BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

INITIAL POST-HEARING BRIEF OF SIERRA CLUB

Sierra Club files this brief in support of Empire's Customer Savings Plan. It will consider both the original list of issues and the issues as modified by the Non-Unanimous Stipulation and Agreement (S&A) as well as the objections of OPC.

Facts Relevant to Wind Investment and Asbury

As the S&A took shape, Sierra Club was chagrined to learn that most of the parties in this case think it necessary to keep an old 200 MW coal plant running, at a much higher cost than wind, rather than countenance an 800 MW wind investment. These parties seem to have abandoned their concern with low, just and reasonable rates while finding a new taste for avoidable environmental upgrades. Nevertheless, Sierra Club accepts the S&A as the position of the applicant, and still a good though second-best outcome.

Empire will need new wind to satisfy the Renewable Energy Standard when its current wind PPAs totaling 255 MW expire in 2025 and 2028 (T. vol. 3, p. 218 lines 12–5; vol 5 494 l. 12–495 l. 7). The S&A (p. 13, ¶ 20) anticipates demand from corporate customers that have renewable energy standards of their own, and obligates Empire to propose a "green tariff" to assign renewable energy credits to non-residential customers. Empire thus joins Ameren and KCPL in seeking such a tariff to meet a potentially large need for wind-served load.

OPC relied for its wind calculations on the Elk River and Meridian Way wind farms (Mantle, T. vol. 7, p. 739 ll. 2–15; Robinett, T. 798–800), which came on line in 2005 and 2008

respectively and have lower capacity factors than newer Kansas wind farms (T. vol. 5, p. 303 ll. 16–24; 319 ll. 2–17). Due to improvements in technology these are no longer accurate indicators of either the capacity factors or production of Kansas wind (McMahon, T. vol. 3, 285–6; Mertens, T. vol. 5, p. 303). The production of those wind farms will have degraded over time (Mertens T. 5:337, ll. 5–14; Holmes p. 558 ll. 18–21).

Off-system sales flow back 95% to customers through the fuel adjustment clause, alleviating OPC's ill-conceived concern that benefits would not be realized by customers (Mantle, T. vol. 7:781–6; Riley T. 831, ll. 12–7).

SPP oversees the reliability of its grid with its large penetration of wind (Mertens, T. 5:312–4; 316). It will also study the effects on reliability of Asbury's retirement (T. 5:314 ll. 5–14). OPC witness Marke testified that reliability was a minimal concern (T. 7:866 l. 18–867 l. 13).

Empire modeled the S&A compared to the Generation Fleet Savings Analysis using new information from bids received by wind developers in response to Empire's RFPs. It found that customer savings would be $295 million over 30 years, or $139 million less than the original Customer Savings Plan, a difference partly explained by the lesser amount of wind but mostly by the continued operation of Asbury. (Exh. 8, McMahon Affidavit p. 7 and Fig. 5; T. vol. 3, pp. 193–6).

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

Yes. Neither the original application nor the S&A seeks any forbidden approval such as a preapproval of prudence for any contemplated costs. Instead Empire seeks the kind of decisional approval the Commission granted in *In re Missouri American Water,* No. WA-97-46: "[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*" (emphasis added).

Empire seeks some assurance that its innovative project, relying on the new mechanism of tax equity financing, will meet other than a hostile reception. This is in essence an experimental regulatory plan (ERP) of a kind the Commission has approved before. Order Approving Stipulation and Agreement, EO-2005-0263 (Aug. 12, 2005), a case involving Empire's ERP for participation in Iatan 2, and Order Approving Stipulation and Agreement in Aquila's ERP for the same project, EO-2005-0293 (Aug. 19, 2005).

Prior to opening statement OPC distributed a handout that includes a list of "prior Commission decision's [sic] or comments against pre-approval." It does not help that OPC cited only the file numbers. Sierra Club has not been able to locate orders in all those cases that answer to OPC's description, but to the extent that it has, they are distinguishable.

In the Report and Order on KCPL's regulatory plan, EO-2005-0329 (July 28, 2005),[1] the Commission found authority to approve experimental regulatory plans in § 393.130.1, RSMo (safe and adequate service on just and reasonable terms) and that approval was within the Commission's jurisdiction, §§ 386.250(1, 7), 386.040, 393.140(3, 5)(pp. 31–2).

The Commission also laid out conditions that were met for a valid ERP: a pre-existing contested case was not a prerequisite to submission of a stipulation (p. 33); the S&A was a contract between the parties but not the Commission (p. 34); provisions for amortization, depreciation rates and a regulatory asset for demand-side investments did not violate the in-

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[1] This order was later reversed by the Court of Appeals, but that court withdrew its opinion (after the Supreme Court granted transfer) at the request of the parties to the appeal, who then entered into a collaboration agreement.

service criterion of § 393.135 (pp. 34–5); nothing in the S%A committed the Commission to pre-approval of rates (p. 36).

The Commission cited *Union Electric v. PSC,* 136 S.W.3d 146 (Mo.App. W.D. 2004), which regarded an ERP "not as an abdication of the Commission's responsibility to regulate, but as embodiment of it. It was an attempt to streamline the rate monitoring process and provided a means to resolve issues in lieu of the formal complaint process." 136 S.W.3d at 152. The Commission's role is to resolve disputes and make adjustments, for which its discretion is not unfettered by law. 136 S.W.3d at 160.

In an "Order Establishing Jurisdiction and Clean Air Act Workshops," EO-92-250, 1992 WL 524221 (Aug. 25, 1992), the Commission noted problems inherent in pre-approval. The case concerned the complexities of Clean Air act compliance, which the Commission thought were best left to utility management. No stipulation or regulatory plan was involved.

In *Missouri Gas Energy,* GR-96-285, 1997 WL 233139, Report and Order (Jan. 22, 1997), MGE attempted to rely on an AAO for preapproval of a 10.54% carrying cost rate. The Commission held that MGE went beyond the purpose of the AAO, and that an AAO has no direct ratemaking impact. No preapproval of rates is sought in this case.

In the Report and Order in the KCPL and GMO rate cases ER-2012-0174 and ER-2012-0175, the utility sought a tracker to defer recording of transmission costs it expected would increase. The Commission ruled the issue moot since KCPL/GMO already could defer costs (pp. 28–30). For purposes of General Instruction 7, KCPL/GMO did not prove that the costs were extraordinary or would amount to more than 5% of income (pp. 29–30). "The only thing that the Commission is denying Applicants is a blessing upon the treatment of facts that have not yet occurred, an order for which Applicants cite no authority in the law" (p. 32). KCPL/GMO could

nevertheless seek an accounting authority order (p. 31). In the present case Empire does not seek any predetermination of facts or any authority that has not been granted in previous cases.

In a case not cited by OPC, *Application of GMO for Approval of AAO,* EU-2011-0034, 2010 WL 4038447 (Sept 28, 2010), the Commission affirmed its authority to grant AAOs and granted GMO the same construction accounting treatment for Iatan 2 that had been allowed in the KCPL and Empire ERPs, EO-2005-0329 and EO-2005-0263.

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

The parties identified four specific requests, not counting the request for an order by June 30 (Application pp. 9–10).

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

Acceptance of the S&A obviates the need to further address this issue. Empire will still need to apply for certificates of convenience and necessity.

If the Commission does not approve the S&A in full, the authorization is still justified under the original Application.

The original plan would result in even greater savings for Empire customers. The objectors have never refuted this case except to wave at the inevitable uncertainty of future energy prices on SPP. Under tax equity financing, the tax equity partners could pick up as much as 60% of the capital cost, keeping it out of rate base to the benefit of customers (Exh. 11, Mooney Direct, pp. 7–8). Empire will set up Wind Project Companies as affiliates (Exh. 11, pp. 10–11; S&A ¶ 13). The Wind Project Cos' revenue will consist of sales to SPP and the hedge agreements with Empire, from which they will pay the expenses (Exh. 11, pp. 14–6; hedge

agreements are incorporated in the S&A, ¶ 18c). After approximately 10 years, when the wind subsidiaries are expected to have achieved their return (Exh. 11, p. 13, fn. 11), ownership will "flip" from 95% Wind Project Cos. to 95% Empire, which will then have the option of buying out the Wind Project Cos' remaining 5% (Exh. 11, pp. 16–7). Accounting will follow GAAP and FERC rules (Exh. 11, pp. 18–9).

Liberty Utilities has experience with tax equity financing, which is a proven investment mechanism (Exh. 11, pp. 17–8). The record supports the approval of the wind investments.

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.

Approval of the S&A would render moot the issues surrounding Asbury retirement because the plant would continue to run. However, its operation would be at Empire's discretion (S&A ¶ 19a), so the issue could re-emerge soon. If the Commission does not approve the S&A in full, the request to authorize a regulatory asset remains as part of the Application (pp. 2, 4; Exh. 14 Sager Direct, pp. 3–4, and Exh. 15, Revised Schedule RWS-1

The existence of a regulatory asset does not guarantee cost recovery in a future rate case. The Commission has approved stipulations in which the parties agreed to support recovery of costs accumulated in a regulatory asset and to support the regulatory asset for rate base treatment. *In re Empire District Gas Co,* GR-2009-0434, 2010WL 764027, Report and Order on DSM Funding (Feb. 24, 2010); *In re UE's Tariff to Increase Rates,* ER-2014-0258, 2015 WL 1967858, Report and Order on solar rebates (April 29, 2015).

The unrefuted evidence that Asbury is no longer economical to run and that Empire's customers would be better off without it supports the authorization of the regulatory asset for the

rate base balance. The all-in cost of new wind is $22–30/MWh while the all-in cost to run Asbury is nearly $38, of which $25/MWh is fuel cost. (Exh. 6, McMahon Direct, pp. 38–9).

The record supports the regulatory asset. The Commission should authorize it. If the Commission does not approve the S&A in full, the issue will be ripe for decision. The likelihood of early retirement for Asbury is not so hypothetical or remote that authorization would be an advisory opinion. *State ex rel. Laclede Gas v. PSC,* 392 S.W.3d 24, 38 (Mo.App. W.D. 2012).

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.

A depreciation rate for wind assets of 3.33% is common to the S&A (pp.5–6, ¶ 14f) and the original plan (Exh. 18, Watson Direct, p. 5). Under § 393.240.2, RSMo, "The 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." The law and the record support approval of the depreciation rate.

d. Approval of the arrangements between Empire and affiliates necessary to implement the Customer Savings Plan, to the extent necessary (also addressing List of Issues no. 10, waiver of affiliate transaction rule).

The use of affiliates, in the form of the Wind Project Cos, is inherent in tax equity financing. The S&A (pp. 13–4, ¶ 22 and p. 11, ¶ 18c) provides for such transactions. The record supports approval as well as waiver of the affiliate transaction rule under the standard of 4 CSR 240-20.015(10)(A)1, since Empire met the requirements of 4 CSR 240-2.060(4) by requesting the waivers in its Application, pp. 10–11, and in Exhibit 9, Mertens Direct, pp. 19–20.

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

Approval of the S&A would moot this issue. The testimony supporting the Application (Exh. 14, Sager Direct, pp. 3–4 and Exh. 15, Revised Schedule RWS-1) provide the evidentiary basis. As suggested under Issue 1b above, early retirement for Asbury is not so hypothetical or remote that authorization would be an advisory opinion. *State ex rel. Laclede Gas v. PSC,* 392 S.W.3d 24, 38 (Mo.App. W.D. 2012). If the Commission does not approve the S&A in full, the issue will be ripe for decision.

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

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

Additional filings would be those contemplated in the S&A or those necessary to carry out the original plan. Sierra Club has no specific list to recommend.

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

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

The S&A takes these issues off the table. Asbury will probably retire soon given the evidence that it costs too much to operate. Unlike the regulatory asset, these issues could yet be worked out without Commission approval and are too uncertain to resolve at this time since the retirement date is unknown. Sierra Club has no conditions to recommend.

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

The S&A has the federal tax cut being returned to customers through rate reductions effective Oct.1, 2018 (S&A ¶¶ 24–5 and Appen. B). Questions concerning pre-October tax reductions could presumably be dealt with in ER-2018-0228 if the S&A is not approved.

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

OPC raised "concerns" about bird and bat mortality at wind farms, but not a blocking objection (Exh. 211, Marke Affidavit, p. 14). OPC makes "recommendations" of best practices (*id.* at 14–6). The S&A contains no protections.

Sierra Club shares OPC's concerns but is satisfied with the assurances given by Empire in the data request response incorporated in Exh. 211, p. 14, and attached to that affidavit as Schedules GM-4 and GM-5. Sierra Club sees no need for the Commission to impose conditions.

Advisory Opinions

At the end of the hearing Chairman Hall alerted the parties to issues he'd like to see answered in the briefs (T. 906). One is whether the Commission is being asked to issue any "inappropriate or possibly illegal advisory opinion." An advisory opinion, as noted above, is one that addresses a future scenario or a hypothetical situation, even if done in the name of avoiding future litigation or delay. *GMO's Application for a RESRAM,* EO-2014-0151, 2014 WL 7402174, Order Denying Relief (Dec. 7, 2014).

The S&A requires Empire to make a number of future filings with the Commission (¶¶ 14c, 16, 18d, 23). Approval of the S&A would trigger Empire's obligation to make the filings without further order, and enable the other signatories to hale Empire before the Commission on a complaint.

If the Commission does not approve the S&A as a whole it becomes void unless all signatories choose to abide by any modifications or conditions the Commission may make (¶ 2). If the S&A goes away, it will be up to Empire to determine how to proceed, if at all, or with the original plan or in smaller, more risk-averse steps.

If the Commission does not approve the S&A, it should order Empire to file an application for a CCN under § 393.170, RSMo, for any wind farm it may propose to build outside Missouri. This would test the theory that a CCN is necessary in such cases (Staff Position Statement, pp. 10–11). Otherwise Empire might not file an application on the assumption that the Commission does not issue extraterritorial CCNs.

CCR investment. This regrettable investment is included in the S&A. Empire is currently due to be in compliance with the US EPA's coal combustion residuals rule by April 1, 2019. Preparation must begin now. This is not hypothetical. It is hard to see how compliance with federal environmental law could be imprudent. The only alternative is to retire Asbury now. If the Commission cannot order retirement, it should approve the decision to proceed with the necessary investment.

OPC's Objections

OPC argues that Empire has adequate capacity and that it is trying to transform itself from a regulated utility into an independent power producer. These categories have been blurred

by the realities of RTO integration, where regulated utilities and merchant generators alike bid all their power into the wholesale market and buy back any power they need.

Furthermore, concepts like native load and serving a fixed customer base in an exclusive territory were always more fluid than they appeared. Territories may overlap, and the policy that favors monopoly over destructive competition is flexible, with the ultimate goal of serving the public interest. *Osage Water Co. v. Miller County Water Authority,* 950 S.W.2d 569, 575 (Mo.App. S.D. 1997). The Commission controls the allocation of territories and may authorize either monopoly or regulated competition as the public interest demands. *Consumers Public Service Co. v. PSC,* 352 Mo. 905, 180 S.W.2d 40, 44–5 (Mo. banc 1944). Territories are largely defined by municipal franchises that may be granted, denied or revoked. *Union Electric v. PSC,* 770 S.W.2d 283, 286 (Mo.App. W.D. 1989). There is no legal impediment to a utility acting in what appears to be a competitive manner, especially when this results in just and reasonable rates lower than what it could achieve by staying the coal course.

The Commission has authority "to order improvements and safety equipment, and to authorize the abandonment or extension of lines and the financing of all improvements or purchases." *City of Sikeston v. PSC,* 336 Mo. 985, 82 S.W.2d 105, 110 (1935); *Stopaquila.org v. Aquila,* 180 S.W.3d 24, 36 (Mo.App. W.D. 2005). These powers give further warrant for approving the Customer Savings Plan. They were cited in *Application of GMO for a CCN,* 515 S.W.3d 754, 760 (Mo.App. W.D. 2016), a case that ratifies many aspects of this case, albeit on the much smaller scale of a 3 MW utility-scale solar project.

The Court in *GMO* found that GMO had no need for new capacity but found it not unreasonable to conclude that the project was needed to satisfy increasing customer demand for solar energy. 515 S.W.3d at 762. In deciding convenience and necessity, the future must be

considered. *Id.* at 760. GMO was trying to improve service in its current area, not extend into new territory. *Id.* at 761. The solar investment tax credit would benefit customers by defraying 30% of the cost, a much smaller proportion than the wind production tax credit in this case. *Id.* at 757. The Court relied on the well settled law that in a CCN case "necessary" does not mean essential or indispensable, but covers any improvement that is highly important to the public and desirable for the public welfare, and of sufficient importance to warrant the expense. *Id.* at 759, 764. Finally, the Court cited Missouri's policy to pursue renewable energy, which had been embraced by customers. *Id.* at 764. The Court therefore upheld the CCN.

Empire's addition of wind could open the door to a significant new customer base of corporations seeking to meet renewable energy goals. A utility that failed to anticipate such demand would disserve not only its own interest but the interest of its territory in economic development. At a time when coal plants are retiring in droves because they cannot compete with wind on cost (not to mention reduced pollution and greenhouse gases), Missouri remains one of the most coal-dependent states in the nation. The Commission should support Empire in attempting to change this laggard status quo.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct PDF version of the foregoing was filed on EFIS and sent by email on this 31st day of May, 2018, to all counsel of record:

/s/ Henry B. Robertson
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