.* at pages 10-11.

Much like the MAWC case, the signatories are not requesting pre-approval of costs or the management of the project. The *Stipulation* explicitly states that "this Stipulation does not preclude the Commission and the Signatories the from reviewing the reasonableness of the costs of the Wind Projects in a general rate proceeding following the date when the Wind Projects are fully operational and used for service."[18] The *Report and Order* in the MAWC case shows the Commission has the ability to make findings of reasonableness and is a great model for the types of findings the signatories would like made in the current case.

The Commission's *Report and Order* regarding the Missouri Energy Efficiency Investment Act ("MEEIA") Opt-Outs[19] is another case where the Commission arguably pre-approved a utility request. The parties to the case requested the Commission to approve a settlement agreement that resolved the case.[20] The settlement provisions included:

- Midwest Energy Consumers Group ("MECG") dismissing its action in Case No. WD76164 at the Court of Appeals;
- Tariff sheets, which at the time of the settlement, Kansas City Power and Light Company ("KCPL") had not yet filed in EFIS for approval by the Commission; and
- The Commission's issuance of an AAO.[21]

The Commission stated it could not make a decision on the merits for several reasons.[22] First, the Commission stated actions before the Court of Appeals are

[18] *Stipulation*, page 5, para. 14(e).

[19] ***In the Matter of Kansas City Power & Light Company's Practices Regarding Customer Opt-Out of Demand-Side Mgmt. Programs & Related Issues,*** EO-2013-0359, 2013 WL 3477513, at *1–5 (June 26, 2013).

[20] *Id.*

[21] *Id.*

outside the Commission's subject matter jurisdiction, so the Commission cannot order dismissals.[23] Next and most relevant, the Commission stated "no tariff sheet as described in the settlement has yet been filed, so a decision on its merits would constitute an advisory opinion."[24] Finally, the Commission stated the issuance of the AAO would be unsupported by evidence or stipulated facts.[25]

However, the Commission did not end its analysis there. The *Report and Order* went on to state, "Nevertheless, a Commission's determination on the settlement is apt because the Commission is not merely a tribunal."[26] The Commission went on to find that the public interest weighed heavily in favor of the Commission reaching a determination on the settlement.[27] The Commission also stated, "And, unlike a private party or State agency, Staff has no authority of its own to settle an action, so Commission approval of Staff's participation in the settlement in this action is necessary."[28] The Commission approved the disposition by settlement, concluding it was in the public interest.[29] The Commission also stated in its orders, "the terms of the *Non-Unanimous Stipulation and Agreement* are memorialized, by incorporating them by reference into this order, as if fully set forth."[30]

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

In a follow up case opened due to the signatories' dissatisfaction with a consent order, the Commission approved the same non-unanimous stipulation and agreement, overriding the consent order.[31] The only change was an affidavit laying out the reasons for an AAO.[32] KCPL still had not filed tariffs for Commission approval, and the *Report and Order* makes no clarification that the approval of the tariff would no longer be considered an advisory opinion.[33]

Even a review of the cases cited during openings by counsel for the Office of Public Counsel ("OPC") lends support for the Commission's authority to make a finding of reasonableness in regards to the decision to build the wind projects. For instance, in case EO-92-285, which concerns KCPL's compliance plans with Clean Air Act Amendments, the Commission declined to pre-approve KCPL's compliance plan. However, the Commission stated, "At the early stages of the CAAA compliance process, the Commission would be willing to provide guidance and general policy considerations."[34] Again, this is very akin to what Signatories are requesting in the current case.[35] Similarly in GT-2003-0032, Staff and OPC raised concerns about what they considered to be pre-approval of *costs* due to tariff language stating, "[P]rovided further that the Company shall not be required to absorb the cost of any pipeline capacity formerly reserved to satisfy the requirements of the [eligible school entities]

[31] ***In The Matter of Kansas City Power & Light Company's Practices Regarding Customer Opt-Out of Demand-Side Programs and Related Issues*****,** File No. EO-2014-0029 (***Report and Order,*** issued October 3, 2013).

[32] *Id.,* at pages 2-3.

[33] *Id.*

[34] ***Re Kansas City Power & Light Co.,*** 144 P.U.R.4th 416 (Aug. 26, 1992).

[35] "We would like a fact finding that directionally the company is moving the right direction." Tr. Vol. 3, page 24, lines 16-18, "But the other one is, we ask for a finding that the direction we're going is reasonable." Tr. Vol. 3, page 106, lines 10-12.

prior to the onset of the program."[36] The Commission went on to state agreement that approving a particular ratemaking treatment before considering all relevant factors is inadvisable.[37] The *Report and Order* went on to state:

> The Commission's action here is very different from pre-approving the **costs** of a utility-initiated transaction, like construction of utility plant, or a merger or acquisition. In this case, the Commission is charged with ensuring the implementation of a short-term experiment mandated by the legislature. While it is not the norm for the Commission to establish in advance the general ratemaking treatment to be afforded a particular event, it is far from unprecedented, and it is quite appropriate here. But the Commission is not doing so here, and so finds Staff's and Public Counsel's concern with the disputed tariff language to be misplaced. [emphasis added][38]

The Commission then approved the tariffs. In referencing this case, OPC again conflates decisions declining to pre-approve of costs with cases that acknowledge the reasonableness, or approve of, an underlying decision.

The Commission made findings of reasonableness in the Regulatory Plans:

The Empire and KCPL regulatory plans are by far the most analogous to the requests being made in this case. Staff witness Mark Oligschlaeger noted the similarities during the hearing.[39] Mr. Oligschlaeger summarizes the case at a very high level as

> Well, what Empire and, actually, KCP&L had a companion case, what these companies were seeking, I guess, was some sort of road map to proceed with construction of a -- what was going to be a very expensive generating station. And, ultimately, the parties were able to agree, or to stipulate, in my recollection, that the decisional prudence of entering into

[36] ***In Re Laclede Gas Co.,*** GT-2003-0032, 2003 WL 21958182 (Aug. 14, 2003).

[37] *Id.*

[38] *Id.*

[39] **"Q. Can you think of another case where Empire filed the stipulation with other parties governing a situation involving the future participation in the generation unit to be built?** A. I think that generally describes Empire's application for what was known as a regulatory plan in relation to its involvement with the IATAN 2 generating unit." Tr. Vol. 5, page 655, lines 10-17.

the IATAN 2 generating unit would not be challenged by the parties in future rate cases.[40]

Mr. Oligschlaeger confirms that what the Signatories in this case are requesting is similar to what the Commission found and ordered as part of the regulatory plans.[41] Furthermore, Empire's *Revised Statement of Position,* filed on May 7, 2018, confirms that Empire is essentially requesting a regulatory plan.[42]

There were two cases from which what has been referred to as "regulatory plans" were the end result. Empire was granted, as the result of a stipulation that OPC was a party to, authority to acquire generation from the proposed Iatan 2 station.[43] The stipulation contained strikingly similar language to the language contained in the *Stipulation* at issue here. The major provision was the signatories agreed the Commission should not exclude the Iatan Unit 1 and Asbury environmental upgrade investments from rate base on the ground that the projects were not necessary or timely or that Empire should have used alternative technologies.[44] The Empire regulatory plan was approved without much fanfare. However, the *Stipulation and Agreement* that

[40] Tr. Vol. 5, page 655 line 21- page 656, line 6.

[41] Tr. Vol. 5, page 665, lines 1-3.

[42] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (***Empire's Revised Statement of Position,*** filed May 7, 2018), page 3.

[43] ***In the Matter of The Empire District Electric Company`s Application for Certificate of Public Convenience and Necessity and Approval of an Experimental Regulatory Plan Related to Generation Plant*****,** EO-2005-0263 (***Order Approving Stipulation and Agreement,*** issued August 2, 2005).

[44] ***In the Matter of The Empire District Electric Company`s Application for Certificate of Public Convenience and Necessity and Approval of an Experimental Regulatory Plan Related to Generation Plant*****,** EO-2005-0263 (***Stipulation and Agreement,*** filed July 19, 2005), page 7.

contained the provisions for the KCPL regulatory plan was objected to, and thus lengthy litigation in front of the Commission and Court of Appeals ensued.[45]

KCPL conducted a series of workshops in Case No. EW-2004-0596 to engage stakeholders in developing a plan going forward to meet KCPL's generation needs.[46] On February 18, 2005, the Commission closed Case No. EW–2004–0596.[47] In the *Order Closing Case,* the Commission stated: "If KCPL develops a regulatory plan (with or without consensus) for which it wants Commission approval, it can request that approval in a new case."[48] KCPL requested approval to build an additional 800 MWs of new generation, located near Iatan 1 in Case No. EO-2005-0329.[49] KCPL would then own 500 MWs of the 800, which, according to modeling that is similar to the modeling performed in the instant case, resulted in the lowest Present Value Revenue Requirement ("PVRR").[50] The Commission granted KCPL the Iatan 1 CCN in 1973, however, Iatan 2 construction did not commence until 2005. KCPL made the request for the additional generation in this docket, and did not request an additional CCN for the construction.

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[45] *See* ***In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power and Light Company,*** Case No. EO-2005-0329, and ***State ex rel. Sierra Club v. Missouri Pub. Serv. Comm'n,*** No. WD66893, 2007 WL 581652, at *7 (Mo. App., W.D. Feb. 27, 2007), *dismissed* (July 11, 2007).

[46] ***State ex rel. Sierra Club v. Missouri Pub. Serv. Comm'n,*** No. WD66893, 2007 WL 581652, at *1 (Mo. Ct. App. Feb. 27, 2007), *dismissed* (July 11, 2007).

[47] *Id.*

[48] *Id.*

[49] ***In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power and Light Company,*** Case No. EO-2005-0329 (***Stipulation and Agreement,*** filed March 28, 2005) page 45 ("***Iatan Stipulation***").

[50] ***In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power and Light Company,*** Case No. EO-2005-0329 (Ex. 44, ***Direct Testimony of Susan Nathan,*** filed April 11, 2005) page 9.

The docket was initiated via a *Stipulation and Agreement* ("*Iatan Stipulation*") signed by Staff, OPC, Missouri Department of Natural Resources, Praxair, Missouri Industrial Energy Consumers, Ford Motor Company, Aquila, Inc., d/b/a Aquila Networks, Aquila Networks-MPS and Aquila Networks-L&P, Empire, Missouri Joint Municipal Electric Utility Commission, Jackson County, City of Kansas City, and KCPL. The *Iatan Stipulation* contained provisions very similar to the provisions in the current *Stipulation*. The signatory parties to the *Iatan Stipulation* agreed, "that under the unique circumstances respecting KCPL, the capital investment package described in Paragraph III.B.4 and the customer programs described in Paragraph III.B.5 constitute major elements of a reasonable and adequate resource plan at the time the Signatory Parties entered into this Agreement."[51] The signatory parties' "commitment not to take the position that the investments should be excluded from KCPL's rate base will extend to the filing that includes such investments consistent with the 'Infrastructure' subparagraph of each 'Rate Filing' section immediately below."[52] The "Infrastructure" portion of the *Iatan Stipulation* outlined KCPL's commitments to construct the 800 MW Iatan 2 facility, of which KCPL will own 500 MWs,[53] 100 megawatts of wind generation, transmission and distribution infrastructure required for the new generation,[54] and a Selective Catalytic Reduction ("SCR") facility at LaCygne 1.[55] The Signatories agreed:

> The Signatory Parties agree that they will not take the position that these investments should be excluded from KCPL's rate base on the ground that the projects were not necessary or timely, or that alternative technologies

[51] ***Iatan Stipulation,*** pages 6-7.

[52] *Id.* at page 29.

[53] *Id.* at page 45.

[54] *Id.* at page 31.

[55] *Id.* at page 36.

> or fuels should have been used by KCPL, so long as KCPL proceeds to implement the Resource Plan described herein (or a modified version of the Resource Plan where the modified plan has been approved by the Commission) and KCPL is in compliance with Paragraph III.B.1(o) "Resource Plan Monitoring." Nothing in this Agreement shall be construed to limit any of the Signatory Parties' ability to inquire regarding the prudence of KCPL's expenditures, or to assert that the appropriate amount to include in KCPL's rate base or its cost of service for these investments is a different amount (e.g., due to imprudent project management) than that proposed by KCPL.[56]

This language is analogous to the language contained in the *Stipulation* in this case. The current *Stipulation* states:

> The Signatories agree to not contest, and recommend that the Commission find, that given the information presented in Case No. EO-2018-0092, and considering that EDE 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. The Signatories recognize that this Stipulation does not preclude the Commission and the Signatories from reviewing the reasonableness of the costs of the Wind Projects in a general rate proceeding following the date when the Wind Projects are fully operational and used for service.[57]

Much like the current case, the *Iatan Stipulation* was objected to by the Sierra Club and Concerned Citizens of Platte County. The parties filed testimony, prehearing briefs, position statements, and post hearing briefs. Praxair, Inc. outlined the remedy the Signatories were seeking rather succinctly in its position statement:

> The Stipulation and Agreement is a contract between the signatory parties a condition of which is the approval of the Commission. Conditioned upon the approval of the Commission, the parties' respective commitments are specified in the Stipulation and Agreement. If the Commission does not approve the Stipulation and Agreement, or conditions that approval, the contract between the parties does not ripen and is void. The signatories, collectively, are thus seeking Commission approval of the Stipulation and Agreement.

[56] *Id.*

[57] ***Stipulation*****,** page 5, para. 14(e).

> At base, the Stipulation and Agreement is an agreement between the signatory parties to deal with certain anticipated issues and circumstances in a particular way, or not to assert certain rights or claims that one or more of those parties might otherwise have. The Commission's approval of the Stipulation and Agreement would reflect only that it judges the Stipulation and Agreement to be in the public interest or, at a minimum, not detrimental to the public interest. As noted above, however, the Commission is not a signatory party to the Stipulation and Agreement and is not bound thereby.[58]

The Commission can view what the signatories in the instant case are requesting similarly. Approving the *Stipulation* vests the signatories with a remedy if a signatory's actions fall outside the boundaries of the *Stipulation*. The signatories are not going as far as Praxair does by requesting a judgement that the *Stipulation* is in the public interest, only a finding that the decision to build 600 MWs of wind is reasonable.

Excerpts from OPC's filed position statement in EO-2005-0329, along with the sworn testimony of its witnesses, strongly advocated for the Commission being able to approve the *Iatan Stipulation*, and make findings regarding its reasonableness. For example, OPC witness Russell Trippensee stated in his direct testimony,

> It is Public Counsel's belief that the signatory parties have reached agreement with respect to what has been termed "decisional" prudence regarding the need for the projects and the initial decision to move forward with the planning, design, and construction of the projects based on information and data provided by KCPL.[59]

OPC later outlined its understanding of the law and policy implications regarding the requests made as part of the regulatory plan and the *Iatan Stipulation*, as part of its

[58] ***In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power and Light Company,*** Case No. EO-2005-0329 (***Praxair, Inc. Statement of Positions,*** filed June 2, 2005).

[59] ***In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power and Light Company,*** Case No. EO-2005-0329 (Ex. 39, ***Direct Testimony of Russell W. Trippensee,*** filed June 22, 2005) page 21.

position statement.[60] There are many examples of OPC acknowledging the legality of findings similar to what is requested in the current case, throughout the document:

> **Issue No. 4**
> **What would be the legal and precedential effect on the Commission of the Commission approving the Stipulation and Agreement in this case? Would the Commission's approval constitute a determination by the Commission that . . .**
>
> Commission approval of the Nonunanimous Stipulation and Agreement would entail the Commission finding that it is just and reasonable and not detrimental to the public interest.[61]

A finding of reasonableness is all that is requested in the current case, which OPC now does not believe the Commission has the authority to grant.[62]

> **Issue No. 5**
> **1. Is the Stipulation and Agreement a contract among the Signatory Parties and what is its legal effect before and on the Commission; e.g., does the Commission have the authority to approve a contract among the Signatory Parties which binds the parties to specific regulatory action to which the Commission cannot be bound? *See State ex rel. Capital City Water Company v. Public Serv. Comm'n,* 850 S.W.2d 903, 911 (Mo.App. 1993); *Union Electric Company v. Public Serv. Comm'n*, 136 S.W.3d 146 (Mo.App. 2004); Paragraph III.B.10.g. at pages 53-54 of the Stipulation and Agreement.**
>
> The Nonuanimous Stipulation and Agreement is an agreement among the signatory parties to treat certain issues in a specific way. The Commission has authority to approve the Nonunanimous Stipulation and Agreement based upon the evidence provided at hearing in this proceeding.[63]

Again, OPC has changed its opinion on the Commission's authority to approve the Stipulation, now claiming the Commission does not have the authority to approve

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[60] ***In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power and Light Company,*** Case No. EO-2005-0329, EFIS Item 53, ***Office of the Public Counsel's Position Statements***, filed June 2, 2005).

[61] *Id.,* at page 2.

[62] Tr. Vol. 3, page 138, lines 1-5.

[63] ***Office of the Public Counsel's Position Statements,*** *supra,* page 3.

it.[64]

> **Issue No. 7**
> **1. Do the various provisions of the Stipulation and Agreement, such as those relating to the prudency of various KCPL decisions concerning the construction of Iatan 2, place on ratepayers some of the risk that KCPL has the obligation to assume due to its assumption of the obligation to provide electric service as a public utility; if the Stipulation and Agreement does shift such risk, what would be the effect of the Commission approving such Stipulation And Agreement; and does the Commission have the authority to approve such a Stipulation and Agreement? *See Capital City Water Company v. Public Serv. Comm'n, 850 S.W.2d 903*, 911 (Mo.App. 1993); Sections 393.130 and 393.170 and *State ex rel. Missouri Power & Light Co. v. Public Serv. Comm'n*, 669 S.W.2d 941, 947 (Mo.App. 1984).**
>
> The Agreement regarding the decisional prudence associated with the decision to move forward with the capital projects identified in the Agreement only addresses the risk associated with the initial decision to proceed with the capital project. This agreement results in a reduction of risk versus a shifting of risk and the agreement protects ratepayers from risks associated with decisions regarding the projects subsequent to the initial decision and all efforts to implement any of the decisions.[65]

Here is another mention of decisional prudence, preceded by a statement that the Commission has the authority to approve the stipulation that contains terms relating to decisional prudency.

Again, mirroring the request in the current case, OPC stated:

> **Issue No. 12**
> **In asking the Commission to approve the Stipulation and Agreement, are the Signatory Parties asking that:**
> **(i) the Commission agree that the construction of Iatan 2 and the environmental enhancements, i.e., these proposed additions to infrastructure, are prudent and in the public interest?**
>
> No. The parties are agreeing, subject to certain conditions, they will not assert in future rate proceedings that the initial decision to move forward with the projects were not prudent.

[64] Tr. Vol. 3, page 138, lines 21-24.

[65] ***Office of the Public Counsel's Position Statements,*** *supra,* pages 4-5.

(ii) the Commission find that the entire Stipulation and Agreement is just and reasonable?

Yes.[66]

Finally, at hearing, OPC's witness Mr. Trippensee stated:

> There are -- there are some agreements. As far as -- I don't think the term has been used, but in regard to the projects listed in the Stipulation and Agreement, the parties agree not to oppose those in the rate case in which they have -- are going to be included in rate-base as operational and in service used and useful. We will not oppose those based on the initial decision to commence with those projects.[67]
>
> **Q. Is there an agreement as to prudency of any of the actions on the part of the company in this agreement?**
>
> A. Only to the date -- up until the date of the Stipulation and Agreement. Basically, what some people have referred to as the initial decisional prudence. After that point in time, if the date -- if there's something that has occurred since this document was signed that the parties aren't aware of, that's subject to review.[68]
>
> And, again, therefore, it was best whatever the outcome, to have a firm review of this -- firm outcome based on a review of the Commission to move forward.[69]

So, at the time of the KCPL regulatory plan, OPC believed decisional prudence could be reviewed and affirmed by the Commission, was willing to sign on to an agreement limiting its ability to challenge KCPL's decision to build generation, and was sympathetic to KCPL's desire to have regulatory guidance before embarking down a path that would expend over a billion dollars, especially if at the outset the Commission's guidance is to not begin the project. OPC also supported the *Iatan Stipulation,* and the terms included therein, as recently as 2015, where OPC,

[66] *Id.,* at page 7.

[67] ***In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power and Light Company,*** Case No. EO-2005-0329, Tr. Vol. 7, page 754, lines 11-18.

[68] *Id*. at page 755, lines 11-19.

[69] *Id.* at page 754, lines 5-7.

along with other signatories, tried to prohibit KCPL from seeking to utilize a fuel adjustment clause, based on its interpretation of language contained in the *Iatan Stipulation*.[70]

Staff understands that parties are not bound by prior positions taken. Differing fact patterns may lead to different outcomes. What one believes is in the public interest at one point may not be the same in the future. However, while facts change, the application of the law should not. Staff is not aware, nor have opposing parties noted, any changes to the Commission's statutory authority between the regulatory plans and now. OPC is free to argue that the facts and policy surrounding the decisions sought in this case should lead to different outcome than the approval OPC supported in the regulatory plans, however, OPC cannot in good faith argue the Commission's statutory authority or the application of the law regarding a finding of reasonableness or decisional pre-approval should differ between the current case and the regulatory plans. OPC may have policy reasons to agree not to challenge the decision to invest in a coal plant over a wind farm, however, the Commission's authority to find those decisions reasonable does not change based on generation type.

Based on the arguments of the signatories, such as the examples provided above, the Commission approved the *Iatan Stipulation*. Sierra Club and the Concerned Citizens of Platte County appealed the decision on the grounds the Commission lacked authority to initiate a contested case by a stipulation and agreement and the Commission lacked authority to approve the *Iatan Stipulation*, create a regulatory plan,

[70] ***In the Matter of Kansas City Power & Light Company's Request for Authority to Implement a General Rate Increase for Electric Service*****,** Case No. ER-2014-0370, (Ex. 309, ***Direct Testimony of Lena Mantle,*** filed April 16, 2015) page 9.

and pre-approve the decision to construct a generating facility.[71] The Western District issued a decision on the case. The Western District noted the agreement included an experimental regulatory plan that was submitted to the Commission "for its consideration and approval."[72] The Court also noted the signatory parties agreed on certain premises, fundamental concepts, and factual conclusions, as set forth in the *Iatan Stipulation*, and recommended that the Commission adopt these agreements and a Regulatory Plan for KCPL.[73] The Court recapped the Commission's decision to

> approve Kansas City Power & Light Company's Experimental Regulatory Plan, which includes construction of coal-fired generating plant to be known as Iatan 2.' The Commission determined the proposed regulatory plan is in the public interest, and should result in lower rates. The Commission also concluded the Stipulation and Agreement contains provisions that facilitates lower rates for customers in the future that would not exist absent the Stipulation and Agreement.[74]

The Court noted

> The Stipulation and Agreement does not limit any signatory party's ability to challenge KCPL when it proposes to recover its costs in future rate cases. However, the signatory parties have agreed not to argue that the proposed investments were not necessary or timely, or that alternative technologies or fuels should have been used, so long as KCPL implements the Resource Plan and the continuous monitoring of the Resource Plan in accordance with the Stipulation and Agreement's provisions.[75]
>
> The salient aspects of the Stipulation and Agreement for purposes of this point pertain to the construction of Iatan 2 and future rates. As to the construction of Iatan 2, the Commission stated its approval of the *Stipulation and Agreement* "is similar to the Commission's action in finding

[71] ***In the Matter of a Proposed Experimental Regulatory Plan of Kansas City Power and Light Company,*** Case No. EO-2005-0329, (***Sierra Club and Concerned Citizens of Platte County's Motion for Rehearing,*** filed August 5, 2005).

[72] ***State ex rel. Sierra Club v. Missouri Pub. Serv. Comm'n,*** No. WD66893, 2007 WL 581652, at *2 (Mo. Ct. App. Feb. 27, 2007), *dismissed* (July 11, 2007).

[73] *Id.,* *2.

[74] *Id.,* *6.

[75] *Id.,* *6.

> that a water utility's plan to build a new treatment plant was 'a reasonable alternative' when it granted that utility a certificate of convenience and necessity for that purpose, and when it approved the utility's financial plan to support that construction as 'reasonable and not detrimental to the public interest.'" The Stipulation and Agreement calls for the Commission to continuously monitor the construction process respecting Iatan 2. As to future rates, it was noted by Staff and the Commission that various items pertaining to amortization and a decrease in the equity portion of the allowance for funds used during construction rate applicable to Iatan 2 would together have the effect of a reduction in rates to ratepayers than would otherwise be the case. This is not an assertion that rates will decrease, however. Instead, it is a conclusion that rates charged the consumer will not increase as much as they would absent the Stipulation and Agreement.[76]

The Court related all of the discussion regarding findings of reasonableness and decisional pre-approval and did not conclude the Commission was without authority to issue such orders. The only finding the Court made was in regard to Sierra Club's claim that a stipulation could not initiate a contested case. The Court reversed and remanded the Commission's decision, finding:

> Stipulations are conceptualized in the statutory scheme as a resolution to a contested case—as a method of simplifying the process of litigating a contested case. They are also conceptualized as a method of avoiding a contested case. They are not, however, conceptualized as a tool by which to initiate a contested case.[77]

Along with not issuing findings in regards to the Commission's authority related to findings of decisional prudence or reasonableness, the precedential value of the case is limited due to the Missouri Supreme Court sustaining the applications of the Commission and KCP&L to transfer the case from the Court of Appeals to the Supreme Court on June 26, 2007. By granting transfer, the Supreme Court vacated and set aside the decision of the Western District Court of Appeals reversing the Commission's

[76] *Id.,* *6.

[77] *Id.,* *7.

approval of the KCPL Regulatory Plan. On July 11, 2007, a *Joint Motion to Dismiss and Suggestions in Support* of KCPL, Sierra Club and Concerned Citizens of Platte County and the Commission were filed with the Missouri Supreme Court. On that very same day, the Court dismissed the case. The Commission itself has challenged the value of the Court's decision in that case, stating

> Further, the Western District's holding is not good law because the Missouri Supreme Court accepted transfer of this case on June 26, 2007. Ultimately the Supreme Court case was dismissed on July 11, 2007 pursuant to a joint motion to dismiss filed by appellants and respondents leaving the Western District's decision of questionable legal precedent.[78]

The Commission's authority to approve regulatory plans and issue decisions regarding the reasonableness of the course of action a utility wishes to embark on or other regulatory options to streamline processes was more explicitly upheld in the Western District Court of Appeals decision in ***Union Electric Company v. Public Service Commission.***[79] Two experimental alternative regulatory plans ("EARPs") were established respecting Union Electric Company ("UE") by two different stipulations and agreements executed by UE, the Staff, Public Counsel, and representatives of major industrial customers designed to reduce the need for formal regulatory procedures and further address the process for dealing with excessive earnings and rate issues.[80] Each EARP ran for a period of three years with each year constituting a sharing period. Upon the expiration of the second three year EARP, UE reverted to traditional utility

[78] ***In the Matter of the Consideration of Adoption of the Purpa Section 111(d)(16) Integrated Res. Planning Standard As Required by Section 532 of the Energy Indep. & Sec. Act of 2007. in the Matter of the Consideration of Adoption of the Purpa Section 111(d)(17) Rate Design Modifications to Promote Energy Efficiency Investments Standard As Required by Section 532 of the Energy Indep. & Sec. Act of 2007. in the Matter of the Consideration of Adoption,*** Case No. EO-2009-0247, 2009 WL 454216, at *4 (Feb. 6, 2009).

[79] 136 S.W.3d 146 (Mo. App., W.D. 2004).

[80] *Id*., at 148.

ratemaking regulation. The Staff and Public Counsel could not reach agreement with UE on six Staff and Public Counsel proposed adjustments for the third year of the first EARP. The Commission adopted four of the Staff's proposed adjustments.[81]

UE before the Western District argued that the Commission did not have the authority to make the four adjustments because "the EARP is a contract that binds the Commission relative to its authority to supervise rates."[82] The Court held as follows:

> it must be clarified that the Commission is not a signatory to the EARP and never relinquished its role as arbiter. In its July 21, 1995, Order adopting the stipulation of the parties, the Commission made a finding that "any unresolved issue concerning sharing will be brought to the Commission.". . .[83]
>
> * * *
>
> That the Commission is charged with statutory obligations and duties regarding utility regulation is beyond question. We construe the EARP, not as an abdication of the Commission's responsibility to regulate, but as embodiment of it. It was an attempt to streamline the rate monitoring process and provided a means to resolve issues in lieu of the formal complaint process. The EARP contemplated extensive and continuous monitoring and embraced the recognition that not all items could be anticipated and addressed and that disputes could arise. The Commission's role is grounded in this recognition. That being said, we find that the Commission, in making the disputed adjustments, did not change or violate the terms of the EARP or its role thereunder. The terms of the EARP permitted the Commission's intervention into the areas of dispute between the parties.[84]

The Commission, as evidenced by the case law cited above, has the ability to issue a finding that the decision to construct the wind projects is reasonable. Opponents to the *Stipulation* have cited to cases in which the Commission has not

[81] *Id*., at 149.

[82] 136 S.W.3d. at 152.

[83] *Id.*

[84] *Id*.

agreed to extend findings of decisional pre-approval or make a finding that a decision was reasonable, but opponents cannot cite to any case law or authority that shows the Commission is not authorized to make such findings. The Commission has the power to, on its own accord after weighing the evidence, exert its ability to make findings regarding reasonableness.

The current request does not constitute a request for an illegal advisory opinion.

The Commission is barred from making advisory opinions. The Commission has stated, in regards to a request to make a ruling on jurisdiction over a contemplated merger: "any such ruling on jurisdiction to make a decision on the transaction, when no decision on the transaction is pending, would constitute an advisory opinion. The Commission has no authority to issue an advisory opinion."[85] The Commission further explained its function is to resolve disputes properly presented by real parties in interest with existing adversary positions.[86] The Commission should not issue decisions with "no practical effect and that are only advisory as to future, hypothetical situations."[87] "The petition must present a 'real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory or hypothetical situation."[88]

The Commission stated further that:

> No complaint is pending related to the transaction, nor any application or petition to authorize the transaction, nor any other extant controversy in which the Commission can grant real relief.

[85] ***In the Matter of Great Plains Energy, Inc's Acquisition of Westar Energy, Inc., & Related Matters,*** EM-2016-0324, 2016 WL 3882167, at *2 (July 12, 2016).

[86] *Id.*

[87] *Id.*

[88] *Id.*

The courts' language on this point is direct.

> merely speculating that the PSC would, at some later date, … attempt to assert regulatory authority [and] asking for an advisory opinion regarding whether such an assertion of authority, were it ever to occur, would be proper" is not enough to generate a controversy ripe for adjudication.[15] With no legal determination pending on which GPE's jurisdictional question has any effect on any legally protected interest, a ruling would constitute an advisory opinion, which the law unequivocally bars.[89]

In the current case, the signatory parties are asking for determination of reasonableness, the ability for Empire to record its capital investment and an order for parties to comply with the provisions of the *Stipulation,* such as the market protection provision, which makes enforcement among parties possible. All of the above are real remedies. In this case, real parties with adversary positions have properly presented a live dispute in front of the Commission. At the very least, a live dispute exists regarding the signatories' position that the *Stipulation* is just and reasonable solution to the issues pending before the Commission, opposed by the adverse position presented by opposing parties that the *Stipulation* is not a reasonable solution. Just because a later review of the prudency of costs or items may occur and other future decisions may be made does not make this an advisory opinion any more than a CCN or AAO would be.

The pending request is not a request for the Commission to determine how it would respond based on a hypothetical set of facts, nor would it have no practical effect. The evidence in the record is concrete and revolves around a stipulated set of facts that Empire must follow. The mere fact that the modeling is forward- looking and there is no final cost figure does not render the case a request based on a hypothetical any more than a utility requesting to build any other generation unit in a typical CCN case.

[89] *Id.*

Commission case law states, "A question is justiciable only where the judgment will declare a fixed right and accomplish a useful purpose."[90] Here we are accomplishing a fixed right and a useful purpose. Approving the *Stipulation* and finding the provisions reasonable grants the parties a remedy if a signatory falls outside the boundaries of the agreement. For instance, if Empire's wind revenue requirement exceeds its wind revenues, the Commission can order Empire to apply the customer protection mechanism to offset ratepayer costs. If a signatory challenges the reasonableness of the decision to build the wind projects, the Commission can disregard the challenge as improper. The legally protected interest at stake here would be the ability for signatories to seek relief in front of the Commission. Therefore, this case before the Commission does not constitute a request for an illegal advisory opinion.

--Nicole Mers.

2. Which of Empire's requests, if any, should the Commission grant?

The Commission should grant Empire's modified plan as described in the *Stipulation* and the *Addendum.* To summarize,[91] Empire will acquire up to 600 MW of wind generation, including related transmission assets, using federal tax incentives in conjunction with a tax equity structure.[92] To create the tax equity structure, Empire and a tax equity partner will form a holding company subsidiary of Empire.[93] The wind generation assets will be located within the Southwest Power Pool ("SPP"), with a specified amount to be physically located within Missouri, and will be operated in

[90] ***State, ex rel. Missouri Energy Dev. Ass'n v. Pub. Serv. Comm'n,*** 386 S.W.3d 165 (Mo. App., W.D. 2012).

[91] The modified plan agreed to by Empire and the other signatory parties is set out in full in the *Stipulation* and *Addendum;* not all material terms are recited here.

[92] *Stipulation,* at ¶ 13.

[93] *Id.*

accordance with the SPP Integrated Marketplace rules and in a manner not detrimental to Empire's customers.[94] Empire will purchase wind generation assets that are fully built and ready for service, and it will record its invested capital as utility plant, subject to audit in the next rate case.[95] Empire will depreciate its wind assets at a 3.33% rate beginning when the assets are placed in service.[96] As part of the plan, certain "Customer Protections" will be implemented.[97] These include a Market Price Protection Mechanism;[98] a rate case moratorium until April 1, 2019;[99] certain restrictive parameters applicable to the proposed tax equity financing;[100] continued operation of Empire's Asbury plant, including necessary environmental compliance investments;[101] adoption of any additional concessions or conditions favorable to customers from the parallel cases in Arkansas, Kansas and Oklahoma not already incorporated here;[102] filing revised retail tariffs, to become effective October 1, 2018, reflecting a base rate reduction due to the impact of the *Tax Cuts and Jobs Act of 2017;*[103] and the establishment of a regulatory liability for the difference between the excess Accumulated Deferred Income Tax ("ADIT") balances included in current rates, which

[94] *Id.,* at ¶ 14.a.

[95] *Id.,* at ¶¶ 14, b & d.

[96] *Id.,* at ¶ 14.f.

[97] *Id.,* at ¶ 17.

[98] *Id.,* at ¶ 17.c and Appendix A.

[99] *Id.,* at ¶ 17.d.

[100] *Id.,* at ¶ 18.

[101] *Id.,* at ¶ 19.

[102] *Id.,* at ¶ 23.

[103] *Id.,* at ¶ 24 and Appendix B.

was calculated using the 35% federal corporate income taxes, versus the now lower federal corporate income tax rate of 21%.[104]

The evidence is that the modified plan will result in savings for Empire's customers. Mr. MacMahon testified, "Adding up to 600 MW of wind to Empire's portfolio is expected to generate customer savings because the levelized cost of the wind is significantly lower than the forecast price paid for energy in Southwest Power Pool."[105] Mr. Meyer testified, "[T]he revenue requirement under the settlement is initially higher as the capital investment in wind is placed in rates. Shortly thereafter the revenue requirement from the settlement is less than under the current IRP plan. In fact, by 2030, the revenue requirement from the settlement is $57 million less than under the IRP."[106]

Because the *Stipulation* was objected to, the Commission cannot simply approve it. However, the Commission can resolve the contested issues as described in the *Stipulation* and order the concessions negotiated by the signatory parties as conditions.

The position of the signatory parties is that the Asbury generating unit should remain operable pending future Electric Utility Resource Planning filings pursuant to 4 CSR 240-22 or a future general rate case. Thus, the issues surrounding the quantification and recovery of a regulatory asset resulting from the retirement of Asbury would not then be a concern.

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[104] *Id.,* at ¶ 25.

[105] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (***Affidavit in Support of Non-Unanimous Stipulation and Agreement,*** filed April 24, 2018) p. 3 (*"MacMahon Affidavit"*).

[106] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (***Supporting Affidavit of Greg R. Meyer,*** filed April 24, 2018) p. 8, lines 3-6 (*"Meyer Affidavit"*).

In evaluating Empire's proposed plan, the parties asked Empire to analyze alternate scenarios to determine if the selected Plan 2 (800 MW of new low cost wind) was truly the best option for customers. One of the scenarios that the parties asked Empire to analyze was Plan 10, which is a modification of the Empire's Plan 4, which would allow Empire to invest in 800 MW of new low cost wind and to invest $20 million to bring Asbury into compliance with Environmental Protection Agency ("EPA") regulations. Importantly, Plan 10 also corrects for an error of approximately $65 million of additional annual cost associated with the reciprocating engine generator beginning in 2035 when it is needed to replace Asbury. According to Staff's analysis of Plan 10 and Plan 2, keeping Asbury in service is expected to have value in the Southwest Power Pool and to result in lower annual revenue requirements from 2026 to 2035 when Asbury would be retired.[107] Plan 10 is also expected to result in increased annual off-system sales revenue of from $20 million to $40 million each year from 2020 to 2035 compared to Plan 2 (800 MW of new low cost wind).[108]

During the evidentiary hearing, Empire witness Blake Mertens revealed that, while Plan 10 included $20 million in 2019 to bring Asbury into compliance with EPA regulations, Plan 2 did not include an estimated $24 million[109] to dismantle Asbury when it is retired from service in 2019. Therefore, it is actually expected to cost $4 million less

[107] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (Ex. 100, ***Rebuttal Testimony of Natelle Dietrich,*** page 4, line 22 – page 5, line 4); Ex. 102, ***Rebuttal Testimony of John A. Rogers,*** page 8, line19 – page 9, line 7 and page 14, chart 3.

[108] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (Ex. 102, ***Rebuttal Testimony of John A. Rogers,*** page 14, Chart 3; Ex. 104, ***Staff Affidavit in Support of Non-Unanimous Stipulation and Agreement,*** page 7.

[109] Tr. Vol. 5, page 406, line 20 - page 407, line 1.

in 2019 to keep Asbury in service and to receive the benefits of increased off-system sales revenues and lower annual revenue requirements for customers.

Keeping Asbury in service until 2035 will (1) result in Empire having another 186 MW of reliable and dispatchable generation as a hedge against the uncertain performance of the 600 MW of new wind resources in the Agreement, and (2) avoid creating a stranded asset by retiring Asbury 15 years earlier than its current planned retirement.[110]

Pursuant to Section 393.240.2, and paragraph 14(f) of the *Stipulation,* the Commission should approve the depreciation rate of 3.33% for FERC accounts 341 through 346. As Staff witness Mr. Oligschlaeger explains, Staff supports the proposed depreciation rate and use of plant in service accounts recommended in Empire witness Dane Watson's direct testimony.[111] Mr. Watson researched wind asset lives across the country to develop a life estimate for Empire and recommends a 30 year life based on that research.[112] This resulted in a depreciation rate of 3.33%.[113] No other party proposed alternative depreciation rates. OPC's witness John Robinett disagreed with the rate based upon his belief that a net salvage of zero was incorrect.[114] Despite disagreeing, OPC did not propose an alternative depreciation rate.[115] The depreciation rate is intended to be applied to the wind projects from the point the projects are found

[110] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (Ex. 104, ***Staff Affidavit in Support of Non-Unanimous Stipulation and Agreement,*** filed April 24, 2018) pages 7-8.

[111] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (Ex. 103, ***Staff Affidavit (Confidential),*** filed April 24, 2018)***,*** page 5 ("*Staff Affidavit C"*).

[112] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (Ex. 18, ***Direct Testimony of Dane Watson,*** filed October 31, 2017) page 5, lines 18-20.

[113] *Id.*

[114] Tr. Vol. 7, page 803, line 25 to page 804, line 2.

[115] Tr. Vol. 7, page 804, lines 3-5.

to be in-service until Empire's next general rate proceeding, in which it will receive further review.[116] A review in Empire's next rate case provides adequate customer safeguards, as the wind assets must have a depreciation rate, but the parties can adjust the rate if new evidence shows the rate of 3.33% is incorrect.

--Kevin A. Thompson, and Nicole Mers.

3. What requirements should be applied to the Asbury regulatory asset?

The Commission should impose the conditions set out in the *Stipulation* at ¶ 19, as follows:

> a. The Signatories agree that Asbury shall not be retired at this time. However, the Signatories acknowledge that neither this Stipulation nor an order approving such Stipulation mandate the retirement of Asbury and that its future operations shall be determined at the discretion of management.
>
> b. The Signatories agree to not contest, and recommend that the Commission find, that the decision to comply with the 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 EDE must make decisions prospectively, rather than in reliance on hindsight. In the event that Asbury is subsequently retired prior to the full depreciation of the CCR Investment, the Signatories agree that in future general rate cases they shall not object to EDE's recovery of the return on at its weighted average costs of capital and return of the net CCR Investment.
>
> c. The Signatories agree to not contest, based on an allegation that Asbury should have been retired: (i) the sufficiency of the financial performance of Asbury unless it is not bid into the SPP IM in accordance with applicable SPP IM rules; (ii) the recovery of operations and maintenance expense during the period of Asbury's continued operation; or; (iii) the need for fuel cost recovery. The Signatories recognize that this Stipulation does not preclude the Commission and the Signatories from

[116] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (Ex. 103, ***Staff Affidavit (Confidential),*** filed April 24, 2018***,*** page 5 ("*Staff Affidavit C"*)., page 5.

reviewing the reasonableness of the costs of the items listed in this paragraph in a future general rate proceeding.

d. Asbury's continued operation may be considered in EDE's future Electric Utility Resource Planning filings pursuant to 4 CSR 240-22, or in any future general rate case.

While some of these provisions are not suitable as conditions to be ordered by the Commission, others are. In particular, the restrictions stated at ¶ 19.c(i) should be imposed as a condition.

--Kevin A. Thompson.

4. Should Empire be required to make any additional filings in relation to the CSP? If so, what filings?

Yes, the Commission should require that Empire, as a condition of the finding of reasonableness it seeks, should make the additional filings it agreed to make in the *Stipulation,* as follows:

(a) Notice of the execution of any purchase agreements for certain Wind projects;[117]

(b) Notice of the execution of any future agreement with tax equity partners;[118] and

(c) Copies of orders from the Oklahoma, Kansas and Arkansas commissions approving the Empire acquisition of Wind Projects.[119]

In addition, the signatories have agreed that Empire should file for a Commission certificate of convenience and necessity for the wind projects and, to the extent necessary, Commission approval, under Section 393.190, to encumber its franchise,

[117] *Stipulation,* ¶ 14(c).

[118] *Id*., ¶ 18(d).

[119] *Id.,* ¶ 23.

works or system necessary or useful in the performance of its duties to the public.[120] The signatories have agreed to not to contest these requests, and to make a good faith effort to process the application within 120 days.[121] It does not appear that opposing parties contested this provision of the *Stipulation,* so the requirements contained within it are an appropriate resolution to what additional filings Empire should provide.

--Nicole Mers.

5. Should the Commission impose any requirements in regard to tax equity financing? If so, what requirements?

Yes, the Commission should impose as conditions the provisions set out in the *Stipulation* at ¶ 18:

> a. EDE, through its ownership in Wind Holdco(s), is authorized to contract with tax equity partner(s) for financing of the Wind Projects (a tax equity agreement) so long as consistent with the following parameters:

Description	Sponsor (Empire)	Tax Equity Partner(s)
Approximate initial capital contribution:	** _____ **	** _____ **
Approximate expected return	As determined in future rate cases	** _____ **
Partnership taxable income allocations: --Years 1 to 10 (flip date) --Thereafter	 1% 90%-95%	 99% 5%-10%
PTC allocation, years 1-10	1%	99%
Partnership cash Distributions: --Years 1 to 5 --Years 6 to 10 (flip date) --Thereafter	 100% 75%-50% 90%-95%	 0% 25%-50% 5%-10%
Contingent contributions, Years 1-10	None.	0% to 2% of Wind Project capital cost per year. Based on actual production in excess of a

[120] *Id.,* ¶ 16(a).

[121] *Id.,* at page 6, ¶ a, and page 7, ¶ b.

		threshold.
Purchase option	After the flip date, the Class B Members will have an option to purchase all of the Class A Interests, for 100% of their fair market value	None.
Creditworthiness	N/A	A-/A3 or better.

b. EDE, through its ownership in Wind Holdco(s), shall enter into any such tax equity agreements with a tax equity partner before the Notice to Proceed with Construction is issued for each Wind Project.

c. In association with the tax equity agreement, EDE is further authorized to enter into fixed price hedging agreement(s) with Wind Project Co(s). 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).

d. EDE shall file a notice in Case No. EO-2018-0092 and provide copies of each tax equity agreement to the Signatories within 30 days of execution of those documents.

e. In the event that EDE, through its ownership in Wind Holdco(s), enters into a tax equity agreement that does not meet any of the parameters set forth in the table above, EDE must provide explanation in its Notice identified above as to why any alternate terms are reasonable and in the public interest.

Each of these provisions is appropriate for the Commission to impose as a condition of the finding of reasonableness sought by Empire.

--Kevin A. Thompson.

6. What conditions, if any, should be applied to the Asbury Employees?

Staff urges the Commission to resolve all of the issues presented by this case as proposed in the *Stipulation.* Under that resolution, Asbury will continue in operation. Therefore, no conditions are required for Asbury Employees.

--Kevin A. Thompson.

7. Should the Commission require conditions related to any impacts on local property taxes? If so, what conditions?

Staff urges the Commission to resolve all of the issues presented by this case as proposed in the *Stipulation.* Under that resolution, Asbury will continue in operation and additional electrical plant, in the form of Wind Generating Assets and associated Transmission Assets, will be constructed. The local property tax base will increase. Therefore, no conditions are required for impacts on local property taxes.

--Kevin A. Thompson.

8. Should there be any requirements associated with the Tax Cuts and Jobs Act of 2017? If so, what requirements?

Yes, the Commission should impose as conditions of the finding of reasonableness and the other authorizations and waivers sought herein by Empire, the provisions set out in the *Stipulation* at ¶¶ 24 and 25:

> **24. Tax Reform.** EDE shall file revised retail tariff sheets in an appropriate timeframe that would allow such tariffs to take effect October 1, 2018. The tariffs shall reflect a reduction in base rate revenue as the result of the implementation of the Tax Cuts and Jobs Act of 2017. The reduction in the annual revenue requirement represents the calculated revenue requirement utilized in current base rates utilizing a federal corporate income tax rate of 35%, compared to a recalculated revenue requirement using the reduced federal corporate income tax rate of 21%. The attached Appendix B displays the annual reduction, along with the revised annual revenue requirement as well as the allocation of the reduced revenue requirement to the individual rate classes.
>
> **25. Excess ADIT.** EDE shall establish a regulatory liability to account for the tax savings associated with excess Accumulated Deferred Income Taxes ("ADIT").
>
> a. EDE will record a regulatory liability for the difference between the excess ADIT balances included in current rates, which was calculated using the 35% federal corporate income taxes, versus the now lower federal corporate income tax rate of 21%.

b. EDE is in the early stages of evaluating the cost and ability to use the Average Rate Assumption Method ("ARAM") as a method for computing and normalizing excess ADIT. If EDE determines that it is unable to use the ARAM, EDE shall notify the Signatories within thirty (30) days of such determination. EDE shall provide testimony and support in its next general rate case of its proposed methodology in dealing with the balances.

c. The calculation of the Regulatory Liability of excess ADIT will begin as of January 1, 2018.

d. The Signatories intend to appropriately reflect excess ADIT in future customer rates using a methodology consistent with the tax normalization requirements specified by IRS normalization principles. The Signatories agree that, in the event the IRS asserts that the terms of this Stipulation create a violation of normalization requirements, this Stipulation shall be amended to cure and prevent any normalization violation.

These provisions constitute a fair, just and reasonable resolution of the issues raised by the *Tax Cuts and Jobs Act of 2017* (*"TCJA 2017"*). Empire will be permitted to retain a portion of the revenue benefit of the Act and ratepayers will get prompt relief without the necessity of prolonged, expensive and uncertain litigation.

--Kevin A. Thompson.

9. Should there be any requirements associated with potential impacts of the Wind Projects on wildlife? If so, what requirements?

No, the Commission should not order any conditions with respect to the potential impact of the Wind Projects on wildlife. The *Public Service Commission Law* does not extend to wildlife and the Commission has no expertise relating to wildlife. Appropriate departments and agencies exist within the governments of the United States, Missouri and neighboring states that have subject matter jurisdiction over wildlife. Those departments and agencies are authorized by rule to impose whatever conditions the public interest may suggest.

10. Should the Commission grant waivers of its affiliate transaction rules for the affiliate agreements associated with the CSP?

Pursuant to 4 CSR 240-20.015, the Commission should approve the variances outlined in the *Stipulation.*[122] The signatory parties recommend that Empire be granted a variance from 4 CSR 240-20.015(2)(A) and 4 CSR 240-20.015(3) to allow Empire to partake in the Asset Management Agreement, Balance of Plant Operations and Maintenance Agreement, and Energy Services Agreement, as described in the *Stipulation.*[123] The signatory parties further recommend that Empire be granted a variance from 4 CSR 240-20.015(2)(A) and 4 CSR 240-20.015(3) to the extent the fixed price hedging agreement[124] with the Wind Project Co(s) requires one. Staff recommends the variances granted be limited to those contained in the *Stipulation.*

OPC objects to the variances being approved due to its belief good cause has not been shown.[125] However, Staff notes that good cause exists in this case because the variances are necessary for Empire to structure the tax equity partnership that allows for Empire's modified Customer Savings Plan to occur, which is estimated to save customers $295 million dollars over 30 years.[126] Significant savings to customers justifies a limited variance from the affiliate transaction rules. Additionally, if the issues are resolved as proposed in the *Stipulation* and the conditions proposed therein are approved and imposed, Empire's customers will be further safeguarded by the signatory

[122] *Stipulation,* ¶ 22.

[123] *Id.,* at pp. 13-14.

[124] As described in paragraph 18(c) on page 11 of the Non-Unanimous Stipulation and Agreement.

[125] ***In the Matter of the Application of The Empire District Electric Company,*** Case No. EO-2018-0092 (Ex. 208, ***Affidavit of Lena M. Mantle in opposition to non-unanimous stipulation and agreement,*** page 10, ¶ 43).

[126] *MacMahon Affidavit C*, page 4, figure 1.

parties' ability to audit and inspect the books and records of Empire, Liberty Utilities Service Corp., Wind Holdco(s), and Wind Project Co(s) to ensure compliance with affiliate transaction rules and the *Stipulation*.[127] The modest variances requested in the *Stipulation* are reasonable and should be approved, with a Commission determination that the variances are appropriate.

--Nicole Mers.

Chairman Hall's Questions:

The appropriate legal standard to use is no public detriment:

The Commission has stated "Missouri courts apply the standard of 'no public detriment'" when "statutes do not set forth a standard for granting or denying authorization for the transactions."[128] "Under that standard, the Commission grants the application, unless detrimental to the public."[129] The Court has explained under this standard, the applicant does not have to show a benefit, only show that the public would not be harmed. "It is not their province to insist that the public shall be benefited…but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'"[130] The *Stipulation* has exceeded that standard by putting forth a path for customers to experience significant savings over the status quo.[131] The inclusion of the market price protection mechanism alone meets the "not detrimental to

[127] *Stipulation,* ¶ 21.

[128] ***In the Matter of Entergy Arkansas, Inc.'s Notification of Internal Restructuring or Alternative Application for Approval of Restructuring & Related Relief***, EO-2018-0169, 2018 WL 2364616, at *2 (Apr. 12, 2018).

[129] *Id.*

[130] ***State ex rel. City of St. Louis v. Pub. Serv. Comm'n of Missouri***, 73 S.W.2d 393, 400 (Mo. 1934)

[131] Ex. 8C, *MacMahon Affidavit C, p*age 4, figure 1.

the public" standard, as it would create a regulatory liability to offset revenue requirement for up to $35 million if customers suffer a detriment due to wind revenues[132] being insufficient to cover the wind revenue requirement. Under the worst case scenario modeled (low market prices and low wind production capacity), customers could face a $22 million shortfall during the first 10 years.[133] The $35 million regulatory liability under the market price protection mechanism ensures there is no detriment to the public.

Even under the worst case scenario modeled, customers will receive a net benefit of $69 million in savings due to a lower PVRR than what the status quo produces.[134] Under the most probable scenario, or the base model, the net benefit rises to $169 million in savings, and the customers could experience $320 million in savings in a high market price scenario.[135] The *Stipulation* is not detrimental, so it passes muster under the appropriate legal standard, and even if held to the higher standard of in the public interest with a required showing of a net benefit, the *Stipulation* easily meets that legal standard.

--Nicole Mers.

What if the Commission doesn't approve the Stipulation as a whole?

Chairman Hall stated, "I'm interested in briefing on whether or not -- if the Commission does not adopt or approve the entire stipulation, whether it can or should

[132] The value gained from the expiring PPAs no longer needing replacement is also accounted for in offsetting the revenue requirement. Ex. 351, *Meyer Affidavit,* page 4, lines 13-15.

[133] *Id.* at lines 18-21.

[134] Ex. 8C, *MacMahon Affidavit,* page 5, figure 2.

[135] *Id.*

order Empire to abide by any of the provisions in the stipulation such as the rate moratorium and the tax cut provision."[136]

Staff responds that, by filing its *Application* and requesting specific relief from the Commission, Empire has engaged the Commission's authority to make such findings as the evidence supports and to grant such authorizations, subject to such conditions, as the law allows and as the Commission believes will best serve the public interest. The Commission need not grant all that Empire seeks, if indeed it grants any of it at all. Likewise, the Commission is not bound by the agreements of the parties, the more so since those agreements are not unanimous. The Commission can, if the record supports it, condition a grant of any or some or all of the relief Empire seeks upon a reasonable rate case moratorium, for example, or upon a particular resolution of the federal income tax cut issue. Should Empire not like the conditions, it need not go forward. If it believes any are unlawful, or unsupported by the record, Empire may appeal.

--Kevin A. Thompson.

What should the report and order look like?

Chairman Hall stated, "have one concept in mind and I'm interested in the parties' reaction to this concept and that is as follows: A report and order that contains a factual finding that acquisition and operation of the additional 600 megawatts of wind energy is reasonable based upon the record in this case; number two, a factual finding that the financial components of the plan are reasonable based upon the record in this case; a legal determination that it would be appropriate to book those expenses as plant

[136] Tr. 7, p. 906, line 21, through p. 907, line 1.

and service with a 3.33 percent depreciation rate; and fourth, a legal determination that a variance of the affiliate transaction rule is appropriate."[137]

Staff responds that the report and order as proposed by Chairman Hall is what the law requires. For each contested issue, the Commission must make findings of fact and conclusions of law supporting its resolution. The Commission can grant some, all or none of the relief requested.

--Kevin A. Thompson.

Conclusion

On the basis of all the foregoing, Staff prays that the Commission will resolve all contested issues, and impose such conditions, as recommended herein by Staff; and grant such other and further relief as the Commission deems just in the circumstances.

Respectfully submitted,

/s/ Kevin A. Thompson
Kevin A. Thompson
Missouri Bar Number 36288
Chief Staff Counsel

/S/ Nicole Mers
Nicole Mers
Missouri Bar Number 66766
Deputy Chief Staff Counsel

Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
573-751-6514 Voice
573-526-6969 FAX
kevin.thompson@psc.mo.gov

Attorneys for the Staff of the Missouri Public Service Commission

[137] Tr. 7, p. 906, lines 1-14.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission, on this 31st day of May, 2018.

/s/ Kevin A. Thompson