

**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) File No. EO-2018-0092
Customer Savings Plan)

RENEW MISSOURI'S POST-HEARING BRIEF

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COMES NOW Renew Missouri Advocates d/b/a Renew Missouri (“Renew Missouri”) and presents its post-hearing to the Missouri Public Service Commission (“Commission”) as follows:

Introduction

1. The Empire District Electric Company (“Empire”) set out on a course to do something extraordinary: embrace renewable resources in meeting the energy needs of its customers, accelerate retirement of its Asbury coal plant, and save customers hundreds of millions of dollars over the next 20 years. In support of its initial application, Empire provided cost-benefit testimony explaining that its proposal is supported by the Generation Fleet Savings Analysis (“GFSA”) showing that retiring Asbury and replacing it with up to 800 MW of wind will generate 20-year Net Present Value (“NPV”) revenue requirement savings of \$325 million, compared to the company’s current resource plan (Ex. 7, p. 3). Over a 30-year period, the benefit to customers would have grown to \$607 million

(*Id* at 11). However certain parties raised concerns about the plan based on the scope of the project, the remaining value of Empire’s recent capital spend at its Asbury coal plant, and the evolving generation landscape in the Southwest Power Pool (“SPP”) market. And so, prior to the hearing, representatives for Empire began discussions with the parties that culminated in the Non-unanimous Stipulation and Agreement (“Stipulation”) filed on April 24th (Doc. No. 101).¹ Renew

¹ The Signatories to the Stipulation filed an Addendum to the Non-unanimous Stipulation and Agreement to clarify the intent behind two provisions therein (Doc. No. 128).

Missouri participated in settlement discussions and, although it recognized the benefits and supported the Company's initial proposal, joined the Stipulation as a signatory.

2. The Stipulation, while calling for the addition of a reduced 600 MW of new wind generation and keeping Asbury operating for the moment, provides significant benefit to customers and is in the public interest. The GFSA, as updated to incorporate the Stipulation terms, shows customer savings of \$169 million over a 20-year period and \$295 million over a 30-year period (Ex. 8, p. 4). In addition to long-term customer savings as compared to the status-quo 2016 resource plan, the Stipulation provides for an expedited *reduction* to customer rates to account for the recent changes to federal tax rates coupled with a commitment by Empire to refrain from filing a rate case until at least April 2019 (Ex. 4, p. 3). Under the Stipulation, Empire customers will have rate certainty that could run until March 2020 or longer (Ex. 4, p. 6).

3. Furthermore, as a part of the Stipulation, Empire agreed to propose a program and tariff sheets that provide an opportunity for non-residential customers to acquire a portion of the Renewable Energy Credits ("RECs") received from the wind projects (Stipulation p. 13). Such a program would enable corporations to comply with sustainability commitments and efforts to acquire renewable energy (Ex. 351, pp. 6-7). While the details of the program will be determined in the next rate case, Empire's commitment to provide commercial and industrial customers an opportunity to access RECs will maximize the value of the RECs generated by this wind project (Ex. 4, p. 6).

4. Satisfying customer demand and lower long-term costs for customers are not the only benefits to Empire's plan to add wind generation. Additional public interest considerations advanced by wind generation include employment opportunities and economic benefits for local economies (Ex. 400, p. 5). According to a recent American Wind Energy Association report, wind

energy technician is the fastest growing occupation in the country (*Id.*). Beyond adding regionally based jobs, the additional wind generation will bring benefits to the people in areas near the selected sites, including potential lease payments to landowners, property tax payments, payments in lieu of taxes, and increased local spending (Ex. 400, p. 5).

5. All of the foregoing benefits to Empire customers illustrate that wind generation is increasingly economic on its own and, when coupled with federal Production Tax Credits and capital investment contributed by tax equity partners to defray a significant portion of the project costs, make this project good for business and good for customers (Ex. 400, p. 4). For these reasons, Renew Missouri supports the Stipulation and asks the Commission to issue an order incorporating the terms and conditions of the Non-unanimous Stipulation and Agreement as described below.

List of Issues

Issue 1: Does the Missouri Public Service Commission have authority to grant Empire's requests?

6. Yes. The Commission has the statutory authority to regulate public utilities in Missouri (Section 386.250 RSMo). Within that role, the Commission is tasked with acting in the public interest (*State ex rel. Gulf Transport Co. v. Public Service Com'n*, 658 S.W.2d 448, 456 (Mo. App. 1983)). “The Commission’s powers to regulate in the public interest are “broad and comprehensive” and include the authority “to order improvements[.]” (*In the Matter of the Application of KCP&L Greater Missouri Operations Company*, 515 S.W.3d 745, 758 (Mo. App. W.D. 2016) (citing *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 34-35 (Mo. App. W.D. 2005)). “It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served.” (Case No. EA-2016-0208, *Report and Order* pp.

18-19)(citing *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d 593, 597-598 (Mo. App. 1993)).

7. Among the Commission's powers to fulfill its duties, the Commission can make a variety of determinations including orders under the specific provisions noted by Empire in its initial application (Doc. No. 2, p. 1). The Commission can "prescribe uniform methods of keeping accounts, records and books, to be observed by ... electrical corporations[.]" (Section 393.140(4) RSMo). The Commission can also "prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited" (Section 393.140(8) RSMo). It can "require any or all ... electrical corporations ... to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the commission may prescribe." (Section 393.240.1 RSMo). The Commission may also "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" (Section 393.240.2 RSMo). Lastly, the Commission has the authority to grant variances from its regulations related to affiliate agreements pursuant to 4 CSR 240-20.015(10). These provisions remain the basis for the Commission's authority to issue an order implementing the terms and conditions contained in the Stipulation.

8. In the Stipulation (as amended), the signatories requested the Commission issue an order containing certain language to permit and facilitate Empire's plan to acquire 600 MW of strategically located wind generation using federal tax incentives in conjunction with a tax equity structure to utilize economic renewable resources and benefit customers over the long-term, expeditiously pass on cost savings resulting from the federal tax change, and otherwise advance the public interest. To encourage the company to acquire 600 MW of wind generation and implement the terms of the Stipulation the Commission should (1) authorize Empire to record its

capital investment to acquire the Wind Projects as utility plant in service subject to audit in its next general rate case pursuant to Sections 393.140(4) and (8) RSMo,² (2) approve the depreciation rate of 3.33% for FERC accounts 341 through 346 pursuant to Section 393.240.2 RSMo, and (3) approve the specific affiliate transaction variances contained in paragraph 22 of the Stipulation pursuant to Commission Rule 4 CSR 240-20.015(10). Every other term, condition, and requested determination contained in the Stipulation stems from these authorities and will advance the public interest.

9. During the hearing, members of the Commission focused on what the parties meant by the Stipulation provisions calling for certain findings of reasonableness. For example, a component of the Stipulation is that 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 [Empire] 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.” (Stipulation p. 5). To be clear, this is not a request for a determination of prudence. The signatories’ commitment not to contest an issue does not preclude the Commission from reviewing the prudence of costs in future rate cases. Furthermore, as will be discussed below, the factual finding of reasonableness is not an advisory opinion. Instead, these factual findings serve to support and provide the basis for the Commission’s decision in this case to grant the requested relief described above and in the Stipulation.

² Notably, as the counsel for MECG noted during the hearing, this accounting authority is not meant to eliminate regulatory lag (Tr. Vol. 3, pp. 116-117).

Issue 2: Which of Empire’s requests, if any, should the Commission grant?

10. The Commission should encourage Empire’s planned investment in 600MW of wind generation by issuing an order consistent with the terms in the negotiated Stipulation.

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

11. As a part of the Stipulation, the signatories agreed that Empire would no longer seek to retire Asbury as a part of this case. Because the company will keep Asbury open for the moment, to be revisited in future Electric Utility Resource Planning filings, no regulatory asset is being requested by the company at this time. Therefore, no requirements are necessary.

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

12. Yes. The terms and conditions agreed upon in the Stipulation call for Empire to make certain filings (as well as to abstain from other filings). Those filings include Certificate of Convenience and Necessity applications for the projects, tariff changes to implement rate reductions associated with the federal tax cut, and a commitment not to file a rate case until at least April 2019. These filings and abstentions are contained in paragraphs 14(c), 16, and 18(d) of the Stipulation. These filings establish a process for the stakeholders to continue to be involved in the project and demonstrate the company’s commitment to work collaboratively.

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

13. Yes. Empire should be required to meet the parameters included in the Stipulation at paragraph 18. These provisions establish a framework that will guide the selection of a tax equity partner. Given the need for flexibility to negotiate with potential partners this reasonably apprises the signatories and the Commission of the expected parameters for a deal.

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

14. Because the Stipulation contemplates keeping Asbury open and operating at this time, conditions regarding the treatment of the Asbury employees are not relevant.

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

15. The Stipulation contemplates keeping Asbury open at this time and so there is no need to attach conditions related to impacts on the local property taxes.

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

16. Yes, pursuant to the Stipulation, and as conditions for the requested authority, the Commission should require Empire to file revised retail tariffs to be effective on October 1, 2018, designed to reduce retail rates by \$17,837,022. Furthermore, Empire should establish a regulatory liability to account for excess Accumulated Deferred Income Taxes. Empire's agreement to take these actions in the Stipulation ensures that customers see a rate reduction and rate stability through March 2020.

Issue 9: Should there be any requirements associated with potential conservation impacts of the Wind Projects? If so, what requirements?

17. No additional requirements related to conservation impacts of the wind projects are necessary. Renew Missouri did not identify specific requirements the Commission should impose associated with potential conservation impacts of the wind projects and expects Empire to follow all applicable conservation requirements otherwise required by law.

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

18. Pursuant to the 4 CSR 240-20.015, the Commission should grant the variances described in paragraph 22 of the Stipulation. Good cause exists to grant these variances because it will

facilitate Empire's ability to administer and operate the wind generation thereby creating long-term benefits for customers.

Chairman Hall's Questions

- A. What is the response to a Report and Order that contains the following:**
- 1) a factual finding that acquisition and operation of the additional 600 megawatts of wind energy is reasonable based upon the record in this case;**
 - 2) a factual finding that the financial components of the plan are reasonable based upon the record in this case;**
 - 3) a legal determination that it would be appropriate to book those expenses as plant and service with a 3.33 percent depreciation rate;**
 - 4) a legal determination that a variance of the affiliate transaction rule is appropriate.**

19. As an initial matter, Renew Missouri is a signatory to the Stipulation and supports the terms contained therein. With that caveat, if the Commission issues an order containing only the items described in the question it is not clear to Renew Missouri that those findings and determinations would sufficiently support action by the company to pursue adding additional wind generation in conjunction with a tax equity partner. To go forward with its plan to finance the project using a tax equity partner, Empire requires (1) authorization to record its capital investment to acquire the Wind Projects as utility plant in service subject to audit in its next general rate case pursuant to Sections 393.140(4) and (8) RSMo, (2) approval to use the depreciation rate of 3.33% for FERC accounts 341 through 346 pursuant to Section 393.240.2 RSMo, and (3) approval of the specific affiliate transaction variances contained in paragraph 22 of the Stipulation pursuant to Commission Rule 4 CSR 240-20.015(10). The four items listed by the Chairman would certainly support orders authorizing the accounting, depreciation, and variances required but standing alone do not address the relief sought and may not enable Empire to move forward.

20. If the intent of the question is to permit the acquisition of the wind generation unencumbered by all of the other negotiated conditions, the order should include the terms that (1)

authorize Empire to record its capital investment to acquire the Wind Projects as utility plant in service subject to audit in EDE's next general rate case³, (2) approve the depreciation rates⁴, and (3) grant the variances related to the affiliate transactions and arrangements necessary to operate the wind projects.⁵ Adding those terms would likely provide a minimum basis for Empire to move forward. Of course, an order containing only those authorizations and approvals leaves out a number of conditions that provide protection to customers and generate benefits that were negotiated by the parties. The terms of the Stipulation, taken as a whole, are more favorable to customers and more likely to result in action by the company than the scenario presented in this question.

B. Whether any of the reasonable determinations requested in this case related to the first two items above⁶, retirement of the Asbury plant, the CCR investment, or any other request would constitute an inappropriate or possibly illegal advisory opinion?

21. The "reasonable determinations" that the signatories ask the Commission to make in this case are simply findings that support a Commission Order authorizing the accounting, depreciation rates, and variances related to the wind project. It is accepted that the Commission cannot not issue advisory opinions. *See State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 392 S.W.3d 24 (Mo. Ct. App. 2012). But these determinations are not advisory opinions. For an order to avoid being advisory, the decision must have a practical effect on an existing controversy not merely future, hypothetical situations. *State ex rel. Missouri Parks Ass'n v. Missouri Dep't of Nat. Res.*, 316 S.W.3d 375, 384 (Mo. Ct. App. 2010).

³ Found at paragraph 14.d of the Stipulation.

⁴ Found at paragraph 14.f.i of the Stipulation.

⁵ Found at paragraph 22 of the Stipulation.

⁶ (1) a factual finding that acquisition and operation of the additional 600 megawatts of wind energy is reasonable based upon the record in this case (2) a factual finding that the financial components of the plan are reasonable based upon the record in this case.

22. Taken alone, such a finding may be an advisory opinion. However, in this case, based on the evidence presented and conditions negotiated by the signatory parties, including the rate reduction, rate case moratorium, market price protection mechanism, regulatory filings, and tax equity parameters, the factual findings as to the reasonableness of certain actions help resolve the case and are appropriate. This is because if the Commission is going to authorize accounting treatment, depreciation rates, or grant a variance from affiliate rules it should first find that the project being facilitated by these mechanisms is reasonable.

23. The need for such findings is illustrated when one considers a possible situation where the Commission is persuaded by the Office of Public Counsel that the project and its terms are not reasonable. In that event, if the Commission believes the project and terms are unreasonable, an order authorizing certain accounting, depreciation rates, or variances risks being arbitrary and capricious. Thus, the “reasonable” determinations requested in the Stipulation are already an essential element for Commission action because the Commission should not authorize accounting, depreciation, or variances to facilitate a plan it believes to be unreasonable. The Commission can, and should, be clear in the reasons and findings of fact upon which it ultimately bases its decision in this case.

24. Certainly, these reasonableness determinations are facts the Company will reference in defense against future challenges to the prudence of costs associated with its decisions to proceed. However, this does not mean the future Commission is bound to agree the costs associated with the decision were prudently incurred. Nor does the expectation that the finding will be used in a future case make it an advisory opinion. These findings are relevant to the present case and form the basis for the Commission to grant the other relief requested in the Stipulation.

C. [I]f the Commission does not adopt or approve the entire stipulation, [comment on] 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?

25. With respect to the specific question on an order considering a rate moratorium or the tax cut provision in isolation of the other negotiated terms, Renew Missouri is unaware of any authority that would permit such an order in this case. If the Commission determines it has authority to order a rate moratorium or rate reduction in this case in isolation of the other negotiated terms, it should not do so in this case.

Conclusion

26. Empire voluntarily developed and proposed a plan to embrace renewable resources in meeting the energy needs of its customers, accelerate retirement of its Asbury coal plant, and save customers hundreds of millions of dollars over the next 20 years. When certain parties raised concerns with the initial plan, the Company spent several weeks meeting with stakeholders developing the technical, legal, and operational aspects contained in the Stipulation. Ultimately, the Company, MECCG, the Commission's Staff, Renew Missouri, and the Department of Economic Development-Division of Energy agreed on terms that balance providing benefits and protection to customers that will enable Empire to move forward with a revised plan to acquire 600MW of strategically located wind generation, using a tax equity structure to utilize economic renewable resources, expeditiously pass on cost savings resulting from the federal tax change, and otherwise advance the public interest. The Commission should issue an order implementing the negotiated terms and granting the relief sought in the Stipulation.

WHEREFORE, Renew Missouri respectfully files its *Post-hearing Brief*.

Respectfully Submitted,

/s/ Tim Opitz

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 31th day of May 2018:

/s/ Tim Opitz
