BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of The Empire District Electric Company d/b/a Liberty to Obtain a Financing Order that Authorizes the Issuance of Securitized Utility Tariff Bonds for Qualified Extraordinary Costs	)))))	Case No. EO-2022-0040
In the Matter of the Petition of The Empire District Electric Company d/b/a Liberty to Obtain a Financing Order that Authorizes the Issuance of Securitized Utility Tariff Bonds for Energy Transition Costs Related to the Asbury Plant	)))))	Case No. EO-2022-0193

LIBERTY'S RESPONSE TO OPC'S APPLICATION FOR REHEARING

COMES NOW The Empire District Electric Company d/b/a Liberty, and for its Response to OPC's Application for Rehearing, respectfully states as follows to the Missouri Public Service Commission ("Commission"):

On August 18, 2022, the Commission issued a Report and Order, effective August 28, 2022, regarding Liberty's securitization petitions on Winter Storm Uri and Asbury (the "Financing Order"). On August 26, 2022, the Office of the Public Counsel ("OPC") submitted an Application for Rehearing regarding the Financing Order ("OPC's Motion"). On August 27, 2022, Liberty submitted its Motion for Reconsideration or Clarification and/or Application for Rehearing concerning the Financing Order ("Liberty's Motion").

Commission decisions are reviewed by the appellate courts to determine whether they are lawful and reasonable. A Commission decision is lawful if the Commission acted within its statutory authority, and a decision is reasonable if supported by substantial and competent evidence, it is not arbitrary or capricious, and the Commission has not abused its discretion. *State ex rel. Sprint Mo., Inc. v. Pub. Serv. Comm'n,* 165 S.W.3d 160, 164 (Mo. banc 2005); *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n,* 344 S.W.3d 178, 184 (Mo. banc 2011); *State ex rel. MoGas*

Pipeline, LLC v. Pub. Serv. Comm'n, 366 S.W.3d 493, 495–96 (Mo. banc 2012). Regarding rehearing requests, RSMo. §386.500.1 provides that "(a)fter an order or decision has been made by the commission, the public counsel or any corporation or person or public utility interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear."

Liberty's Motion

As noted in Liberty's Motion, the Financing Order is the first time that the Commission has applied the securitization statute that the Missouri legislature enacted in 2021 (RSMo. §393.1700), and what the Commission does here not only has a serious effect on Liberty and its customers but also sets a precedent for how the Commission will implement the securitization statute in the future for all Missouri utilities.

Liberty's Motion identifies a number of errors in the Financing Order, including an objective error as to the "ADIT offset," that render the decision unlawful and unreasonable. If the Commission permits the errors identified in Liberty's Motion to stand, then the incentive for Missouri electric utilities to file under the securitization statute, which has significant benefits for customers, will be greatly reduced. As such, the Commission should amend its decision to reasonably and lawfully address the issues raised in Liberty's Motion.

OPC's Motion

OPC's Motion, on the other hand, fails to provide sufficient reason for rehearing or amendment of the Financing Order. OPC points to six decision points, each of which is addressed below. As to each of those points, the Commission's decision was both lawful and reasonable.

1. Asbury Abandonment Tax Deductions (Issue 3N): "Public Counsel's proposed disallowance for income tax deductions for Asbury abandonment is unnecessary and will not be imposed."

OPC's Motion incorrectly asserts that the Commission's conclusion as to OPC's proposed disallowance for income tax deductions for Asbury abandonment violates RSMo. §393.1700.1(7)(a). According to OPC, the Commission's conclusion is inconsistent with the statement in the statutory definition of "energy transition costs" that the "pretax costs" of qualifying retired or abandoned plant should be "reduced by applicable tax benefits of accumulated and excess deferred income taxes." RSMo. §393.1700.1(7)(a).

As explained in Liberty's Initial Post-Hearing Brief, OPC's argument simply ignores what was previously in Liberty's rates associated with Asbury. Specifically, OPC fails to take into account that a regulatory asset was established for the net book value of Asbury. This regulatory asset has deferred taxes associated with it. Because Asbury already qualified as an abandonment for tax purposes, Liberty will pay taxes when it collects the surcharge revenue to recover the bond costs. As the regulatory asset gets amortized, the amortization expense is added back for taxable income purposes, with no corresponding tax deduction. OPC's proposal thus would result in "double dipping" of the tax benefit, and RSMo. §393.1700.1(7)(a) cannot be read to require reducing energy transition costs by a tax benefit that has *already* been taken into consideration when determining the amount to securitize.

In the Financing Order, the Commission has reasonably and lawfully acknowledged that what OPC describes as a tax benefit resulting from Liberty's write-off of Asbury in 2020 is actually a normal timing item that is treated the same as any other deferred income tax item in rates. The Commission properly followed the law and the testimony of Liberty and the Staff of the Commission ("Staff") on this issue, and rehearing of this issue is not warranted.

2. Storm Loss Tax Deduction (Issue 2H): "Public Counsel's proposal that income tax deductions for Winter Storm Uri costs be disallowed from the costs to be securitized is not supported by the facts or the law, and the Commission will not make that disallowance."

OPC argues that Liberty has received a tax benefit for the losses from Winter Storm Uri that should reduce the amount of Liberty's qualified extraordinary costs. OPC's arguments are inaccurate, and they find no support in the language of the securitization statute.

OPC's argument is based on the fact that Liberty expended $204 million for fuel and purchased power expenses during Storm Uri and, as of its tax reporting period, did not report any revenues for those costs. OPC appears to argue that, absent any offsetting taxable income, Liberty's deduction represents a net tax benefit. As the Commission stated, that argument is "incorrect" because it disregards the key fact about taxable income here. Order, p. 33. OPC incorrectly focuses on the fact that the *issuance* of bonds will not create taxable income to Liberty. OPC Motion, p. 4. But what OPC fails to take into account, as the Commission correctly noted, is that payments received from ratepayers for the bonds will produce taxable income to Liberty, offsetting the earlier-year tax deduction arising from the fuel and purchased power expenses. Order, p. 33 ("In fact, the charges that will be used to pay the bonds is taxed as income to the utility.") The tax issue therefore is simply one of timing, which the Commission will address in future years. Order, p. 34. There is no basis for the Commission to disallow part of the securitization based on a temporary tax effect that will be offset with future taxable income.

Effectively, OPC would require Liberty to pay taxes on the recovery of its Storm Uri expenses twice, first by returning the temporary benefit of the tax deduction and again when it is required to pay income taxes when it collects the surcharge to recover the cost of the securitization bonds. As justification for the proposed offset, OPC has previously relied on two provisions of the securitization statute: the definition of energy transition costs and the definition of financing costs.

But the Commission properly rejected those statutory arguments, as neither of those definitions provides support for OPC's proposed adjustment. First, the definition of energy transition costs is irrelevant here. Energy transition costs are "costs with respect to a retired or abandoned or to be retired or abandoned electric generating facility," RSMo. §393.1700.1(7). The extraordinary storm costs associated with Storm Uri are not energy transition costs; they fall into the separate statutory category of "qualified extraordinary costs," which encompasses costs "related to purchases of fuel or power, inclusive of carrying charges, during anomalous weather events." RSMo. §393.1700.1(13). The definition of qualified extraordinary costs does not say anything about special tax treatment. Accordingly, the only possible interpretation of the securitization statute is that that ADIT liabilities or assets for extraordinary storm costs will be addressed in future rate cases.

Second, OPC's reliance on the definition of "financing costs" is misplaced. That definition refers to taxes "imposed on the revenues generated from the collection of the securitized utility tariff charge or otherwise resulting from the collection of securitized utility tariff charges." RSMo. §393.1700.1(8)(d). But the definition does not refer to, or otherwise cover, any tax deduction unrelated to the securitization process.

In short, the Commission properly rejected OPC's request for a storm loss tax deduction. The Commission is correct that OPC got a particular fact about taxable income wrong; however, even assuming that OPC was right about that fact, OPC ignored a *different* fact about taxable income that doomed OPC's argument. Order, p. 33. In the end, there is no statutory support for OPC's requested deduction and no competent evidence in the record that would justify it.

3. Riverton 11 Revenues (Issue 2F): "Public Counsel's argument that Liberty was imprudent in not ensuring that its fuel oil tanks at Riverton were full before Winter Storm Uri is an extension of Staff's argument that Liberty was imprudent in failing to tune Riverton Unit 11 to operate in winter weather conditions. Since Staff's argument fails, Public Counsel's extension of that argument must also fail . . ."

On this issue, OPC's Motion argues "that Liberty was imprudent for not maximizing its fuel oil storage at Riverton and not having or acquiring the means to warm that fuel oil during Winter Storm Uri so that it could run that unit just as it ran its dual fuel units—Stateline 1, and Energy Center 1, 2, 3, & 4." OPC's argument is perplexing. OPC claims that its argument about the amount of fuel stored at Riverton 11 is distinct from the Staff's argument that Liberty was imprudent in not tuning Riverton 11 to burn fuel oil under extreme conditions like those presented by Winter Storm Uri. But, in order for the amount of fuel stored at Riverton 11 to be an issue, one must assume as a predicate that Liberty should have been able to tune Riverton 11 to burn fuel oil under extreme conditions and then start Riverton 11 during the storm. In fact, Riverton 11 would not start, and the Commission correctly found that there was nothing imprudent about the conditions that led to Riverton 11's inability to start: "Liberty's air permit from Kansas authorities did not allow Liberty to burn fuel oil in Riverton Unit 11 for purpose of tuning that unit to operate during extremely cold weather." Order, p. 30.

For the Commission to conclude that the Company was imprudent because it did not break the law would be clear error. Further, there was no testimony in the record that Riverton 11 would have necessarily started during Winter Storm Uri, even if it had been possible to tune it using fuel oil, to "warm" the oil (OPC Motion, p. 6), or to try any other potential method. There is also no testimony in the record from OPC, or any other party, to establish what steps to address this issue would have been effective and reasonable, or even possible. The Commission properly followed the law and the record evidence in rejecting OPC's argument on this issue.

4. Liberty Resource Planning and Storm Costs (Issue 2G): "Public Counsel [alleges] that Liberty imprudently failed to plan to secure and retain sufficient capacity that it controls to meet the needs of its customers independent of its membership in, and purchases from, SPP," and OPC's argument "is entirely based on perfect hindsight."

OPC's argument about "resource planning" is nothing more than an argument in hindsight that Liberty should not have retired a "supply-side resource" like its Asbury coal-fired plant because, it turned out later, revenues from that plant over a finite period might have offset the costs associated with Winter Storm Uri. OPC witness Mantle argued that $67,031,627 in fuel and power purchase costs should be disallowed on the ground that they were incurred "because of its [Liberty's] imprudent planning," particularly "imprudent resource planning to beat the Southwest Power Pool ('SPP') market." Ex. 200, Mantle Reb., p. 1.

Although OPC baldly claims that Mantle's testimony was not based on hindsight, the fact remains that her analysis consisted entirely of assessing, in retrospect, what the effect would have been if Liberty had not retired Asbury. Ex. 200, Mantle Rebuttal, pp. 9-10. Mantle did not define what would, in her opinion, have been the appropriate or industry norm approach to resource planning; nor did she demonstrate how Liberty's actions deviated from any such standard. Ex. 4, Doll Surreb., p. 3. The Commission therefore lawfully and reasonably concluded that OPC's position was based on an improper hindsight review that could not possibly justify a prudence disallowance. *See State ex rel. Associated Nat. Gas Co. v. Pub. Serv. Comm'n of State of Mo.*, 954 S.W.2d 520, 529 (Mo. Ct. App. 1997) (stating that the "test of prudence should not be based upon hindsight, but upon a reasonableness standard").

5. Liberty Resource Planning and Asbury (Issue 3E): "Based on the evidence that is in the record, the Commission deems Liberty's decision to retire Asbury when it did to be reasonable and prudent."

The Commission properly followed the prudence standard, as explained in detail by Liberty's expert witness John Reed, and reasonably relied on the testimony of Liberty and Staff to conclude that Liberty's decision to retire Asbury in 2020 was reasonable and prudent. There is no substantial evidence in the record that Liberty's decision was anything other than reasonable and prudent.

The contrary argument in OPC's Motion consists of nothing more than a conclusory assertion that it would have been beneficial for Liberty to have more "reliably dispatchable supply-side resources." OPC Motion, p. 10. But, to state the obvious, maintaining a plant is not without cost. As the Commission recognized, a broad range of market factors indicated that it was no longer economic – or beneficial to ratepayers – for Liberty to maintain Asbury in the face of lower cost alternatives. *See* Order, pp. 41-46; *see id.* at p. 48 (explaining and rejecting OPC's argument). OPC fails entirely to grapple with any of these factors, and, indeed, offers no modeling of the costs or benefits of maintaining the plant on a prospective basis. Again, OPC's argument is based on nothing more than impermissible hindsight.

6. Asbury Labor Costs (Issue 3O): "But those costs were still used to provide service to those ratepayers through other operations of Liberty."

OPC's Motion argues that "[i]f the purpose of the Asbury AAO was to preserve costs and revenues for future consideration, then to now ignore the labor costs for operating Asbury included in that AAO in recognition that Liberty was not incurring them defies logic and is neither lawful nor reasonable." OPC's claim that Liberty "was not incurring" labor costs for Asbury employees is flatly wrong. All Asbury employees were retained and were either transferred to other departments within the Company or stayed at Asbury to work on the decommissioning. Ex. 8,

Emery Surreb., p. 36; Ex. 100, McMellen Surreb., p. 4. Further, all of the labor expense for the reassigned employees was included in the continuing cost of service in Liberty's most recent rate case (Case No. ER-2021-0312). Ex. 100, p. 4; *see also* Ex. 8, p. 36. "These employees filled positions elsewhere at Liberty that were needed to provide safe and adequate service." Ex. 100, p. 4. Thus, the labor at issue was, in fact, incurred by Liberty after the retirement of Asbury, and the Commission reasonably relied on the competent and substantial evidence in the record in reaching its decision on this issue.

Conclusion

Witness credibility is a matter for the Commission to assess, and the Commission is "free to believe none, part, or all of the testimony." *Spire Missouri, Inc. v. Missouri Pub. Serv. Comm'n*, 607 S.W.3d 759, 765 (Mo. Ct. App. 2020) (quoting *In re Kansas City Power & Light Co.*, 509 S.W.3d 757, 764 (Mo. App. W.D. 2016)). On each of the six issues raised in OPC's Motion, the Commission acted within its statutory authority. Further, the Commission acted reasonably in weighing the credibility of the competing witnesses and reaching conclusions based on the substantial and competent record evidence.

WHEREFORE, Liberty respectfully submits this Response to OPC's Application for Rehearing. Liberty requests clarification, reconsideration, and/or rehearing as specified in Liberty's Motion, and further requests the denial in full of OPC's application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above document was filed in EFIS on this 8th day of September, 2022, and sent by electronic transmission to all counsel of record.

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