BEFORE THE PUBLIC SERVICE COMMISSION
<u>OF THE STATE OF MISSOURI</u>

In the Matter of the Application of	)	
The Empire District Electric Company for	)	Case No. EO-2018-0092
Approval of Its Customer Savings Plan.	)	

INITIAL POSTHEARING BRIEF

OF

MIDWEST ENERGY CONSUMERS GROUP

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COME NOW the Midwest Energy Consumers' Group ("MECG") by and through the undersigned counsel, pursuant to the Commission's April 20, 2019 *Order Amending Procedural Schedule*, and provides its initial post-hearing brief.

I. INTRODUCTION

In this brief, MECG urges the Commission to approve the April 24, 2018 Non-Unanimous Stipulation. In doing so, MECG urges the Commission to resist any temptation to make modifications to the Stipulation. As an initial matter, the Stipulation contains a provision which indicates that all provisions are interdependent.

> This Stipulation has resulted from extensive negotiations among the parties, and the terms herein are interdependent and non-severable. If the Commission does not approve this Stipulation unconditionally and without modification, or if the Commission approves the Stipulation with modifications or conditions to which a Signatory objects, then this Stipulation shall be void and none of the Signatories shall be bound by any of the agreements or provisions hereof.[1]

Moreover, the Stipulation represents a delicate balancing of interests. Specifically, the Stipulation represents the final product of several weeks of negotiations in which the concerns of the utility, customers, environmental interests, and the state's economic development agency were also considered and satisfied. Given this delicate

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[1] *Non-Unanimous Stipulation and Agreement*, filed April 24, 2018, provision 2.

balance, any decision to modify the Stipulation will likely remove an important consideration of one of the Signatories and upset the entire settlement.

In its opening statement, MECG suggested that, given the delicate balancing of interests, a modification to the Stipulation would be tantamount to opening Pandora's Box.

> I wouldn't -- we will take whatever you say and we will consider it. This isn't a rate case. Be very careful. And I'm not trying to take away your authority. You're the policy makers. But this is one of -- in 25 years, one of the toughest cases I've ever done. ***And if you make a change, it is likely to open Pandora's Box. It took a lot of work to get to this careful settlement***.[2]

Staff shared MECG's assessment of the delicate nature of the settlement provisions:

> **Q. Without getting into the -- the settlement communications, could you just characterize – use an adjective to describe how complicated the settlement communications -- or settlement talks were?**
>
> A. Extremely.
>
> **Q. Yeah. So when I expressed to Commissioner Rupp that this was a complicated settlement and encouraged him not to change things because it opens up Pandora's box, would you share that concern?**
>
> A. Yes.[3]

Given this, MECG would ask that the Commission recognize the broad nature of the interests represented by the Non-Unanimous Stipulation, as well as the thorough nature of the provisions and protections reflected in the Stipulation, and approve it as being in the public interest.

II. STANDARD OF REVIEW

At the beginning of the evidentiary hearing, the Regulatory Law Judge asked the parties to brief the legal standard "the Commission should use in evaluating the plan and

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[2] Tr. 109-110 (emphasis added).

[3] Tr. 615-616.

the settlement plan."[4] As it indicated at that time, MECG believes that the appropriate legal standard is whether the Non-Unanimous Stipulation and Agreement is in the "public interest".[5]

MECG is unaware of any statute or case law that dictates the applicability of the public interest standard. Instead, MECG derives its public interest standard from the Commission's Electric Utility Resource Planning rule.[6] Although this is not technically an integrated resource plan docket, it is somewhat analogous. Specifically, the IRP rules and this docket are both focused on ensuring that a utility's addition of generation is done in a responsible manner that focuses on minimizing the overall cost of service to ratepayers.[7] Given the analogous nature, MECG suggests that the same standard should apply.

At least <u>six</u> times in its IRP rule, the Commission applies the public interest standard.

> ***<u>The commission's policy goal in promulgating this chapter is</u>*** to set minimum standards to govern the scope and objectives of the resource planning process that is required of electric utilities subject to its jurisdiction in order ***<u>to ensure that the public interest is adequately served</u>***. Compliance with these rules shall not be construed to result in commission approval of the utility's resource plans, resource acquisition strategies, or investment decisions.[8]

Still again, the Commission references the public interest standard when discussing the "fundamental objective" of the resource planning process.

> The fundamental objective of the resource planning process at electric utilities shall be to provide the public with energy services that are safe, reliable, and efficient, at just and reasonable rates, in compliance with all

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[4] Tr. 64-65.
[5] Tr. 90.
[6] 4 CSR 240-22.
[7] 4 CSR 240-22.070(3).
[8] 4 CSR 240-22.010(1) (emphasis added).

> legal mandates, and ***in a manner that serves the public interest*** and is consistent with state energy and environmental policies.[9]

The Commission invokes the public interest four other times in its IRP rule: (1) 4 CSR 240-22.070(1)(B); (2) 4 CSR 240-22.070(1)(C); (3) 4 CSR 240-22.070(5)(A)(5); and (4) 4 CSR 240-22.070(5)(B).

The applicability of the public interest standard is also suggested by a previous Empire case. In 2005, the Commission considered a Regulatory Plan stipulation under which Empire sought to add generation in the form of the Iatan 2 generating station. There, the Commission approved the stipulation finding that it was "in the public interest."

> ***Based upon its review, the Commission concludes that the Stipulation and Agreement filed on July 18, 2005 is in the public interest***. The Commission will therefore approve the Agreement and direct that the parties to the Agreement comply with its terms.[10]

Given the Commission's IRP rule as well as the Commission's Order from the 2005 Empire Regulatory Plan, MECG suggests that the "public interest" standard be applied to the Commission's consideration of the Non-Unanimous Stipulation.

III. THE INITIAL APPLICATION

A. THE REQUEST FOR DECISIONAL-PREAPPROVAL

In its application, Empire sought the following Commission authorizations and findings:

(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

---

[9] 4 CSR 240-22.010(2) (emphasis added).

[10] *Order Approving Stipulation and Agreement*, Case No. EO-2005-0263, issued August 2, 2005, at page 7 (emphasis added). The Commission also applied a "public interest" standard to its consideration of the 2005 KCPL Regulatory Plan. There, the Commission found and concluded "that the Proposed Regulatory Plan is in the public interest." *Report and Order*, Case No. EO-2005-0329, issued July 28, 2005, at pages 31 and 42.

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

As MECG noted in its original statement of positions, Empire's request in (a) was legally troublesome.

It is well established that the Commission is a "creature of statute" and its "powers are limited to those conferred by the above statutes."[11] Consistent with its limited authority, a reviewing court demands that the Commission provide specific authority for its actions.[12] In this regard, the Commission may not simply create the desired authority out of the broad general authority conveyed in Sections 386 and 393.[13]

The Commission lacks the statutory authority to make "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." In fact, the Commission's lack of authority to grant pre-approval of a utility's resource plans is reflected throughout its Integrated Resource Plan rule.

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[11] *Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).
[12] *Id.*
[13] *Id.* at 51.

- Compliance with these rules shall not be construed to result in commission approval of the utility's resource plans, resource acquisition strategies, or investment decisions. (4 CSR 240-22.010(1));

- Acknowledgment is an action the commission may take with respect to the officially adopted resource acquisition strategy or any element of the resource acquisition strategy including the preferred resource plan. Acknowledgement means that the commission finds the preferred resource plan, resource acquisition strategy, or the specified element of the resource acquisition strategy to be reasonable at a specific date, typically the date of the filing of the utility's Chapter 22 compliance filing or the date that acknowledgment is given. Acknowledgment may be given in whole, in part, or not at all. ***<u>Acknowledgment shall not be construed to mean or constitute a finding as to the prudence, pre-approval, or prior commission authorization of any specific project or group of projects.</u>*** (4 CSR 240-22.020(1) (emphasis added)).

- This rule specifies the requirements for electric utility filings to demonstrate compliance with the provisions of this chapter. ***<u>The purpose of the compliance review required by this chapter is not commission approval of the substantive findings, determinations, or analyses contained in the filing.</u>*** The purpose of the compliance review required by this chapter is to determine whether the utility's resource acquisition strategy meets the requirements of Chapter 22. (4 CSR 240-22.080 (emphasis added).

- The commission may acknowledge the preferred resource plan or resource acquisition strategy in whole, in part, with exceptions, or not at all. ***<u>Acknowledgment shall not be construed to mean or constitute a finding as to the prudence, pre-approval, or prior commission authorization of any specific project or group of projects</u>***. In proceedings where the reasonableness of resource acquisitions are considered, consistency with an acknowledged preferred resource plan or resource acquisition strategy may be used as supporting evidence but shall not be considered any more or less relevant than any other piece of evidence in the case. Consistency with an acknowledged preferred resource plan or resource acquisition strategy does not create a rebuttable presumption of prudence and shall not be considered to be dispositive of the issue. (4 CSR 240-22.080(17) (emphasis added).

The inability to engage in pre-approval is made even clearer in the Commission's Order of Rulemaking for 4 CSR 240-22.080.

> The Commission does not wish to move down the path toward preapproval of projects as part of the resource planning process. . . . The Commission will adopt modified language that defines acknowledgment

> in a manner that will make it clear that acknowledgment is not preapproval and will not bind a future commission in any future case.[14]

Given this lack of authority, the utilities, in recent years, have sponsored legislation that would grant the specific authority that Empire initially asked the Commission to exercise. In each instance, that legislation failed. For instance, HB2056, introduced in the 2018 legislative session specifically authorized the Commission "to approve decisional pre-approval with a postconstruction [sic] review of construction projects." Still again, HB1 introduced during the 2017 extraordinary session also provided specific authorization for "decisional pre-approval." As can be seen from the definition contained in that bill, decisional pre-approval is exactly what Empire initially sought in this case.

> Decisional pre-approval with a post-construction review of construction projects", a process in which the electrical corporation may request commission pre-approval of a decision to undertake major construction projects, whereby, if pre-approval is granted, the electrical corporation shall remain subject to a post-construction review of the prudence and reasonableness of the incurred costs of the projects prior to inclusion of the costs in customer rates.

In a 1997 Missouri American case, the Commission confronted a similar utility request for decisional pre-approval.

> All parties agree that the Commission need only issue a certificate of convenience and necessity for that portion of the proposed project to be located outside the current MAWC service area. Authority exists supporting the position that the Commission may not legally take any further action regarding the pre-approval of the proposed project. In *State ex rel. Capital City Water Co. v. Public Service Commission,* the Court stated:
>
> > "The Commission's principal interest is to serve and protect ratepayers, and as a result, the Commission cannot commit itself to a position that, because of varying

[14] *Order of Rulemaking*, Case No. EX-2010-0254, issued March 2, 2011.

> conditions and occurrences over time, may require adjustment to protect the ratepayers."

> And in re *Union Electric Company*, the Commission states: "the appropriate time for the Commission to inquire regarding the prudence of a capital improvement project is a rate case in which a utility attempts to recover the associated costs of such a project.[15]

Recognizing that the Commission lacks statutory authority to grant the decisional pre-approval that Empire initially asked the Commission to exercise, the Commission should refrain from granting Empire's initially requested relief in this case.

B. CLOSING ASBURY AND RECOVERY OF REGULATORY ASSET

In addition to the lack of legal authority for the Commission to pre-approve Empire's decision to add wind generation and close Asbury, the initial request to close Asbury was, in and of itself, troublesome. Furthermore, Empire's request to recover the remaining undepreciated Asbury investment, and the method by which it quantified this regulatory asset, was problematic.

1. Decision To Close Asbury

As part of its initial application, Empire sought to retire the Asbury coal fired generation plant.[16] Empire based the decision to close Asbury on the fact that it would be facing certain "environmental compliance obligations" at Asbury.[17] Empire also based its decision on the faulty premise that, simply because it is no longer "as competitive as new, larger coal-fired facilities thus impacting its dispatch profile in the SPP market"[18], Asbury is no longer economical.

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[15] *Report and Order*, Case No. WA-97-46, 1997 Mo.PSC Lexis 179 (1997) (citing to *State ex rel. Capital City Water Co. v. Public Service Commission*, 850 S.W.2d 903 (Mo.App.W.D. 1993); *State ex rel. Crown Coach v. Public Service Commission*, 179 S.W.2d 123, 126 (1944); *State ex rel. Chicago, Rock Island & Pacific Railroad Co.*, 312 S.W.2d 796; *In Re: Union Electric Company*, 27 Mo.PSC (N.S.) 183 (1985).
[16] Exhibit 14, Swain Direct, page 4.
[17] *Id.*
[18] Exhibit 9, Mertens Direct, page 12.

The evidence indicates, however, that a significant portion of the "environmental compliance obligations" would be incurred regardless of whether Asbury was retired. Specifically, Empire suggests that Asbury is facing future investment associated with: (1) compliance with the EPA's coal combustion residuals ("CCR") rule and (2) closure of the Asbury ash ponds.[19] During cross-examination, however, it was revealed that the investment associated with the closure of the Asbury ash ponds, approximately $10 million, "is going to occur whether we retire Asbury or not."[20] Thus, the retirement of Asbury will not prevent all future environmental costs.

While the retirement of Asbury may result in the avoidance of some future costs, the evidence elicited at the hearing indicates that there is a greater level of costs that will be incurred simply because of Asbury's premature retirement. Specifically, while the premature retirement of Asbury may result in the avoidance of approximately $20 million of environmental compliance costs,[21] it will also cause Empire to <u>incur</u> approximately $24 million of dismantlement costs.[22] On sum, therefore, the premature retirement will cause Empire to incur a greater amount of costs than it will avoid.

The more troublesome aspect regarding the proposal to premature retire Asbury, however, is that Asbury continues to be an economic plant. As Empire readily admits, while Asbury may have experienced a decline in the margins it produces from selling energy into the Southwest Power Pool, Asbury nevertheless continues to produce a

[19] *Id.* at pages 14-15. Tr. 308.
[20] Tr. 308.
[21] Tr. 309 and 637.
[22] Tr. 637.

positive margin.[23] Thus, it is unquestioned that Asbury is still an economic asset to customers.

Furthermore, Asbury is also expected to continue to provide positive margins into the future. As Staff witness Rogers points out, the best example of the economic value of Asbury is reflected in a comparison of Plans 2 and 10. Since Plan 2 reflects the economics of adding 800 MWs of wind and retiring Asbury, and Plan 10 reflects the economics of adding 800 MWs of wind and keeping Asbury, any difference is attributable solely to the economics of keeping Asbury operational.[24]

As the following chart indicates, the solid red line reflects annual revenue requirements associated with Plan 2 which reflects the premature retirement of Asbury. In contrast, the solid black line reflects the annual revenue requirements associated with Plan 10 which reflects the continued operation of Asbury. As Mr. Rogers points out,

> And what this tells us is that ***keeping Asbury does have value*** in the marketplace in terms of overall revenue requirement savings beginning in 2020 and extending throughout the planning horizon after that.[25]

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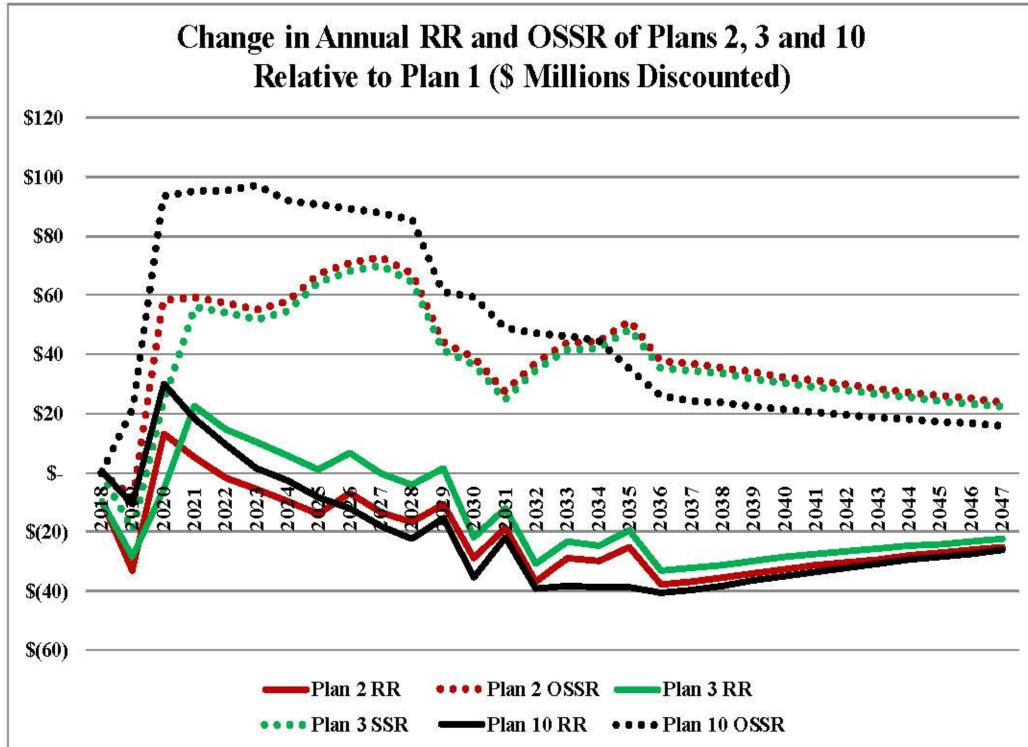
[23] Tr. 402-403.
[24] Tr. 634.
[25] Tr. 635 (emphasis added).



Source: Exhibit 103, Staff Affidavit in Support, page 7.

While this chart indicates that Asbury is providing economic value to ratepayers, the evidence also indicates that this chart may, in fact, underestimate the economic value provided by Asbury. Specifically, this chart quantified the annual revenue requirements based upon current market conditions. As such, it does not contemplate other economic opportunities provided by Asbury. For instance, Asbury may provide additional economic value in the form of allowing Empire to respond to other utility RFPs for capacity or in the event that the Southwest Power Pool implements a capacity market.[26] In addition, the continued operation of Asbury prevents Empire from becoming overly reliant on wind generation and promotes greater fuel diversity.[27] Bottom line, while Asbury has seen diminishing economics, no party questions that Asbury continues to

[26] Tr. 635.
[27] Tr. 307.

provide economic value to its customers. As such, Empire's initial proposal to prematurely retire Asbury was clearly short-sighted.

2. Quantification of Asbury Regulatory Asset

The premature retirement of Asbury not only deprives ratepayers of the economic value provided by that unit, it also raises myriad issues related to its premature retirement. Specifically, Empire has consistently pointed out that it would only retire Asbury early if it is allowed to continue to earn a return on and of the undepreciated investment in that unit.[28] In other words, Empire initially expected ratepayers to pay for the entirety of Asbury, but then sought to deprive them of the value produced by that asset.

The undepreciated investment in Asbury is significant. As the record indicates, Empire invested over $140 million between 2008 and 2014 for the installation of a selective catalytic converter ("SCR") and other environmental retrofits.[29] These environmental improvements were designed to allow Asbury to operate until 2035.[30] Thus, these capital improvements are barely depreciated. Now, less than 3 years later, Empire initially sought to retire Asbury and recover over $204 million from ratepayers for a plant that is no longer providing benefits to ratepayers.[31]

As an initial matter, it is legally questionable whether a utility is entitled to recover unrecovered investment on retired property. In a previous Commission decision, which was subsequently upheld by the Missouri Supreme Court, the Commission distinguished between utility property that was worn out and property that was not worn

[28] Exhibit 14, Sager Direct, page 5; Exhibit 14, Swain Direct, page 15.
[29] Exhibit 350, Meyer Rebuttal, pages 18-19.
[30] *Id.* at page 18.
[31] Exhibit 14, Sager Direct, page 3.

out, but effectively abandoned. As to the latter category, the Commission disallowed any recovery on this property "no longer used in the public service" and noted that it is "one of the hazards of the game."[32] Recognizing that Asbury is not worn out, and still producing economic benefits, its retirement would effectively constitute abandonment by Empire.

Issues regarding the legality of recovering the remaining investment aside, the evidence indicates that Empire's quantification of the Asbury regulatory asset is significantly inflated. In fact, Staff and MECG recommend five different adjustments to Empire's quantification of the Asbury regulatory asset.

First, it is important to recognize that when Asbury would be retired, it is unlikely that this retirement would perfectly coincide with the change in rates that reflect such retirement. As such, Empire will continue to recover depreciation on Asbury until rates are subsequently changed. Therefore, the Asbury regulatory asset should be reduced "by the monthly amount of depreciation expense included in customer rates from Empire's last general rate case (Case No. ER-2016-0023). This reduction would occur until the month when customer rates are changed from either a rate case or complaint case."[33]

Second, a similar adjustment should be made to reflect the ongoing return on Asbury investment being paid through rates.

> [I]n addition to depreciation, the Asbury plant is also providing a return (profit) in current rates. Again, Empire will continue to realize this return until the next rate case regardless of whether Asbury is retired. Any regulatory asset associated with the approval of the CSP, and the retirement of Asbury, should be reduced by the monthly return included in customer rates from Empire's last general rate case.[34]

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[32] *State ex rel. St. Louis v. Public Service Commission*, 47 S.W.2d 102, 117 (Mo. 1932).
[33] Exhibit 350, Meyer Rebuttal, pages 21-22; See also, Exhibit 101, Oligschlaeger Rebuttal, page 8.
[34] Exhibit 350, Meyer Rebuttal, page 22.

Staff agrees, "Empire should be ordered 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."[35]

Third, the Asbury regulatory asset needs to be reduced "for the value of the excess deferred taxes associated with the TCJA [Tax Cut and Jobs Act of 2017]." While utilities are permitted to utilize accelerated depreciation for tax purposes, depreciation for ratemaking purposes reflects a straightline pattern. As Mr. Meyer explains, "[t]he accelerated depreciation causes an income tax deduction for tax purposes that isn't reflected in the regulatory calculation of income taxes. Therefore, ratepayers pay a higher amount of income taxes than the utility actually pays."[36] The difference between the income taxes that the utility actually pays and the amount that it collects from ratepayers is known as deferred taxes.[37] These deferred taxes have been affected by the recent Tax Cuts and Jobs Act which should be reflected in the Asbury regulatory asset.

> The TCJA reduced the federal tax rate from 35% to 21% for Empire. As a result, the taxes previously deferred at an effective federal tax rate of 35% will now be recognized at a 21% federal tax rate. This requires that the incremental tax change from 35% to 21% must be addressed. Since the Asbury plant will be retired, it is possible to use those excess deferred taxes as an offset to the regulatory asset immediately. I would propose that those excess taxes be used to immediately reduce the regulatory asset for amortization and rate base.[38]

Fourth, the Asbury regulatory asset should be minimized by employing an expedited amortization period. Importantly, the longer the amortization period, the longer the period of time in which Empire is allowed to earn a return on the regulatory asset. Therefore, the regulatory asset should be amortized quickly. Such a concept is

[35] Exhibit 101, Oligschlaeger Rebuttal, page 8.
[36] Exhibit 350, Meyer Rebuttal, pages 22-23.
[37] *Id.* at page 23.
[38] *Id.*

also consistent with notions of intergenerational equity. "Empire has requested a 30-year amortization period. . . I believe this period can be reduced as a result of my recommended carrying cost that should be applied to the regulatory asset."[39]

Fifth, in contrast to Empire's request to earn its authorized weighted average cost of capital on the regulatory asset, MECG recommended that Empire only be allowed to earn its long-term cost of debt on the obsolete Asbury asset.

> The latest retrofit to the Asbury plant occurred in December 2014 costing over $112 million. Asbury's net plant balance increased by over $138 million in 2014. Those retrofits were intended to allow the Asbury plant to continue operations to at least 2033. However, just three years later, customers are being asked to allow Asbury to retire nearly 15 years before its anticipated retirement date. Given that ratepayers received such little benefit underlying the investment in Asbury environmental improvements, it seems inequitable to charge ratepayers the full weighted average cost of capital for the Asbury regulatory asset. Applying Empire's long-term interest rates to the regulatory asset seems to be a reasonable balance between the customers and shareholders of Empire.[40]

IV. THE STIPULATION

As mentioned, there were significant problems with Empire's initial application. Specifically, as reflected at pages 4 through 8, Empire initially sought pre-approval for its decision to retire Asbury and add wind generation. Moreover, as reflected at pages 8 through 15, Empire sought to prematurely retire Asbury and earn a return on an inflated level of unrecovered investment in Asbury. On April 24, 2018, Empire, Staff, MECG, Renew Missouri, and the Department of Economic Development – Division of Energy executed a stipulation which addressed the shortcomings in Empire's initial application. Relative to MECG's concerns, the important aspects of that stipulation are:

1. The Signatories agree not to challenge the prudency of Empire adding 600 MWs of wind generation and, given the Commission's inability to make a

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[39] *Id.*
[40] *Id.* at page 24.

finding of decisional prudence, simply ask that the Commission find that the decision to add wind generation is reasonable.

2. The Signatories agree not to challenge the prudency of Empire incurring additional environmental investment in order to keep Asbury operational until some future integrated resource plan and, given the Commission's inability to make a finding of decisional prudence, simply ask that the Commission find that the decision to keep Asbury operational is reasonable.

3. The inclusion of several customer protections including provisions related to: (a) the return of tax savings related to the Tax Cut and Jobs Act; (b) a rate moratorium; (c) a market price protection provision; (d) rate case provisions applicable to cases in which wind generation is included in rates; (e) a most favored nations provision; and (f) the future offering of program for non-residential customers to access renewable energy and the associated renewable energy credits ("RECs").

A. THE ADDITION OF 600 MWs OF WIND GENERATION

Section 14(a) of the Non-Unanimous Stipulation and Agreement provides, "[t]he Signatories agree EDE, through its ownership in Wind Holdco(s), will enter into purchase agreement(s) for a nameplate capacity of up to 600 MW of Wind Projects."[41] As the following sections discuss, there are other stipulation provisions relevant to the addition of Wind Projects that must be considered as part of the Commission's consideration of the public interest including: (1) the use of tax equity financing to positively reduce the present value of future revenue requirements; (2) the need for a Commission finding that the addition of 600 MWs of wind capacity is "reasonable", without a finding of pre-approval or that the addition is "prudent"; (3) the Commission's approval of a depreciation rate for the plant accounts used for the new wind assets; and (4) a Commission waiver of aspects of the Commission's affiliate transaction rule such that the tax equity financing of the wind project may be effectuated.

[41] *Non-Unanimous Stipulation and Agreement*, filed April 24, 2018; *Addendum to Non-Unanimous Stipulation and Agreement*, filed May 7, 2018.

1. Tax Equity Financing Reduces Rates and Risk For Ratepayers

A novel aspect of the Non-Unanimous Stipulation is the utilization of tax equity financing to reduce the amount of investment required by Empire and, as a result, the amount of return paid by ratepayers. The practical effect is that, as compared to Empire's current preferred integrated resource plan, the present value of future revenue requirements is reduced under the terms of the Non-Unanimous Stipulation.

The federal government provides incentives for wind projects through production tax credits ("PTCs") as well as through accelerated tax depreciation deduction.[42] As Empire witness Mooney explains:

> Wind projects generate PTCs for the first ten years of commercial operations in the amount of $24 per MW-hour, which is adjusted annually for inflation, as reported by the Internal Revenue Service ("IRS"). The PTCs represent a dollar for dollar reduction of the tax liability of an owner of a qualifying wind project.[43]

While the production tax credits represent a dollar for dollar credit applied to the owner's tax liability, the accelerated depreciation represents a tax deduction.

> [W]ind projects also qualify for accelerated tax depreciation using the five-year Modified Accelerated Cost Recovery System ("MACRS") schedule. Depreciation is a deductible expense that reduces taxable income, decreasing income tax payable. Depreciating the assets of a wind project over a five year timeframe (compared to the approximately 30 year life of the project) creates income tax losses for the wind project in its first five years. These losses can also be used by its owner(s) to offset other sources of taxable income, realizing significant income tax savings.[44]

Given its current tax liability situation, Empire has a limited "appetite" for the PTCs associated with constructing a wind farm. "Empire does not have the tax appetite to take advantage of federal PTCs in a timely manner. As a result, if Empire were to

[42] Exhibit 11, Mooney Direct, page 5.
[43] *Id.*
[44] *Id.* at page 7.

construct renewable generation that would otherwise qualify for the PTCs, there would be lost economic value to Empire's customers given the inability to use the value of the PTCs."[45]

Despite the fact that the economic value of the PTCs would be minimized if assigned to Empire, the value of the PTCs may, nonetheless, be monetized through the use of tax equity financing.[46] Specifically, other entities, with significant tax liabilities, are willing to provide investment in the wind project (typically 50-60% of the total capital)[47], in order to access the associated PTCs and accelerated depreciation deduction.

> In a tax equity structure, large, tax-paying corporations (typically large banks and insurance companies) become equity partners in a wind project ("Tax Equity Partners"). In exchange for providing a significant portion of the capital investment of the partnership, which is used to develop the wind generation facility, a Tax Equity Partner receives the tax incentives (PTCs and MACRS discussed earlier) generated from the wind project during the first 10 years of the project's life.[48]

The following visual demonstrates the relative investment of Empire and the tax equity partner as well as the benefits accruing to each entity.

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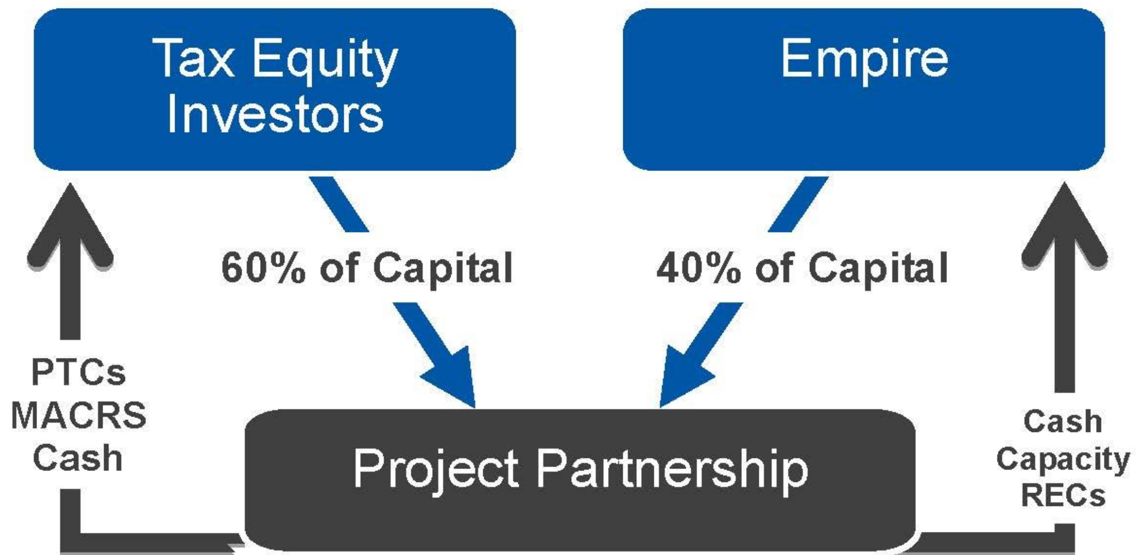
[45] Exhibit 12, Mooney Surrebuttal, page 8.
[46] *Id.* ("The way to bring that value to Empire's customers is to finance the project in conjunction with a tax equity partner, who can take advantage of the PTCs and at the same time reduce the overall cost of the project to Empire's customers.").
[47] Exhibit 11, Mooney Direct, page 7.
[48] *Id.* at page 8.



Source: Exhibit 11, Mooney Direct, page 9.

Importantly, the tax equity partner typically does not retain ownership for the life of the wind project. Instead, once the tax equity partner has recovered both its initial investment and the necessary return, "the ownership structure 'flips' and the majority of the ongoing financial benefits of the wind project transfers over to the non-tax equity partner, with the Tax Equity Partner retaining a nominal residual stake in the partnership (typically 5%). At this point, the non-tax equity investor also has an option to purchase the tax equity partner's interest in the partnership."[49]

The utilization of tax equity financing is beneficial to ratepayers. Under the typical utility investment model, the utility would provide the <u>entirety</u> of the capital investment and would receive all PTCs and accelerated depreciation, whether beneficial to the utility or not. Given this, ratepayers would pay depreciation and return on a larger amount of investment. Under the tax equity structure, however, the PTCs and accelerated

[49] Exhibit 11, Mooney Direct, page 9.

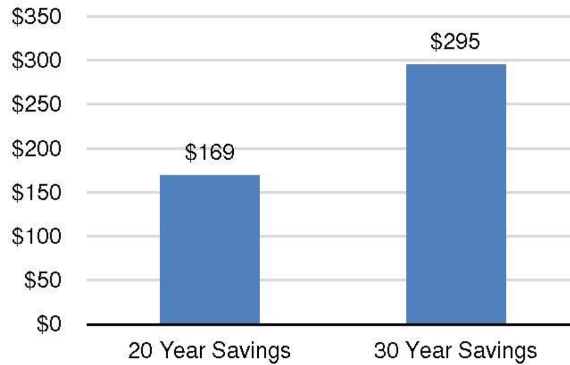
depreciation are monetized in the form of a third-party investment in the wind project.[50] Therefore, while receiving the same amount of generated energy, ratepayers are required to pay depreciation and return on a lower amount of investment.

The benefits to ratepayers from receiving the energy associated with 600 MWs of capacity for a much lower amount of investment is manifest in the capacity plan modeling. Specifically, under the proposal, ratepayers would be receiving energy from 600 MWs of capacity. While that amount of capacity requires approximately $958 million of investment, Empire would only be required to pay $429 million with the tax equity partner assuming the remainder.

Given the effective utilization of tax equity financing, the addition of 600 MWs of wind capacity provides significant benefits as compared to Empire's current preferred 2016 resource plan. Specifically, over the next 20 years, the addition of 600 MWs of wind, with Asbury remaining open, will deliver $169 million of savings as compared to the current preferred resource plan. Over a 30 year period, those savings almost double to $295 million.

[50] As Empire indicates, based on the short-listed bids to the Request for Proposal issued by Empire, the "expected total capital cost to acquired [600 MWs of wind capacity] is $1,587 / kW of $958 million. Tax equity is expected to contributed $529 million, leaving $429 million to be reimbursed through rates by Empire customers." (McMahon Affidavit in Support, Exhibit 8, page 4). Thus, the Tax Equity Partner would be contributing 55.21% of the investment capital and Empire would be contributing 44.97% of the investment capital. (Tr. 212-213).

Figure 1: Stipulation Customer Savings Relative to the 2016 IRP Preferred Plan ($ millions)



Source: McMahon Affidavit in Support, Exhibit 8, page 4.

The benefits to customers are not only realized in the form of nominal savings, but also through reduced risk. As Mr. McMahon points out, "wind in the portfolio mitigates the impact that rising fuel and market prices have on Empire's retail rates."[51] The following chart "shows the 20 year present value revenue requirement for the Stipulation and the 2016 IRP Preferred Plan under three market cases: Base, High Market, and Low Market:"

Figure 2: 20 Year Present Value Revenue Requirement Under Base, High, and Low Market

Source: McMahon Affidavit in Support, Exhibit 8, page 5.

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[51] *Id.* at page 4.

As can be seen, "the High Market and Low Market cases in the Stipulation form a tighter band around the base case than in the 2016 IRP, implying a portfolio that is at lower risk to market forces."[52]

Clearly then, the Stipulation (addition of 600 MWs of wind and keeping Asbury in service) not only results in savings for ratepayers, it also reduces risk associated with exposure to market forces.

2. No Request for Decisional Pre-Approval, Only a Finding that the Addition is Reasonable. Prudency may be Challenged by Other Parties in the Future

As mentioned at pages 4-8, the initial Application was problematic in that it sought "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."[53] In effect, the Application asked the Commission to exercise authority (decision pre-approval) not provided by the General Assembly.

In the stipulation, however, the requested action from the Commission is not decisional pre-approval. While the Signatory Parties have bound themselves regarding the prudency of the actions contained in the Stipulation, they seek something less from the Commission. Instead, recognizing that the Commission must be available to determine issues of prudency that may be raised at some point in the future,[54] the Signatories simply ask the Commission to make a finding that the actions contemplated by the Stipulation are "reasonable."

[52] *Id.* at page 5.
[53] Application, pages 2 and 9.
[54] The Commission has previously found that "the appropriate time for the Commission to inquire regarding the prudence of a capital improvement project is a rate case in which a utility attempts to recover the associated costs of such a project." *In Re: Union Electric Company*, 27 Mo.PSC (N.S.) 183 (1985).

> 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.[55]

The approach taken in this case, to seek a Commission finding that the actions are "reasonable", is consistent with the approach taken by the Commission in a Missouri-American case. There, the Commission was asked, as part of a certificate case, to "make a finding that there is a need for the proposed project and that the alternative selected by MAWC is the most appropriate and cost effective method of addressing this need."[56] As the Commission noted, "this type of finding by a regulatory commission is generally referred to as a finding of prudence or project pre-approval."[57]

After considering the legal and policy limitations on decisional pre-approval, the Commission rejected the request for a finding of pre-approval.

> [T]he Commission will make no finding regarding the prudence of the actual costs incurred and the management of construction of the proposed project. 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***.[58]

In this case, the Signatories ask the Commission to take similar action. Specifically, the Signatories stop short of seeking decisional pre-approval. Instead, the Signatories ask the Commission to find that "the decision to acquire up to 600 MWs of Wind Projects under the terms of this Stipulation is reasonable."[59] Given the economics

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[55] Non-Unanimous Stipulation, filed April 24, 2018, at page 5 (provision 14(e)).
[56] *Report and Order*, Case No. WA-97-46, 1997 Mo.PSC Lexis 179 (1997).
[57] *Id.*
[58] *Id.* (emphasis added).
[59] Non-Unanimous Stipulation, filed April 24, 2018, at page 5 (provision 14(e)).

associated with the availability of tax equity financing, as well as the savings generated by the stipulation plan, a Commission finding of reasonableness is certainly warranted.

It should be noted that MECG's willingness to execute the Stipulation is based entirely on the facts of this case and the unique situation faced by Empire. As MECG noted in its opening statement:

> Unlike Ameren and KCP&L, Empire faces some challenges simply by way of its small size. Risks that may be easily assumed by Ameren and KCP&L and large utilities cannot be so easily assumed by a company the size of Empire. So MECG is more willing to work to help a company the size of Empire to solve these challenges.[60]

The stipulation in this case is unique and MECG does not foresee that this approach will become standard operating procedure for Missouri utilities.

3. Commission Approval of Depreciation Rates

Section 393.240.2 provides that "[t]he commission may, from time to time, ascertain and determine and by order fix the proper and adequate rates of depreciation of the several classes of property of such corporation, person or public utility."

Currently, while Empire has power purchase agreements for wind energy, it does not own any wind assets.[61] As such, it does not have any wind plant accounts and would not have a Commission-approved depreciation rate for wind assets.

As part of the Stipulation, the Signatory Parties ask the Commission to approve a "composite 3.33% depreciation rate for all Wind Project asset accounts beginning when the assets are placed in-service and continuing until such time as depreciation rates may be changed by order of the Commission."

[60] Tr. 93.
[61] Tr. 802-803.

Empire witness Watson provides significant justification for the 3.33% depreciation rate.

> When the Wind Assets are constructed and placed in service, Empire will need an approved depreciation rate for those assets in order to depreciate them on the books of the Company. Because the Wind Assets are not yet in service, there is no history on which to develop historic life estimates. In order to propose a life estimate for these assets, I researched Wind Assets' lives across the nation in order to develop a life estimate for Empire. Based on that research, I recommend a 30 year life for Empire's Wind Assets resulting in a 3.33% depreciation rate.[62]

As Mr. Watson further notes, the development of the 3.33% recommended depreciation rate was based upon his review of "nearly 70 different wind farms."[63] "The average projected life of those nearly 70 wind farms was 26.95 years."[64] As such, Mr. Watson's 30 year life for the Empire wind assets is "conservative."[65]

Under Section 393.240.2, the Commission has legal authority to establish depreciation rates. Recognizing that Empire does not currently have a depreciation rate for wind assets and will need one upon the completion of the Wind Project, the Signatories ask that the Commission order a composite 3.33% depreciation rate to be applied to Accounts 341 through 346.

4. <u>Waiver of Affiliate Transaction Rule Provisions</u>

Commission Rule 4 CSR 240-20.015 contains the Commission's affiliate transaction rule. In general, that rule is "intended to prevent regulated utilities from subsidizing their non-regulated operations."[66] The rule accomplishes this goal by requiring the regulated utility to buy and sell goods and services at the lesser of fair

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[62] Exhibit 18, Watson Direct, page 5.
[63] *Id.* at page 8.
[64] *Id.*
[65] *Id.*
[66] 4 CSR 240-20.015: Purpose Clause.

market price or fully distributed cost.[67] 4 CSR 240-20.015(10) provides that the Commission may grant a variance from the affiliate transaction rule when the variance would be "in the best interests of [the utility's] regulated customers."

In this case, the Signatory Parties ask the Commission to grant a variance from the affiliate transaction rule for the following specific transactions necessary for Empire to own and operate the Wind Projects:

> Asset Management Agreement: Under this agreement, employees of Service Corp. that provide services to Empire will provide all asset management services to the Wind Project Co., including (a) management of all agreements for the Wind Project Co.; (b) management of energy/financial reporting; (c) management of all banking/financing agreements; (d) management of all landowner/local tax/municipal issues; (e) management of all government permits/regulatory issues including NERC/FERC; (f) management of all reporting for lenders/investors; (g) project management services; (h) optimization of performance of the wind farm; (i) obtaining insurance and other professional services necessary for the wind farm, and; (j) state/federal regulatory management/reporting services for the Wind Project Co;
>
> Balance of Plant Operations and Maintenance Agreement: Under this agreement, employees of Service Corp. that provide services to Empire will provide the balance of plant O&M services to the Wind Project Co. including operations and maintenance services for the main substation and collection system and access for road maintenance;
>
> Energy Services Agreement: Under this agreement, employees of Service Corp. that provide services to Empire will provide energy management services to the Wind Project Co. including: (a) acting as the market participant; (b) daily/periodic scheduling services for the wind farm; (c) managing all hedge agreements, and; (d) representing the wind farm in SPP activities; and
>
> Fixed Price Hedging Agreement(s): to the extent necessary to effectuate the Tax Equity Financing provision of the Stipulation and Agreement.[68]

As Empire witness Krygier explains, the affiliate transaction waiver is specific and requested only "to the extent required in order to implement" the Non-Unanimous Stipulation. Since the Non-Unanimous Stipulation and the transactions contemplated

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[67] 4 CSR 240-20.015(2).

[68] See, *Non-Unanimous Stipulation and Agreement*, filed April 24, 2018, at pages 13-14.

therein are in the public interest, it is also in the best interests of the public to grant the requested variance.

B. ASBURY REMAINS IN OPERATION

1. Asbury Currently Provides an Economic Benefit and is Expected to Continue to Provide Economic Benefits

As previously indicated, Empire initially sought to retire Asbury and recover the remaining investment in that unit. Virtually every other party (Staff, Public Counsel, MECG and the Division of Energy) opposed Empire's proposal to prematurely close Asbury.

As reflected on pages 8 to 12, Asbury has provided, continues to provide, and is expected to provide an economic benefit to ratepayers. While Asbury may have seen a decline in the margins it produces by selling energy into the Southwest Power Pool, it nonetheless continues to produce a positive margin.[69]

More importantly, Asbury is expected to continue to provide a positive margin into the indefinite future. As Staff witness Rogers points out, the best example of the economic value of Asbury is reflected in a comparison of Plans 2 and 10. As the following chart indicates, the solid red line reflects annual revenue requirements associated with Plan 2 which reflects the premature retirement of Asbury. In contrast, the solid black line reflects the annual revenue requirements associated with Plan 10 which reflects the continued operation of Asbury. As Mr. Rogers points out,

> And what this tells us is that ***keeping Asbury does have value*** in the marketplace in terms of overall revenue requirement savings beginning in 2020 and extending throughout the planning horizon after that.[70]

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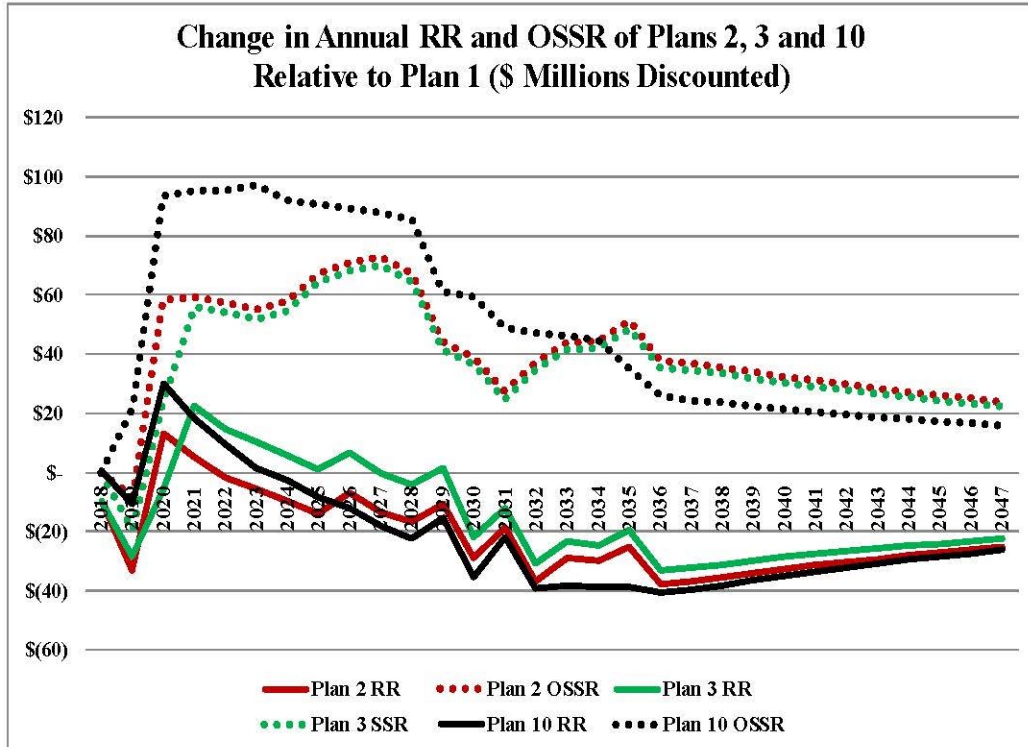
[69] Tr. 402-403.
[70] Tr. 635 (emphasis added).



Source: Exhibit 103, Staff Affidavit in Support, page 7.

Recognizing the economic value provided by Asbury and expected to be provided, the Signatory Parties drafted the Stipulation with the understanding that Asbury would continue to operate.

> The Signatories agree that Asbury should 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. . . . Asbury's continued operation may be considered in EDE future Electric Utility Resource Planning filings pursuant to 4 CSR 240-22 or in any future general rate case.[71]

The Signatories agreed to this provision understanding that the continued operation of Asbury would necessitate certain environmental improvements and agreed not to contest the prudence of Empire incurring those costs.[72] That said, the continued economic

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[71] See, *Non-Unanimous Stipulation and Agreement*, filed April 24, 2018, at pages 11, 12-13.
[72] *Id.* at page 12.

benefit provided by Asbury, as demonstrated in the previous chart, justifies the operation of Asbury.

This provision [the continued operation of Asbury] is a critical component of the Non-Unanimous Stipulation. MECG's support of the settlement as well as its commitment not to challenge the prudency of the actions contained in the Stipulation are expressly conditioned on this provision. As such, MECG urges the Commission not to modify or exclude this provision and MECG would not be willing to modify the settlement to contemplate a Commission decision to actually retire Asbury.

2. Issues Regarding the Quantification and Recovery of the Asbury Regulatory Asset are Avoided

As indicated (pages 8 to 15), Empire initially sought to prematurely retire Asbury and be allowed to recover the remaining investment in that unit. This request raised certain issues regarding the legality of recovering the remaining investment (pages 12-13) as well issues regarding the quantification of the regulatory asset.

In addition to the customer issues, the Missouri Department of Economic Development raised issues in this case regarding local economic development concerns associated with the premature retirement of Asbury. "The relocation of up to 55 employees could have impacts on area communities, since these employees spend part of their earnings in local economies. The employees could also be negatively impacted by having to spend money for relocation, as well as by potential salary decreases."[73]

In addition, Empire pays, as a result of the operation of Asbury, "approximately $2,759,000" in property taxes and "$19,256 in use taxes."[74] "The loss of these tax revenues will affect state and local budget decisions. For example, to the extent that

[73] Exhibit 300, Hyman Rebuttal, page 11.
[74] *Id.* at pages 11-12.

school districts rely on property taxes from the plant, schools near the plant may receive less revenue."[75] For these reasons, the Department of Economic Development had concerns regarding the premature retirement of Asbury.

Recognizing that the Stipulation contemplates the continued operation of Asbury for the indefinite future, issues regarding the recovery of remaining investment, the amount of that recovery, effect on displaced employees and loss of property taxes, are all no longer relevant. To the extent that Asbury is retired as a result of this case, however, all of those issues require a Commission decision. Therefore, the decision to keep Asbury operational is not only economic for ratepayers, it is also administratively expedient for the Commission.

3. No Request for Decisional Pre-Approval, Only a Finding that the Future Environmental Investment is Reasonable. Prudency may be Challenged by Other Parties in the Future

In its application and testimony, Empire initially sought a Commission order finding that the decision to retire Asbury is prudent and making certain decisions regarding the recovery of the unrecovered investment. Like the proposed investment in wind generation, Empire has since stepped back from this request and now simply asks that the Commission find that the decision is reasonable.

> 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

[75] *Id.* at page 12.

> shall not object to EDE's recovery of the return on at [sic] its weighted average costs of capital and return of the net CCR Investment.[76]

Given that the Signatories are only asking that the Commission find that the decision to keep Asbury in service is "reasonable", concerns regarding the legality of a decisional pre-approval finding are avoided. Instead, the Commission is free to determine issues regarding prudency if raised by non-Signatory parties in the future.

C. THE CUSTOMER BENEFITS AND PROTECTIONS

Unlike Empire's initial application, the stipulation provides for a number of customer benefits and protections. These range from provisions designed to benefit current ratepayers (i.e., reduced rates for Tax Cuts and Jobs Act as well as a rate moratorium) as well as future ratepayers (i.e., a market price protection mechanism; rate case provisions; and a most favored nations clause). As will be discussed in the subsequent section, these significant customer benefits and protections help to ensure that the stipulation is in the public interest and should be approved.

1. Tax Savings Related to the Tax Cuts and Jobs Act: On February 16, 2018, the Commission established a generic docket for the quantification and return of tax benefits to customers (AW-2018-0174). Subsequently, the Commission issued a separate docket focused solely on Empire Electric (Case No. ER-2018-0228). In its pleading addressing the Commission show-cause order, Empire alleged that

> In order to effectuate a change (including a reduction) in the Company's rates for every class and category of electric service, there would need to be a rate case or a complaint case. *See* Sections 386.390 and 393.150, RSMo. Although a complaint case alleging that EDE is over-earning may be authorized by statute, the Commission does not have the power to order EDE to file tariffs to reduce rates to reflect the singular effect of the Act. In either a rate case or a complaint case, the Commission would be required to consider all relevant factors when effectuating a rate change based on the effect of tax reform.

[76] See, *Non-Unanimous Stipulation and Agreement*, filed April 24, 2018, at pages 12.

> Missouri law generally requires that utility rates only be adjusted based on the Commission's consideration of "all relevant factors."[77]

Thus, it appeared that it could be difficult or timely for the Commission to return the tax savings to ratepayers.

As part of this settlement, and if approved in total, Empire is willing to return over $17.8 million of tax savings to Empire retail customers effective October 1, 2018 and regardless of whether SB564 is ever signed by the Governor.[78] As MECG witness Meyer noted: "since the agreement provides assurances that the benefits of the corporate tax reduction are passed through to customers, regardless of whether current state legislation is enacted, there are definite customer benefits."[79] Staff concurs. "Staff supports the provisions of this Agreement regarding TCJA impacts as being reasonable, and notes that it results in a rate reduction for Empire's customers at an earlier point in time than might otherwise be feasible if Case No. ER-2018-0228 had continued to follow a separate course."[80]

2. Rate Moratorium: Current customers also see an immediate benefit from the Non-Unanimous Stipulation in the form of a rate moratorium. "EDE agrees that it shall not file tariffs seeking to implement a general rate case prior to April 1, 2019."[81] The implication of this moratorium is to provide current customers with a significant period of rate stability. "Given the typical 11-month rate case timeline in Missouri, rates will not change until approximately March of 2020. Given that Empire's last rate case

[77] *Response to Show Cause Motion and Order*, Case No. ER-2018-0228, filed March 19, 2018, at page 2.
[78] *Non-Unanimous Stipulation and Agreement*, filed April 24, 2018, at page 15 and Appendix B.
[79] Exhibit 351, Meyer Affidavit in Support, page 6.
[80] Exhibit 103, Staff Affidavit in Support, page 9.
[81] See, *Non-Unanimous Stipulation and Agreement*, filed April 24, 2018, at page 9.

was completed in September of 2016, Empire's rates will have remained the same, except for the reduction for corporate taxes, for a period of 3 ½ years."[82]

3. Market Price Protection Mechanism: Throughout this proceeding there were criticisms that Empire did not immediately need capacity. As such, critics contended that Empire should build its wind farms as an Independent Power Producer ("IPP"). Critics postulated that, by making this a regulated venture, Empire was exposing ratepayers to a significant amount of risk.[83]

While MECG does acknowledge that Empire currently has sufficient capacity to meet current peak loads. That said, however, events transpiring in the near future will dramatically change that calculus. Specifically, Empire's purchased power agreements for wind energy and capacity from Elk River and Meridian Way will expire in the next 7 years. Moreover, as was discussed in this case, while Asbury is still economical and providing value, that may change in the near future. Therefore, it is prudent for Empire to begin considering replacement capacity and energy sources. Given the maximization of tax equity financing that is currently possible as a result of high production tax credits, it is important to act today.

In order to protect customers from unnecessary risk, the Signatories modeled the wind revenues assuming a base case scenario consisting of mid-level pricing and wind production of P50. The wind revenues under this base case scenario are then modeled

[82] Exhibit 351, Meyer Affidavit in Support, page 6.
[83] Exhibit 200, Mantle Rebuttal, pages 6-14; Exhibit 201, Mantle Surrebuttal, pages 7-10; Exhibit 206, Market Rebuttal.

against the worst case scenario consisting of low-level pricing and wind production of P95.[84]

> While the modeling shows reduced customer rates for the agreed upon plan relative to Empire's current preferred plan, those savings may disappear if a situation develops in which both the low market price scenario and the low wind production scenario occur simultaneously. In order to protect customers against this possibility, the parties developed a mechanism that I call a market price protection provision. In general, that mechanism compares the revenues derived from selling the wind energy into the SPP Integrated Marketplace to the revenue requirement associated with 600 MW of wind additions agreed to in the stipulation. In addition, the mechanism also allows for recognizing the benefit of the expiration of two wind purchase power agreements ("PPA") that Empire currently pays, but will expire in 2025 and 2028. To the extent that revenues and the benefits from the expiring PPAs exceed the wind revenue requirement, then customers are realizing benefits. To the extent that the revenues and the expiring PPAs fall short of the wind revenue requirement, then customers are suffering a detriment. Under the modeling conducted, if the low market price [low] scenario and the low wind production [P95] scenario occur simultaneously, then customers may lose as much as $22 million over the initial 10-year period.[85]

While customers are exposed to a maximum risk of $22 million in the first 10 year period, "the market price protection mechanism calls for the possibility of Empire paying Missouri customers, through the form of reduced revenue requirements in a rate case, as much as $35 million over the first ten years of the Customer Savings Plan."[86] In other words, market prices and wind production conditions would have to be much worse than that considered as a worst case scenario in order for ratepayers to be harmed.[87]

4. Rate Case Provisions Applicable to Cases in which Wind Generation is Included in Rates: The non-unanimous stipulation also provides mechanisms regarding

[84] P95 represents that level of wind generation where actual generation exceeds 95% of the time. Similarly, one would expect that a P75 level of generation would be exceeded 75% of the time. For purposes of the market price protection mechanism, P95 "was the lowest set of generation assumptions" because it is such a low level of expected generation. (Tr. 696-697 and 730).
[85] Exhibit 351, Meyer Affidavit in Support, page 4.
[86] *Id.*
[87] *Id.* at pages 4-5.

the processing of the rate cases in which Empire seeks to include wind generation assets in rates. Specifically, in order to ensure that parties have a sufficient opportunity to determine that the wind assets are "fully operational and used for service, Empire agrees to utilize a true-up date that is at least five months prior to the operation of law date. Moreover, concerns have arisen regarding the method by which Empire will finance its share of the wind financing costs. "[T]o protect customers from the possibility that Empire's regulatory capital structure becomes either highly leveraged or equity-rich in order to finance the wind investment, there is a provision that requires the equity in the regulatory capital structure to fall within a band of 47%-53%." Finally, there is a provision that ensures that ratepayers are protected against a credit downgrade by costing all debt used to finance the wind projects at the current BBB credit rating.[88]

5. Most Favored Nation Provision: As was mentioned in opening statements, Empire serves electric customers in Missouri, Kansas, Oklahoma and Arkansas. Given this, Empire will likely seek Commission approval of this plan in all of its retail jurisdictions. In such a scenario, no state wants to be the first to act since it means that subsequent states will build off of that settlement and seek to extract greater benefits for its customers. In order to prevent a potential stalemate and to protect Missouri ratepayers from the possibility that other states will realize greater benefits, the Non-Unanimous Stipulation contains a Most Favored Nation Provision.[89] The utilization of this provision would allow Missouri customers to seek to include any beneficial provisions included in the approval order in either Kansas, Oklahoma or Arkansas. In this way, Missouri is not

[88] See, Non-Unanimous Stipulation and Agreement, page 6; Exhibit 351, Meyer Affidavit in Support, page 5.
[89] See, Non-Unanimous Stipulation and Agreement, page 14.

penalized for acting on this matter in an expeditious fashion prior to the completion by other states.

6. Non-Residential Access to Renewable Energy and Associated Renewable Energy Credits: In recent years, many companies have made sustainability commitments or taken efforts to ensure that they are served by renewable energy.[90] While Missouri utilities are served by some amount of renewable energy, there is no way to verify that the customer is provided energy from coal, nuclear or wind resources. The only way for such a customer to effectively meet its commitment is to actually receive the underlying renewable energy credit associated with wind generation. Currently, Ameren (Case No. ET-2018-0063) and KCPL / GMO (Case Nos. ER-2018-0145 / 0146) have proposed programs by which non-residential customers could access renewable energy and the associated RECs.[91] Through this provision, Empire agrees, as part of its first general rate case when the wind assets are placed in service, to propose a tariff by which non-residential customers may be assigned a portion of the RECs from the wind projects.[92]

D. THE COMMISSION'S ROLE UNDER THE NON-UNANIMOUS STIPULATION.

In its opening statement, MECG was clear to articulate the nature of the requests made under the Non-Unanimous Stipulation. Specifically, while the Stipulation contains many commitments by the Signatory Parties, for those provisions, the Signatories are only asking that the Commission act in an enforcement capacity.

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[90] See, Exhibit 300, Hyman Rebuttal, page 8 (listing Walmart; Target; Bloomberg; General Motors; IKEA; Proctor & Gamble; Intel; Sprint; Kellogg's; Nestle; Unilever; General Electric; Owens Corning and many other companies as supporting the establishment of sustainability goals and access to renewable energy).

[91] *Id.* at page 10.

[92] See, Non-Unanimous Stipulation and Agreement, page 13. See also, Exhibit 351, Meyer Affidavit in Support, pages 6-7.

> What are we asking for? Be very clear about what the stipulation does. The stipulation is really focused on two things. In large part the stipulation is a private agreement. It's an agreement between the five parties that says certain parties will do certain things. And as it applies to those five parties, the only thing we're looking for from you is enforcement.[93]

That said, however, there are certain provisions that seek specific Commission actions. ***First***, the Stipulation asks the Commission to order, pursuant to Section 393.240.2, a depreciation rate to be applied to the wind plant accounts. ***Second***, the Stipulation asks the Commission to grant a variance, pursuant to 4 CSR 240-20.0105(10), from the affiliate transaction rule for certain specific affiliate transactions. ***Third***, the Signatories ask the Commission to make a finding that the decision to add 600 MWs of wind generation, through the use of tax equity financing, as well as the decision to keep Asbury in service is "reasonable."

This is the extent of the Stipulation. As MECG suggested in its opening statement, the Commission should "focus on the provisions and say, what is being agreed to here, things between the parties or things that involve the Commission?" While the Stipulation is 16 pages, the vast majority of the provisions contained therein are commitments that simply involve the Signatories and do not implicate the Commission's exercise of authority.

V. THE STIPULATION IS IN THE PUBLIC INTEREST

As previously indicated, the standard by which the Commission should consider the Non-Unanimous Stipulation in this case is whether it is "in the public interest." MECG suggests that the Non-Unanimous Stipulation is in the public interest for three specific reasons.

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[93] Tr. 104.

First, the fact that the Stipulation is in the public interest is best exemplified by the broad nature of the interests either supporting or not opposing the Stipulation. The settlement is supported or not opposed by utilities (Empire District Electric and Ameren); customers (Midwest Energy Consumers Group); environmental interests (Renew Missouri and Sierra Club); the Missouri Department of Economic Development, as well as the Commission's Staff. Every nature of interest involved in Commission proceedings has participated fully in the settlement talks and supported the settlement. This should be a significant consideration when weighing the public interest in this case.

Second, the fact that the Stipulation is in the public interest is also demonstrated by the fact that the settlement is consistent with the goals of the Commission's integrated resource planning rules. 4 CSR 240-22.070(3) states that one critical assessment in a utility selecting its preferred resource plan is the "present value of utility revenue requirements." This standard was similarly applied in the context of this case. As the evidence indicates, as compared to Empire's 2016 Preferred IRP Plan, the Stipulation provides for a reduction in the 20 year present value of utility revenue requirements. As such, the Stipulation is in the public interest.

Third, the public interest is implicated by the ubiquitous nature of the customer benefits and protections contained in the stipulation. For instance, there are customer protections related to the actual addition of 600 MWs of wind to Empire's generation portfolio including a market price protection mechanism and rate case provisions. The customer benefits in the Stipulation, however, go beyond Empire's resource planning. As reflected by its May 24, 2018 oral argument, the Commission is obviously wrestling with ways to return the savings associated with the 2017 Tax Cuts and Jobs Act. By this

stipulation, if adopted, those savings are flowed back to customers and the Commission is alleviated of this concern.[94] Similarly, the Stipulation provides for the anticipated introduction of a non-residential renewable energy program. Such a program would address economic development concerns that go beyond the initial scope of this docket. Finally, the Stipulation includes a provision for a rate moratorium, unrelated to the scope of this case, which ensures a longer period of Empire rate stability. These customer benefits go beyond the simple addition of 600 MWs of wind generation and demonstrate the public interest focus of the Stipulation. Given the extensive nature of the customer protections and benefits, the Commission should be satisfied that the Stipulation is in the public interest.

VI. THE CHAIRMAN'S QUESTIONS

At the conclusion of the evidentiary hearing, the Chairman sought briefing on the appropriateness of a Commission Report and Order comprising the following:

> 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 and service with a 3.33 percent depreciation rate; and fourth, a legal determination that a variance of the affiliate transaction rule is appropriate.[95]

When clarification was sought regarding the status of Asbury under such a scenario, it was pointed out that the status of Asbury was intentionally excluded from the finding of reasonableness.[96]

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[94] Empire has also indicated a willingness to return savings for Empire Gas in a similar fashion if the Stipulation is approved.
[95] Tr. 906.
[96] Tr. 907.

The appropriateness of such a decision depends on how the status of Asbury is determined under such an order: (1) was Asbury simply excluded from the reasonableness finding or (2) was Asbury ordered to be retired regardless of the provision in the Stipulation which expressly calls for the continued operation of Asbury.

As reflected at pages 12 through 15, Empire's initial proposal to prematurely retire Asbury was problematic in that Asbury has historically provided economic benefits to ratepayers in the form of positive margins associated with energy sales into the SPP Integrated Marketplace. Moreover, given Empire's modeling, Asbury is expected to continue to provide such margins into the indefinite future. While the continued operation of Asbury will necessitate the incurrence of certain environmental costs, it will also prevent the incurrence of a larger amount of dismantlement costs. Bottom line, if ratepayers are expected to pay for the unrecovered Asbury investment, they should be permitted to receive the benefits associated with that facility. Therefore, a Commission order that purports to require Empire to prematurely retire Asbury would be patently inappropriate and unreasonable.[97] The provision that Asbury continue to operate was a critical component of MECG's willingness to execute the settlement.

On the other hand, if the scenario contemplated by the Chairman merely suggests that the Stipulation would be approved <u>except</u> that it would exclude a finding that the continued operation of Asbury is reasonable, then that would undoubtedly eliminate an important part of the settlement for Empire. Specifically, Empire undoubtedly believes that a Commission finding that the continued operation of Asbury is reasonable is a

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[97] The decision to retire a generating station is part of the management discretion. As such, a Commission order that purports to require Empire to prematurely retire Asbury may be beyond the scope of the Commission's authority.

necessary component of the settlement which required the concessions contained in the settlement.

As mentioned, any modification to that settlement, including a provision that attempts to require Empire to retire Asbury would negate the settlement and open the "Pandora's Box" referenced in MECG's opening statement.[98] While Empire, as the beneficiary of such a provision, would be free to waive the requirement that the Commission order actually include a finding that the continued operation of Asbury is reasonable, MECG would not be willing to modify the settlement to contemplate a Commission decision to actually retire Asbury. The continued operation of Asbury, in light of its ongoing positive margin as well Empire's insistence that it be allowed to recover any undepreciated investment, is a necessary component of the settlement.

Next, the Chairman asked whether the Commission could pick and choose aspects of the Stipulation.

> 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 order Empire to abide by any of the provisions in the stipulation such as the rate moratorium and the tax cut provision.[99]

The settlement expressly notes that all provisions are interdependent and not subject to modification.

> This Stipulation has resulted from extensive negotiations among the parties, and the terms herein are interdependent and non-severable. If the Commission does not approve this Stipulation unconditionally and without modification, or if the Commission approves the Stipulation with modifications or conditions to which a Signatory objects, then this Stipulation shall be void and none of the Signatories shall be bound by any of the agreements or provisions hereof.[100]

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[98] See, pages 1 to 2.
[99] Tr. 906-907.
[100] *Non-Unanimous Stipulation and Agreement*, filed April 24, 2018, provision 2.

While MECG is not in a position to speak on behalf of Empire regarding its willingness to accept a Commission order requiring certain provisions while modifying other provisions, the clear language of the Stipulation indicates that it is not bound to accept such a modification.

VII. CONCLUSION

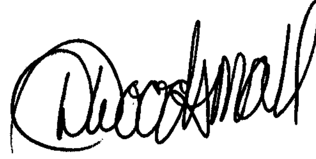
MECG asks that the Commission recognize that the Non-Unanimous Stipulation is in the public interest. Such a finding is dictated by: (1) the interests either supporting or not opposing the settlement; (2) the fact that the settlement would minimize the present value of utility revenue requirements as set forth in the Commission's integrated resource plan rule; and (3) the ubiquitous nature of the protections and benefits contained in the settlement.

Given this, MECG asks the Commission to issue its Report and Order:

1) Ordering the establishment of a 3.33% depreciation rate to be applied to Accounts 341 to 346;
2) Granting a waiver from the Commission's affiliate transaction rule for: (a) the Asset Management Agreement; (b) the Balance of Plant Operations and Maintenance Agreement; (c) the Energy Services Agreement and (d) the Fixed Price Hedging Agreement(s); and
3) Finding that Stipulation's provision which calls for the addition of 600 MWs of wind generation and the continued operation of Asbury is reasonable.

Respectfully submitted,

WOODSMALL LAW OFFICE



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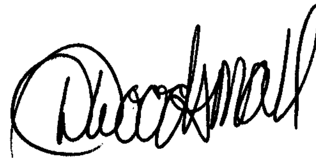
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: May 31, 2018