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 POSITION STATEMENT

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), and states its positions regarding the previously filed issue statements.

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

Staff Position: In *State ex rel. AG Processing Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732 (Mo.banc 2003), 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. The Court found the Commission erred in failing to decide a necessary and essential issue. 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. It is Staff's position, therefore, that the Commission has to decide Empire's request to retire Asbury, create a regulatory asset, and build wind farms in File No. EO-2018-0092 similar to the acquisition premium issue in the *AG Processing* case.

There is also the Western District Court of Appeals decision in *Union Electric Co. v. Public Serv. Comm'n*, 136 S.W.3d 146 (Mo.App. W.D. 2004). Two experimental alternative regulatory plans ("EARPs") were established respecting Union Electric Company ("UE") by two different Stipulation 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. *Id*. at 148. 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 ratemaking regulation. The Staff and Public Counsel could not reach agreement with UE on six (6) Staff and Public Counsel proposed adjustments for the third year of the first EARP. The Commission adopted four (4) of the Staff's proposed adjustments. *Id*. at 149.

UE before the Western District argued that the Commission did not have the authority to make the four (4) adjustments that "the EARP is a contract that binds the Commission relative to its authority to supervise rates." 136 S.W.3d. at 152. 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." . . .
>
> 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. [*Id*. at 152.]

Although there are advisory opinion, *stare decisis*, and declaratory judgment judicial decisions that some parties might use to assert that the Commission has no power to address Empire's Application,[1] the Commission seemingly cannot simply cite these cases, adopt those assertions and not deal with the Empire filing on the basis that it has no power to decide this case. There are probably for one or more parties the remnants of the question of if the Commission granted pre-approval previously in the Kansas City Power & Light Company Iatan 2 Generating Plant Construction / Iatan 1 Environmental Investments, Case No. EO-2005-0329, by approving a non-unanimous Stipulation and Agreement ("Regulatory Plan"). The Case No. EO-2005-0329 Regulatory Plan also addressed (1) LaCygne 1 Generating Plant environmental investments, (2) the construction of up to 200 MW of new wind generation, and (3) additional amortizations to maintain KCP&L's financial ratios. Although not an application for a certificate of convenience and necessity case under Section 393.170, belatedly the question arose in Case No. EO-2005-0329 whether KCP&L needed to have filed for a CCN for Iatan 2.

The Signatories to the Case No. EO-2005-0329 Regulatory Plan agreed to pre-approve certain investments so long as KCP&L implemented the Regulatory Plan and the continuous monitoring provisions of the Regulatory Plan, (a) by agreeing not to argue in future cases that the proposed investments should be excluded from KCP&L's rate base on the basis that (1) they were not necessary or timely, or (2) alternative

[1] *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 392 S.W.3d 24, 38 (Mo.App. W.D. 2012)(advisory opinion case); *State ex rel. GTE North v. Public Serv. Comm'n*, 835 S.W.2d 356, 371-72 (Mo.App. W.D. 1992)(*stare decisis* case); *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75-77 (Mo.banc 1982)(declaratory judgment case); *In the Matter of MoGas Pipeline, LLC's Application and Complaint*, File No. GC-2011-0138, p. 8, *Order Regarding Motions To Dismiss,* issued January 26, 2011 (declaratory judgment case citing *State Tax Comm'n*).

technologies or fuels should have been used. Nothing in the pre-approval was to be construed to limit any Signatory's ability to (1) inquire into the prudence of KCP&L's expenditures or (2) assert that as a consequence of imprudence the appropriate amount to include in KCP&L's rate base or cost of service for these investments was a different amount than what KCP&L was proposing.

The Sierra Club and the Concerned Citizens of Platte County appealed the Report and Order of the Commission. The Appellants argued the Commission erred in approving the Stipulation and Agreement comprising the Regulatory Plan in a case commenced by the filing of the Stipulation and Agreement. The Court's Opinion issued on February 27, 2007, stated that stipulation and agreements may resolve a contested case but there is no statutory authority that a stipulation and agreement may initiate a contested case. The Court of Appeals overturned the Commission's authorization of the Regulatory Plan, finding that the Commission lacked jurisdiction, since the stipulation and agreement did not create a contested case. On March 13, 2007, the Commission and KCP&L filed Motions for Rehearing and Applications for Transfer to the Missouri Supreme Court.

KCP&L entered into a Collaborative Agreement with the Appellants resolving the litigation. As part of the Collaborative Agreement the Appellants agreed to seek remand of their appeal and if remand were denied, dismissal of their appeal. Sierra Club and Concerned Citizens of Platte County also agreed that they would not, in any subsequent case, file any opposition to the Commission's approval of the KCPL Regulatory Plan. The Commission on April 5, 2007, filed with the Western District Court of Appeals Notice that it did not oppose the Appellants and KCP&L's Joint Motion to Dismiss and

withdraw the Court's February 27, 2007, Opinion. On May 1, 2007, the Court denied the Motion for Dismissal. The Court of Appeals also on May 1, 2007, Overruled the Commission's and KCP&L's Motions for Rehearing and denied their Motions for Transfer to the Missouri Supreme Court.

However, on June 26, 2007, the Missouri Supreme Court Sustained the Applications of the Commission and KCP&L to Transfer the case from the Court of Appeals to the Supreme Court. By granting transfer, the Supreme Court vacated and set aside the decision of the Western District Court of Appeals reversing the Commission's 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. Due to the Supreme Court vacating the Western District's decision and that the Western District's decision being premised on a lack of statutory authority to allow a stipulation and agreement to initiate a contested case, but silent on the issue of the Commission's authority in granting pre-approvals.

The Staff would also note that in *Re Kansas City Power & Light Co*., 28 Mo.P.S.C.(N.S.) 228, 282, 376-77, Report and Order, Case Nos. EO-85-185 and EO-85-224, 1986 WL 1301283, 75 P.U.R.4th 1 (April 23, 1986), the Commission advised the parties that it would apply res judicata and collateral estoppel to two issues: (1) Wolf Creek overruns disallowed by it in the Report and Order also would be disallowed in subsequent cases, and (2) the matter of the recovery of the repair and replacement power costs of the Hawthorn 5 generating unit forced outage which had been litigated and allowed to be amortized in the prior KCP&L rate case and re-litigated

in the instant case and again allowed to be amortized would be continued to be allowed to be authorized in subsequent KCP&L rate cases. The Commission cited *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966) (*subsequently superseded on other grounds*) and *Anthan v. Professional Air Traffic Controllers Organization*, 672 F.2d 706 (8thCir. 1982) as setting the criteria in administrative proceedings with the *Anthan* court enumerating four criteria:

(1) the issue must be identical to the one in a prior adjudication;

(2) there was a final judgment on the merits;

(3) the estopped party was a party or is in privity with a party to the prior adjudication; and

(4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

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

Staff Position: The Commission should not approve Empire's request as proposed in its application and direct testimony. However, Staff offers alternatives for Commission consideration.[2] One alternative suggests the Commission could approve an alternative plan. In the surrebuttal testimony of Empire Witness McMahon, Empire presents Plan 550.[3] Although Staff was not able to address this proposal in testimony since it was offered in surrebuttal testimony in response to concerns raised in parties' rebuttal testimony, Staff has analyzed Plan 550, is of the opinion that the plan could be approved by the Commission because it offers overall short term (10 years) benefits for

[2] Dietrich Rebuttal Pg. 3.
[3] McMahon Surrebuttal Pg. 11.

customers, requires less capital investment, and requires lower off-system sales revenue.

In its Application and direct testimony, Empire requests the following from the Commission. Staff offers more specific positions on these issues should the Commission determine it is appropriate to approve the initial plan as proposed.

b. *(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;*

Staff Position: The Commission should only provide approval of the accounting treatment of the investment in, and costs to operate, the Wind Projects, and not commit to any specific ratemaking treatment at this time. If the Commission determines in this case that it is prudent for Empire to build the Wind Projects as described in Empire Witness Mooney's Direct Testimony, it should also make a finding that Empire's investment in those Wind Projects should not be excluded from Empire's rate base solely on the ground that the decision to proceed with the Plan was not prudent.[4]

b. (2) *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;*

Staff Position: The Commission should only provide approval of Asbury accounting treatment after its retirement, and not commit to any specific ratemaking treatment of any unrecovered investment at this time. More specifically, any

[4] Dietrich Rebuttal Pg. 4.

order approving retirement of Asbury should: 1) direct Empire to reduce its regulatory asset each month by the full amount of its continued rate recovery of the return of and on Asbury plant investment up to the point new customer rates are ordered for Empire, and 2) state that all ratemaking findings regarding amounts booked to the Asbury regulatory asset are reserved to future general rate proceedings including such findings as the period of time over which any amortization of the regulatory asset to expense is to be reflected in rates, and the rate by which any allowed return on the regulatory asset will be calculated.[5]

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;

Staff Position: Staff takes no position on this issue, but reserves the right to take a position on this issue at a later time, based upon the evidence presented at the evidentiary hearing.

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

Staff Position: Staff recommends that if the Commission were to grant the various elements of Empire's Application, including the granting of a variance upon a proper showing of good cause, that the Commission specifically limit the variance to the three (3) affiliate agreements for which a variance has been requested by Empire.[6]

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;

[5] Oligschlaeger Rebuttal Testimony, p.7 – 8.
[6] Dietrich Rebuttal Testimony, p. 3.

Staff Position: Staff did not take a position on the effective date of an order that the Commission might issue based on the options in response to issue 2a.

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

Staff Position: In this case, the Commission should only provide approval of Asbury accounting treatment after its retirement, and not commit to any specific ratemaking treatment of any unrecovered investment at this time. More specifically, any order approving retirement of Asbury should: 1) direct Empire to reduce its regulatory asset each month by the full amount of its continued rate recovery of the return of and on Asbury plant investment up to the point new customer rates are ordered for Empire, and 2) state that all ratemaking findings regarding amounts booked to the Asbury regulatory asset are reserved to future general rate proceedings including such findings as the period of time over which any amortization of the regulatory asset to expense is to be reflected in rates, and the rate by which any allowed return on the regulatory asset will be calculated.[7]

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

Staff Position: Based on Empire's Application and the Direct Testimony it filed, the Staff took the view that it was not clear that there were any limits to the pre-approval decision that Empire was seeking regarding the retirement of the Asbury plant and the acquisition of up to 800 MW of wind generation. The Staff outlined in rebuttal testimony the decisions that it believed were entailed in the CSP proposal that had not been addressed by Empire in its Application or its witnesses' Direct Testimony that would need to be addressed by the Commission at some time in the future:

[7] Oligschlaeger Rebuttal Testimony, p.7 – 8.

a. Certificates of convenience and necessity (“CCN”) pursuant to Section 393.170 RSMo. for the wind farms in Missouri and outside Missouri (Tartan Criteria standard)

b. Fully operational and used for service status of each wind farm before its costs can be recovered in rates from Missouri retail customers pursuant to Section 393.135 RSMo.

c. Authorization of Empire financings related to the wind projects pursuant to Sections 393.180 and 393.190 RSMo. (not detrimental to the public interest standard)

d. Prudence of costs incurred to build the wind project pursuant to Section 393.150 RSMo.

e. Prudence of the management of the construction of the wind projects pursuant to Section 393.150 RSMo.[8]

Empire in the Surrebuttal Testimony of Mr. Christopher D. Krygier at pages 10-11 committed to the Commission the following:

a. If the Wind Projects are physically located in the state of Missouri, Empire shall file or cause the Wind Projects to file a request for a Certificate of Convenience and Necessity ("CCN") consistent with Commission Rule 4 CSR 240-3.105 before constructing the facilities.

b. If Empire plans to utilize financing (debt or equity) in association with acquisition of the Wind Projects that encumbers its franchise, works or system necessary or useful in the performance of its duties to the public, as described by Section 393.190, RSMo, it shall request such authorization.

c. Empire is not opposed to Staff witness Dietrich's recommendation that the Commission “issue a finding that the Commission has not relinquished its responsibilities as arbiter in disputes regarding issues such as the prudency of cost expenditures, the siting of the wind projects, the management of the construction of the wind projects, and whether the wind project is ‘fully operational and used for service.’”

The basis for the Staff’s position that a Section 393.170 RSMo. CCN needs to be considered even for generation and transmission constructed outside the state of

[8] Dietrich Rebuttal Testimony, p. 3.

Missouri but the output of which will, in part or in entirety, be used by an owning utility to serve its Missouri retail customers and which utility will seek to ratebase its portion of the plant are *Wisconsin Indus. Energy Group, Inc. v. Public Serv. Comm'n*, 819 N.W.2d 240 (Wis. S.Ct. 2012); Sierra Pacific Power Company (Sierra) Receives a Certificate of Public Convenience and Necessity (CPCN), Subject to Conditions, to Construct a 345,000 volt (345 kV) Overhead Electric Transmission Line and Two Related Substations (Project) in Northeastern California, Decision No. 96-01-012 (dated January 10, 1996), Application No. 93-11-018, 64 CPUC2d 442, 1996 WL 37798 (Ca.PUC); SCE and SDG&E Ordered to Obtain Certificate of Public Convenience and Necessity (CPCN) Prior to Beginning Construction of Any Line, Plant, or System Whether in California or Elsewhere, Decision No. 88005 (dated October 18, 1977), Application No. 56050, 82 CPUC 775, 1977 WL 42796 (Ca.PUC); and *Re Empire District Electric Co*., 9 Mo.P.S.C.3d 136, Case Nos. EM-2000-145 and EA-2000-153, *Order Approving Application To Transfer Assets And Order Granting Certificate Of Convenience And Necessity* (2000).

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

Staff Position: Staff takes no position on this issue, but reserves the right to take a position on this issue at a later time, based upon the evidence presented at the evidentiary hearing.

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

Staff Position: Staff takes no position on this issue, but reserves the right to take a position on this issue at a later time, based upon the evidence presented at the evidentiary hearing.

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

Staff Position: Staff takes no position on this issue, but reserves the right to take a position on this issue at a later time, based upon the evidence presented at the evidentiary hearing.

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

Staff Position: No. File No. ER-2018-0228 is the most appropriate means to address rate impacts as a result of the Tax Cuts and Jobs Act of 2017.

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

Staff takes no position on this issue, but reserves the right to take a position on this issue at a later time, based upon the evidence presented at the evidentiary hearing.

10. Should the Commission grant waivers of its Affiliate Transactions Rules for the affiliate agreements associated with the CSP?

Staff Position: Staff recommends that if the Commission were to grant the various elements of Empire's Application, including the granting of a variance upon a proper showing of good cause, that the Commission specifically limit the variance to the three (3) affiliate agreements for which a variance has been requested by Empire.[9]

[9] *Id*.

Empire's employees were transferred to Liberty Utilities Service Corp. after Liberty Utilities acquired Empire in File No. EM-2016-0213.[10] Empire is requesting a variance from the Commission's Electric Affiliate Transactions Rule 4 CSR 240-20.015 for three (3) agreements that Liberty Utilities Service Corp. will have with Empire as a consequence of the CSP; an Asset Management Agreement, a Balance of Plant Operations and Maintenance Agreement, and an Energy Services Agreement, all agreements relating to the proposed new wind generation.[11] Empire appears to be seeking a variance under 4 CSR 2.015(10)(A)(1) which applies if the affiliate transaction has not yet occurred and the variance is being sought before the transaction. In the Code of State Regulations, 4 CSR 240-20.015(10)(A)(1) refers to 4 CSR 240-2.060(11), but the reference should be to 4 CSR 240-2.060(4) which requires a showing of good cause for the granting of a variance.[12]

WHEREFORE, the Staff files this *Staff Position Statement*.

Respectfully submitted,

/s/ Marcella L Forck

Marcella L. Forck
Associate Staff Counsel
Missouri Bar No. 66098
P. O. Box 360
Jefferson City, MO 65102
(573) 751-4140 (Telephone)
(573) 751-9265 (Fax)
Marcella.Forck@psc.mo.gov
Attorney for the Staff of the
Public Service Commission

[10] Oligschlaeger Rebuttal Testimony, p. 9.

[11] Application at page 10, Paragraph 19 and Mertens Direct Testimony, pp. 19-20.

[12] Oligschlaeger Rebuttal Testimony, p. 10.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were mailed, electronically mailed, or hand-delivered to all counsel of record this 4th day of April, 2018.

/s/ Marcella L. Forck