BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Third Prudence Review of Costs Subject to Commission-Approved Fuel Adjustment Clause of The Empire District Electric Company.	)))))	Case No. EO-2013-0114

THE EMPIRE DISTRICT ELECTRIC COMPANY'S REPLY TO DOGWOOD ENERGY'S FURTHER RESPONSE REGARDING ITS APPLICATION TO INTERVENE

In its February 20, 2013, *Order Directing Filing*, the Commission instructed Dogwood Energy, LLC ("Dogwood"), to clarify its application to intervene in this case by showing (i) how Dogwood would be harmed if the Commission denied the application to intervene, and (ii) why Dogwood did not intervene in the rate case establishing The Empire District Electric Company's ("Empire" or "the Company") fuel adjustment clause ("FAC"). On February 22, 2013, Dogwood filed a pleading entitled *Dogwood Energy, LLC's Further Response Regarding Its Application to Intervene* ("Response"), which purported to respond to the Commission's questions. In this reply, Empire will show that Dogwood's Response fails to adequately address either of the questions that the Commission identified for clarification in its February 20th order.

1. In its Response, Dogwood characterizes its interests in this proceeding as "multifaceted,"[1] but the interests that the Response specifically identifies don't justify that characterization. Dogwood states that it is a "market participant" that needs to "assure a fair opportunity to provide capacity and energy to monopoly electric utilities, as well as the need to avoid imprudent, unnecessary and inefficient additions to sources of supply that would glut and distort the market."[2] These interests, the Response claims, "are aligned with those of utility ratepayers,[3] but the nature and extent of that alleged alignment is never identified or explained. Based solely on those allegations, the Response goes on to claim that denial of Dogwood's application to intervene "not only precludes [Dogwood] from protecting its interests, but also

[1] Dogwood's Response at ¶ 1.
[2] *Id.*
[3] *Id.*

precludes it from even being able to fully assess the potential impacts of the proceeding" on those interests.[4]

2. Dogwood's parochial interests as a potential power supplier to Empire have nothing to do with the audit the Commission Staff ("Staff") will perform in this case or the final order the Commission will issue based on the results of that audit. As the Company noted in its February 6, 2013, pleading in opposition to Dogwood's intervention, the *Notice of Start of Third Prudence Audit* that initiated this case limits the scope of Staff's audit – and this proceeding – to a review of those costs (offset by off-system sales and emission allowance revenues) that were subject to Empire's FAC for the eighteen month period ending August 31, 2012. If those costs are found to have been prudently incurred, no further action by the Commission is necessary. Alternatively, if some or all of those costs are deemed imprudent, Empire will be required to make refunds, with interest, to customers who paid those costs through periodic FAC-related rate adjustments. Thus, the only parties whose interests could possibly be adversely affected by the Commission's final order in this case are those parties who were customers during the eighteen-month period that will be audited. Dogwood never has been one of Empire's retail customers. Consequently, Dogwood has no interest whatsoever in the historical period that will be covered by Staff's audit or in any refunds that will or will not be required as part of the Commission's final order. Dogwood's only interest is that it hopes to be able to provide purchased power to Empire sometime in the future.

3. Indeed, Dogwood's response all but admits that it has no interests that could be adversely affected by the Commission's final order in this case. Paragraph 5 of the Response states: "[w]hile the retrospective nature of a prudence review does not afford any immediate relief to Dogwood, such a review can nonetheless have a significant prospective effect." But the Commission's rules require a potential intervenor to demonstrate more than just a speculative, prospective interest. As the Company noted in its initial filing in opposition to Dogwood's proposed intervention, 4 CSR 240-2.075(4) requires a potential intervenor to show that it has interests that are different from those of the general public *and*

[4] *Id*. at ¶ 6.

that those interests will be adversely affected by the Commission's final order. Empire's initial pleading further pointed out that Dogwood's status as a potential provider of supply-side energy resources to Empire has nothing to do with the historical, FAC-related costs that are the subject of Staff's audit in this case. And Dogwood's Response serves only to confirm that fact.

4. In reply to the Commission's second question, the Response states that "Dogwood has not participated in Empire's rate cases to date, because Dogwood has not identified any specific issues of concern to it in those proceedings."[5] But rather than excuse Dogwood's non-participation, that statement demonstrates how little Dogwood knows about how Empire's FAC operates and the important decisions regarding the FAC that the Commission is required to make in each of the Company's general rate cases.

5. The determination of base fuel costs – i.e. all costs for, and related to, energy generated by Empire or purchased from other sources – is a critical issue in each of the Company's general rate cases. General rate cases also provide a forum to raise issues regarding the mix of base load and purchased power resources the Company actually employs to satisfy its energy requirements, and the costs it incurs to generate or acquire that energy. In addition, general rate cases determine which categories of costs can be recovered through and FAC and which cannot. Consequently, if, as it states in its Response, Dogwood has legitimate concerns regarding Empire's purchased power decisions, the impact those decisions have on energy costs, and the types of costs that the Company recovers through its FAC, Dogwood could have – and probably should have – raised those concerns in one or more of the general rate cases Empire has prosecuted since the initial approval of its FAC. That Dogwood fails to appreciate the opportunity general rate cases provide to address its alleged concerns, and that it failed to avail itself of opportunities to express those concerns in past rate cases, belies Dogwood's claim that its participation in the current case would provide information and insights that would prove helpful to the Commission in resolving issues raised by Staff's prudence review.

[5] *Id* at ¶ 4.

6. Dogwood's Response further claims that its application to intervene should be granted because to do otherwise would prevent its counsel from examining the confidential aspects of Staff's audit report and assessing the potential impacts of Staff's recommendations.[6] But the Response fails to explain how Dogwood's counsel would accomplish those objectives. It is questionable whether a lawyer acting alone is qualified to fully assess and evaluate an audit report that addresses the prudence of Empire's energy costs. And it is equally questionable whether Dogwood's counsel's "legal" analysis or opinions regarding the results of Staff's audit would be of much value to the Commission in preparing its final order in this case. Nowhere in any of its filings in this case has Dogwood indicated that it intends to incur the expense necessary to employ outside accounting or energy cost experts who may be necessary to assist Dogwood's counsel to evaluate information provided by Empire or the results of Staff's audit, especially information or those portions of Staff's final audit report that are designated "highly confidential." Yet under the Commission's rule governing access to and use of proprietary and highly confidential information, 4 CSR 240-2.135, Dogwood's counsel is prohibited from disclosing highly confidential information to anyone other than "outside experts that have been retained for the purpose of the case."[7] Employees, officers, or directors of Dogwood or any of its affiliates are disqualified from serving as experts and, therefore, are prohibited from having access to or using such information.[8] And although the rules governing the dissemination of proprietary information are somewhat less stringent,[9] serious questions remain unanswered as to how Dogwood expects to lawfully review and analyze proprietary or highly confidential information provided by Empire – which likely will comprise most, if not all, of the information regarding the terms and prices of the Company's third-party power purchases – or to the highly confidential portions of Staff's final audit report.

7. Paragraph 2 of the Response states that Dogwood has participated in the Company's Integrated Resource Planning ("IRP") cases since 2010, and that it has raised significant supply-side

[6] *Id*. at ¶ 6.
[7] 4 CSR 240-2.135(5).
[8] 4 CSR 240-2.135(5)(A).
[9] 4 CSR 240-2.135(4).

issues in those proceedings. But the Response fails to disclose how the Commission has reacted to the issues that Dogwood raised. The Company's most recent IRP-related case was Case No. EO-2012-0294, which considered Empire's 2012 IRP update. Similar to the current case, Dogwood's filings in that case sought to question certain of the Company's purchase power decisions, most specifically, Empire's decision to reject Dogwood's proposal to sell the Company an equity interest in the combined-cycle Dogwood Energy Facility located in Pleasant Hill, Missouri.[10] As disclosed during the course of that IRP update proceeding, Empire rejected Dogwood's proposal in favor of a plan to convert the Company's Riverton 12 generating facility from coal-fired to combined-cycle. Because of Empire's decision, Dogwood argued in that case that the Commission should order Empire to accept Dogwood's proposal. But, in its order closing the docket, the Commission rejected Dogwood's argument, concluding that issues related to Empire's energy resource choices should be deferred to the Company's triennial IRP case.[11] Just as the Commission found in that case, the questions regarding Empire's future decisions regarding the procurement of energy necessary to fulfill its customer needs that Dogwood is attempting to raise in this case should, instead, be deferred and addressed in one the Company's triennial IRP filings.

8. Finally, while there are numerous reasons why Dogwood's application for intervention should be denied, Dogwood is incorrect if it suggests that it cannot have its views on Staff's final audit report heard unless it is allowed to intervene in this case. The Commission's rules – specifically 4 CSR 240-2.075(11) – authorizes any person not a party to a case to petition the Commission for authority to file a brief as an *amicus curiae*. Consequently, if Dogwood believes the Staff's audit report and any recommendations that Staff makes as part of that report are incorrect or otherwise warrant comment, Dogwood can make a filing to file a brief as *amicus curiae*. If its request satisfies the requirements of the rule, such a brief will allow the Commission to consider Dogwood's so that its views and opinions regarding Staff's report prior to the issuance of a final order in this case.

[10] *Comments of Dogwood Energy, LLC Regarding Empire Annual IRP Update Report*, Case No. EO-2012-0294 at ¶ 7 (April 26, 2012).

[11] *Order Regarding 2012 Integrated Resource Planning Annual Update Summary*, Case No. EO-2012-0294, p. 3 (July 17, 2012).

WHEREFORE, because Dogwood has failed to adequately address either of the questions posed by the Commission in its February 20th *Order Directing Filing*, and also because Dogwood has failed to demonstrate that it can satisfy any of the requirements for potential intervenors found in 4 CSR 240-2.075(4), the Commission should deny Dogwood's application to intervene in this case. The Commission's order denying Dogwood's application should be without prejudice to any petition Dogwood might later make for authority to file a brief as *amicus curiae*, as provided in the Commission's rules.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record on this 25th day of February, 2013.

_____/s/ L. Russell Mitten_____