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

RENEW MISSOURI'S REPLY BRIEF

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COMES NOW Renew Missouri Advocates d/b/a Renew Missouri ("Renew Missouri") and presents its reply brief to the Missouri Public Service Commission ("Commission") as follows:

Introduction

From the pre-determined list of issues, two broad issues emerged as the focus of the initial briefs. First, whether the Commission has the authority to grant the requests in the Non-unanimous Stipulation and Agreement ("Stipulation"). Second, whether the terms and conditions in the Stipulation are in the public interest. A broad coalition of stakeholders including the Commission's Staff ("Staff"), The Empire District Electric Company ("Empire"), Midwest Energy Consumers Group ("MECG"), Missouri Division of Energy ("DE"), Sierra Club, and Renew Missouri offered briefs supporting the wind project as both legal and in the public interest. Two groups remain opposed, the City of Joplin ("Joplin") and the Office of the Public Counsel ("OPC").

The Commission has the authority to grant the requested relief

What is the requested relief? As Renew Missouri discussed in its initial brief 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) 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) (Renew Missouri Br. p. 4). Accompanying these approvals, in order to protect the

public interest, the signatories agreed the Stipulation's additional terms and conditions are appropriate. The Commission should issue an order containing that language to permit and facilitate Empire's efforts to use federal tax incentives and a tax equity structure to add 600 MW of economic wind generation that will benefit customers over the long-term and otherwise advance the public interest. Effecting these changes requires the foregoing accounting approval and affiliate variance.

Joplin and OPC either misread or misrepresent the Stipulation when each claims the signatories seek pre-approval of cost recovery (OPC Br. p. 15; Joplin Br. p. 10). No signatory agrees.[1] However, OPC and Joplin each make these claims in an effort to convince the Commission that – despite the plain language used by the Signatories – it should interpret the Stipulation to say something it does not. For example, OPC is wrong when it says "[t]he terms of the stipulation and agreement ask the Commission … to find prudent and authorize recovery of costs associated with compliance with the coal combustion residuals rules." (OPC br. pp. 19-20). No such request is made (*See* Stipulation pp. 11-13). Joplin, for its part, pretends that MECG – a signatory to the Stipulation – opposes the Stipulation because of a position statement filed prior to the weeks-long negotiation culminating in a changed plan (Joplin Br. p. 10). In reality, MECG supports the Stipulation, firmly states "the requested action from the Commission is <u>not</u> decisional pre-approval", and argues it is in the public interest (MECG Br. pp. 22, 37). Joplin goes on to argue "Paragraph 16(a) of Empire's Application expressly seeks a finding that the unspecified expenditures 'not be excluded from Empire's rate based on the ground that the decision to proceed with the Plan was not prudent…'" noting "…Empire has not sought to Amend its Application."

[1] Staff takes the position that "pre-approval" is appropriate, but explains that it does not mean rate recovery is guaranteed because prudence must still be evaluated in a rate case (*See generally* Staff Br. pp. 4-7).

(Joplin Br. p. 10). Joplin ignores that Empire changed its position by joining the Stipulation as a signatory. Furthermore, Empire asserted its change by filing a revised statement of positions supporting the Stipulation (Doc. No. 130).

Rather than address the relief requested in the Stipulation substantively, Joplin and OPC prefer to ignore the Commission's clear authority to grant the relief requested in the Stipulation. Joplin's brief never mentions Section 393.140 RSMo (giving the Commission power to authorize Empire to record its capital investment to acquire the Wind Projects as utility plant-in-service subject to audit), Section 393.240 RSMo (giving the Commission power to approve depreciation rates), or Commission Rule 4 CSR 240-20.015(10) (giving the Commission power to grant variances from its regulation governing affiliate transactions).

OPC mentions the cited authority in its brief but fails to address the relief requested in the Stipulation. OPC mentions Section 393.140 once to say it does not authorize the Commission to issue advisory opinions (OPC Br. p. 21). Which is true, but irrelevant, because the Signatories are not seeking an advisory opinion. Nor are the Signatories seeking pre-approval of cost recovery in the stipulation. Section 393.140 RSMo empowers the Commission to authorize Empire to record its capital investment as plant-in-service. So although it does not authorize the relief OPC imagines, it *does* authorize the relief the signatories *actually seek*.

OPC discusses Section 393.240 and agrees it gives the Commission power to set depreciation rates for utility property (OPC Br. p. 31). However, OPC says the Commission has no power to do so in *this case* because Empire will not own the wind project outright (*Id*). OPC misses the point. Empire is seeking permission to record its contribution to acquire the wind project as utility plant-in-service. If the Commission grants that request a deprecation rate will be needed. In order to pass on the benefits (acquiring 600 MW of wind generation at a reduced price to

ratepayers), Empire proposes to use a tax-equity partner. Given the unique ownership arrangement that will exist until the "flip date", the signatories recognize certain accounting treatment is inter-related, and vital to giving customers the ability to realize benefits from a tax-equity partner that will likely never be matched by technological advances. Empire's Mr. Mertens testified:

> … the biggest deadline is related to the protection tax credit. And that provides our customers basically a 50 percent discount. So we -- you know, if you would equate that to turbine technology, we would have to see a 50 percent improvement in the amount of wind that -- the capacity factor.
>
> So we'd have to go from a 45 percent capacity factor to a 90 percent capacity factor. I can tell you today that's just not possible unless we make turbines, you know, thousands of feet tall.

(Tr. Vol. 5, pp. 322-23). By insisting the Commission cannot approve depreciation rates in this case OPC fails to recognize the totality of the requested relief and demonstrates it misses the point of the proposal.

At the core of OPC's and Joplin's opposition to the Commission's authority is the question: "can the Commission find that certain items are reasonable?" Joplin and OPC believe the Commission is forbidden from saying that certain items are "reasonable" because, in their view, a finding of "reasonable" is either an advisory opinion or pre-approval of costs. The relevant language in the Stipulation containing the term "reasonable" includes requests for findings and conclusions:

> (1) 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. The Signatories recognize that this Stipulation does not preclude the Commission and the Signatories from reviewing the reasonableness of the costs of the Wind Projects in a general rate proceeding following the date when the Wind Projects are fully operational and used for service. (Stipulation p. 5, para 14.e).

(2) 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 shall not object to EDE's recovery of the return on at its weighted average costs of capital and return of the net CCR Investment. (Stipulation p. 12, para. 19.b).

To the extent the terms go beyond simple findings that certain decisions are reasonable, the language binds only the Signatories to the Stipulation, not the Commission. For every contested issue, the Commission must make findings of fact and conclusions to support its decisions (Section 536.090 RSMo). In its brief, Empire summarizes "[f]indings of fact resolve disputes of material fact – the facts that guide the Commission's conclusions of law" (Empire Br. p. 11). Here, these findings will support the Commission's decisions on the accounting, depreciation, and affiliate transaction variances requested.

Furthermore, the Commission regularly finds that items (or entire stipulation and agreements) are "reasonable" in orders. For example:

- "The Commission finds all of the conditions and commitments in the 1st and 2nd Agreement to be **reasonable** and will adopt them." (Report and Order, Case No. EM-2018-0012, p. 30) (emphasis added);
- "A small-scale, limited investment is a **reasonable** way to investigate and gain knowledge of distributed solar generation before expanding the scale and investment level of this service." (Report and order, Case No. EA-2016-0208, p. 17) (emphasis added);
- "After considering these stipulations and agreements, the Commission independently finds and concludes that the stipulations and agreements are **reasonable** resolutions of the issues addressed by those agreements." (Report and Order, Case No. GR-2017-0215, p. 9) (emphasis added);
- "The Commission finds that it is **reasonable** to adopt the agreement of Spire Missouri, Staff, and Public Counsel regarding surveillance." (Report and Order, Case No. GR-2017-0215, p. 77) (emphasis added);
- "After reviewing the stipulation and agreement, the Commission independently finds and concludes that the stipulation and agreement is a **reasonable** resolution of the issues it addresses and should be approved." (Order Approving Stipulation and Agreement, Case No. GR-2018-0013, p. 3) (emphasis added).

Every stipulation that is approved as "reasonable" necessarily finds that the commitments and decisions made in the underlying terms are themselves reasonable.

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 material disputes of fact in 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 and in the public interest.

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 with one possible exception. In the Stipulation, the signatories agreed "[Empire] shall file revised retail tariff sheets in an appropriate timeframe that would allow such tariffs to take effect October 1, 2018." (Stipulation p. 15). Since the Stipulation was signed, Section 393.137, passed as part of Senate Bill 564 during the second regular session of the 99th General Assembly, now gives the Commission one-time

authority to order an adjustment to the electric rates of an electrical corporation in light of the recently enacted Tax Cuts and Jobs Act of 2017. Because it contains an emergency clause, that section became effective on June 1, 2018, when Senate Bill 564 was signed by the Governor. The section allows the Commission only ninety days after its effective date to act on the granted authority – a timeframe that may be inconsistent with the October 1st date.

Whether or not the tax reform issue is addressed here or in the recently opened Case No. ER-2018-0366, the Commission has the authority to: (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 393.140(4) and (8) RSMo, (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). Furthermore, the Commission *must* support its decisions with findings of fact and *should* do so by adopting the language related to findings of reasonableness.

The plan to add 600 MW of economic wind generation is in the public interest

The terms and conditions in the Stipulation, including the plan to add 600 MW of economic wind, are in the public interest. The Commission has the statutory authority to regulate public utilities in Missouri (Section 386.250 RSMo). When the specific power exercised does not contain an express standard, the Commission should evaluate the requests under a "public interest" standard. 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 Application of KCP&L Greater Missouri Operations Company*, 515 S.W.3d 754, 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)). Here, the negotiated terms and conditions in the Stipulation positively impact the public interest and should accompany any order in this case granting accounting authority, approving depreciation rates, and granting relief from the specified affiliate transaction rules.

Why should the Commission consider the Stipulation terms and conditions when evaluating the Public interest? Because those terms facilitate and ensure a variety of benefits to Empire's customers and the public generally. OPC and Joplin would have the Commission inordinately focus on the initial rate impact (Joplin Br. p. 4; OPC Br. pp 52-56). Each errs in evaluating the rate impact associated with the project by comparing the cost of the project to the status quo, not the current IRP plan projections. A more accurate assessment of adding the 600 MW of wind is to compare the project to the current IRP plan. Doing so reveals the rate impact of the Stipulation plan to be closer to 3.33% (*See* Empire Br. p. 29; Ex. 216). It is only when the plan is unreasonably compared to the status quo and the project revenues are ignored that the immediate rate impact approaches the inflated figures offered by Joplin and OPC. Moreover, after the initial investment, the long-term benefits to ratepayers from adding 600 MW of wind are significant. As shown by the Generation Fleet Savings Analysis ("GFSA"), updated to incorporate the Stipulation terms, the customers will see Net Present Value revenue requirement savings of $169 million over a 20-year period and $295 million over a 30-year period compared to the current IRP plan (Ex. 8, p. 4). These cost savings are a significant benefit of the project.

Setting aside the flaws in how Joplin an OPC view rate impact, their focus is too narrow. When evaluating the public interest, the Commission should embrace a broad view of the benefits to customers and the public at-large that will result from the terms and conditions in the Stipulation. In addition to the long-term ratepayer benefits, the parties filing briefs in support of the Stipulation point out a variety of other positive impacts to the public interest. MECG points out, the Stipulation will cause Empire to introduce a non-residential renewable energy program, create economic benefits, and ensure a rate moratorium (MECG Br. p. 39). DE argues the benefits of developing new wind generation include: 1) impacts on the long-term energy needs and bills of every home and business in Empire's service territory; 2) impacts on economic development opportunities for businesses seeking to locate in areas with renewable energy options; 3) impacts on the local economies where wind generation is sited; 4) impacts on the diversity of Empire's energy portfolio; and 5) impacts on Empire's ability to achieve a higher level of energy independence by harnessing locally-sourced energy (DE Br. p. 1).

Renew Missouri agrees with both MECG and DE that the benefits of the Stipulation are extensive. Additional public interest considerations advanced by Empire's decision to add wind generation include employment opportunities and economic benefits for local economies (Ex. 400, p. 5). 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). Furthermore, the Stipulation contains Empire's agreement 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).

When it is making its "public interest" determination in this case, this Commission should continue to embrace renewable energy development as highly important to the public interest as it has done in multiple recent cases. In its *Report and Order* in Case No. EA-2016-0208 the Commission found customers "have a strong interest in the development of economical renewable energy sources to provide safe, reliable, and affordable service while improving the environment and reducing the amount of carbon dioxide released into the atmosphere". Similarly, in Case No. EA-2015-0256, the Commission concluded:

> customers and the general public have a strong interest in the development of economical renewable energy sources to provide safe, reliable, and affordable service while improving the environment and reducing the amount of carbon dioxide released into the atmosphere.

These decisions are consistent with the views offered in DE's initial brief that promoting renewable energy is in the public interest generally (DE Br. pp. 6-9).

Applying those metrics, the terms and conditions in the Stipulation are in the public interest because they encourage Empire to embrace renewable resources in meeting the energy needs of its customers, ensure reliability of service, and will save customers hundreds of millions of dollars over the long-term. In addition to long-term customer savings as compared to the status-quo 2016 resource plan, the Stipulation provides for a *reduction* to customer rates to account for the recent changes to federal tax rates[2] 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). All of the foregoing benefits to

[2] As explained above, the recent passage of SB 564 may impact the Commission's ability to approve a date of October 1, 2018.

Empire customers illustrate that the terms of the Stipulation are in the public interest and should be adopted in the Commission's final order.

Conclusion

The Commission *can* grant the requests in the Non-unanimous Stipulation and Agreement under Section 393.140 RSMo, Section 393.240, and 4 CSR 240-20.015(10). Customers have a strong interest in the development of economical renewable energy sources to provide safe, reliable, and affordable service while improving the environment. To advance those interests the Commission *should* issue an order containing the terms and conditions in the Stipulation that will enable customers and the public at-large to benefit from Empire's efforts to acquire 600 MW of wind generation, embrace renewable resources in meeting the energy needs of its customers, save customers hundreds of millions of dollars over the next 20 years, and spur additional economic development.

WHEREFORE, Renew Missouri respectfully files its *Reply Brief*.

Respectfully Submitted,

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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 12th day of June 2018:

/s/ Tim Opitz