BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

Ahlstrom Development Corporation, and Cottonwood Energy Partners, L.P.,	)	
Complainants,	)	
v.	)	**Case No. EC-95-28**
The Empire District Electric Corporation, a corporation,	)	
Respondent.	)	

REPORT AND ORDER

Issue Date: November 8, 1995

Effective Date: November 29, 1995

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Complainants,	)	
v.	)	**Case No. EC-95-28**
The Empire District Electric Corporation, a corporation,	)	
Respondent.	)	

APPEARANCES

Earle H. O'Donnell and **Benga L. Farina**, Dewey Ballantine, 1775 Pennsylvania Avenue, N.W., Washington, D.C. 20006-4605,

and

Lee M. Smithyman, Smithyman & Zakoura, Chartered, 650 Commerce Plaza, 7300 West 110th Street, Overland Park, Kansas 66210, for Ahlstrom Development Corporation and Cottonwood Energy Partners, L.P.

Gary W. Duffy, **Dean L. Cooper**, **James C. Swearengen**, and **Paul A. Boudreau**, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri, 65102,

and

Michael E. Small, Wright & Talisman, P.C., 1200 G Street, N.W., Suite 600, Washington, D.C. 20005, for The Empire District Electric Company.

James M. Fischer, Attorney at Law, 101 West McCarty Street, Suite 215, Jefferson City, Missouri 65101,

and

Mark G. English, Vice President and General Counsel, KLT Power, Inc., 1201 Walnut Street, Post Office Box 412472, Kansas City, Missouri 64141, for KLT Power, Inc.

William G. Riggins, Staff Attorney, Kansas City Power & Light Company, 1201 Walnut Street, Kansas City, Missouri 64106, for Kansas City Power & Light Company.

Joseph H. Raybuck, Attorney, Union Electric Company, 1901 Chouteau Avenue, Post Office Box 149 (M/C 1310), St. Louis, Missouri 63166, for Union Electric Company.

Mark W. Comley, Newman, Comley & Ruth, P.C., 205 East Capitol Avenue, Post Office Box 537, Jefferson City, Missouri 65102-0537, for Cogentrix Energy, Inc.

Stuart W. Conrad, Finnegan, Conrad & Peterson, 1209 Penntower Building, 3100 Broadway, Kansas City, Missouri 64111, for Kenetech Energy Systems, Inc.

Richard W. French, French & Stewart, 1001 Cherry Street, Suite 302, Columbia, Missouri 65201, for Trigen-St. Louis Energy Corporation.

Lewis R. Mills, Jr., Deputy Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Jeffrey A. Keevil, Deputy General Counsel, and **David Woodsmall**, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

ADMINISTRATIVE LAW JUDGE: **Thomas H. Luckenbill, Deputy Chief.**

REPORT AND ORDER

Procedural History

On August 1, 1994, Ahlstrom Development Corporation and Cottonwood Energy Partners, L.P. (Ahlstrom) filed a Complaint with the Missouri Public Service Commission (Commission). In the Complaint, Ahlstrom requests an order of the Commission directing The Empire District Electric Company (Empire) to purchase 160 megawatts (MW) of capacity and energy from the Jayhawk Project in accordance with the Public Utility Regulatory Policies Act of 1978 (PURPA), implementing Federal Energy Regulatory Commission (FERC) regulations and Missouri regulations by entering into the power purchase agreement (PPA) attached to the Complaint.

On September 1, 1994, Empire filed an Answer to Ahlstrom's Complaint. In the Answer, Empire denied numerous allegations contained in the Complaint, raised eleven affirmative defenses, and requested that the Commission dismiss the Complaint and discharge Empire.

By order issued September 14, 1994, the Commission refused to dismiss the Complaint. Rather, the Commission stated that a hearing would be necessary to resolve several of the factual disputes and scheduled an early prehearing

conference for November 3, 1994. In that order, the Commission provided notice to interested persons and an opportunity to intervene.

Before the early prehearing conference, numerous parties filed applications to intervene and Cogentrix Energy, Inc. (Cogentrix) filed a motion to participate without intervention. On October 28, 1994, the Commission issued an order which granted Cogentrix's application to participate without intervention. Also, on October 28, the Commission granted intervention on a limited basis to Kansas City Power & Light Company (KCPL), Union Electric Company (UE), KLT Power, Inc. (KLT), and Kenetech Energy Systems, Inc. (Kenetech). Kenetech subsequently withdrew from the case. Also, on January 6, 1995, the Commission granted the request of Trigen-St. Louis Energy Corporation to participate without intervention.

On November 17, 1994, the parties respectively filed nonbinding lists of issues and proposed procedural schedules. On December 2, 1994, the Commission issued an order setting a procedural schedule.

On January 23, 1995, Ahlstrom witnesses James K. Martin, James R. Carlson, and Dr. Craig Roach filed direct testimony.

On February 14, 1995, Empire filed a motion for summary determination and suggestions in support thereof. Empire requested that the Commission dismiss the Complaint or enter summary judgment in its favor. In its motion, Empire argued that the Complaint was not ripe for adjudication when filed because, at that time, Empire was still negotiating with various parties to satisfy its need for baseload capacity and associated energy in the year 2000, and, thus, avoided costs could not be determined until Empire had determined the low cost, best alternative. Empire further stated that it had signed an agreement with another entity to supply its needs for 160 MW of baseload capacity and associated energy beginning in the year 2000. Empire further stated that Empire's avoided costs for the year 2000, based on the agreement, are significantly less than the cost

associated with the PPA attached to Ahlstrom's Complaint. Finally, Empire suggested that it no longer needed 160 MW additional baseload capacity and energy due to the new agreement.

On February 24, 1995, the Staff of the Missouri Public Service Commission (Staff) filed a response to Empire's motion. Staff supported Empire's motion. Staff argued that the Complaint was premature because the Complaint is based on avoided cost estimates which should be deemed inapplicable in that the bases of those estimates have changed, or in the case of Missouri 2000, been abandoned. On March 6, 1995, Ahlstrom filed a response to Empire's motion. Ahlstrom opposed the motion for several reasons including its contention that the PPA offered by Ahlstrom to Empire for the sale of 160 MW of capacity and energy from the Jayhawk Energy Project over its 25-year term compares favorably with an agreement that Empire had recently entered into with Western Resources, Inc. (WRI) for 160 MW of capacity and energy from June 1, 2000, through May 31, 2010. On March 10, 1995, the Commission issued an order which denied Empire's motion for summary determination.

On April 4, 1995, Empire witnesses Morgan, Daileader, Baylor, Beecher and Stark filed direct/rebuttal testimony. On May 16, 1995, UE witness Gilbert E. Elliott filed direct testimony. Also on May 16, 1995, Staff witnesses Proctor and Weatherwax filed direct/rebuttal testimony.

On June 20, 1995, Ahlstrom witnesses Grundmann, Whiting, Carlson, Roach and Kennedy filed surrebuttal testimony. Also, on June 20, 1995, Empire witnesses McKinney, Baylor and Beecher filed surrebuttal testimony.

On June 29, 1995, the Commission convened a prehearing conference in which all parties participated.

On July 6, 1995, a Hearing Memorandum was filed which identified four contested issues. The four issues identified in the Hearing Memorandum are: (1) has Ahlstrom created a legally enforceable obligation (LEO) to provide Empire

with capacity and associated energy in the year 2000; (2) what are Empire's avoided costs beginning in the year 2000 and over what period of time should they be determined; (3) in light of the Commission's determinations on the first two issues above, what action should the Commission take; and (4) should the Commission establish a generic methodology for calculating avoided costs in this proceeding.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

In May of 1993, Ahlstrom Development Corporation contacted Empire about building an electrical generation facility to meet Empire's anticipated growth in electricity demand. The plant proposed by Ahlstrom would come on line in the year 2000. The proposals contemplate that Empire would buy 160 MW of power from the plant until 2025, at which time Empire could purchase the facility.

The facility contemplated by Ahlstrom is referred to as the Jayhawk Project. The Jayhawk Project is a primarily waste-fired (unreclaimed waste coal and petroleum coke) small power production facility. The facility would be located on property under option by Ahlstrom and currently owned by Clemens Coal Company, which property is between Liberal, Missouri, and Mulberry, Kansas.

The Complaint states that the Jayhawk Project will be developed, owned and operated by Cottonwood Energy Partners, L.P., a California Limited Partnership. Cottonwood Energy Partners is composed of a general partner, Sagittarius Power Company, Inc., and a limited partner, Ahlstrom. Ahlstrom and its affiliates have developed, own interests in, or operate ten power generation

facilities in North America with a total aggregate investment of $2,035,000,000 and with an aggregate generating capacity of 885 MW.

The electric generating facilities developed, owned and operated by Ahlstrom or its affiliates utilize the AHLSTROM PYROFLOW® circulating fluidized bed (CFB) technology originated by an affiliate of Ahlstrom.

By letter dated October 18, 1995, Ahlstrom advised the Commission that Foster Wheeling Corporation has recently purchased certain assets from Ahlstrom. Ahlstrom states that as part of this process a Delaware Limited Liability Company, General Power, LLC, (General Power) has been created. The sole owners of General Power are Robert Joyce and Douglas A. Wert, former senior executives of Ahlstrom. Ahlstrom states that General Power has assumed all rights and obligations with respect to the Jayhawk Project, as well as responsibility for managing the project.

To carefully define the issue in this case, the Commission must first clarify the relief requested by Ahlstrom. As pointed out by Empire and Staff at the hearing, Ahlstrom's testimony contains statements that are not consistent with the request for relief stated in the Complaint. This testimony and the objections relating to it are addressed in the Pending Motions and Objections section of this Report And Order. A complainant is not allowed to materially change its request for relief in the latter stages of a proceeding, as this would deny a respondent a meaningful opportunity to respond. Thus, the Commission determines that its duty is to decide whether to order Empire to enter into the draft power purchase agreement attached to the Complaint (PPA).

Ahlstrom has the burden to prove the following two elements to establish a basis for the Commission to order Empire to enter into the PPA. First, Ahlstrom must show that it did everything in its power to obtain a contract by describing a fully designed facility to Empire, proffering a complete contract for that facility to Empire, and negotiating all issues to the point of

agreement or to the point of impasse. Second, Ahlstrom must show that the rates for capacity and energy contained in the PPA attached to the Complaint are equal to or below Empire's avoided costs.

Status of Facility Design/Contract Negotiations

The first matter that the Commission must determine is whether Ahlstrom has described a fully designed facility to Empire, proffered a complete contract for the facility to Empire, and negotiated all issues to the point of agreement or impasse.

Ahlstrom contends that it created a legally enforceable obligation on the date the Complaint was filed (August 1, 1994). Ahlstrom states that it had developed the Jayhawk Project sufficiently to ensure that the project is viable and that it is able to enter into a binding commitment to provide power to Empire.

Ahlstrom states that it attempted to negotiate with Empire since May, 1993, but time and time again it received no meaningful response from Empire. Ahlstrom states that it was essentially negotiating with itself because Empire provided minimal feedback and never presented an offer or counteroffer.

Ahlstrom maintains that Empire was predisposed to a rate base addition -- Missouri 2000 -- and that during July, 1994, Empire cut off communications with Ahlstrom and refused to meet with any of Ahlstrom's employees.

Ahlstrom states that it did all that a prudent developer would do to develop the Jayhawk Project prior to entering into a PPA with Empire. Ahlstrom states that the Jayhawk facility was viable at the time the Complaint was filed.

Empire argues that the Jayhawk Project never has been sufficiently mature to make Ahlstrom ready, willing and able to incur a lawful obligation to enter into a power purchase agreement with Empire. Empire acknowledges that the

filing of a complaint in some circumstances can create an LEO, but the mere filing of a complaint, without more, is insufficient. Empire contends that the project must be sufficiently mature at the time the complaint is filed to justify the LEO. Also, Empire states, the developer must have legally committed to develop a specific project and to provide the power. Empire states that a developer cannot simply use the filing of a complaint as a ruse or leverage to require a utility to purchase while the developer remains free to later choose whether to go forward with the project or make dramatic changes in the basic scope of the terms. Empire maintains that this is precisely what Ahlstrom's PPA allows.

Staff maintains that Ahlstrom has failed to establish a legally enforceable obligation because the PPA attached to the Complaint contains no language specifying what size facility should be constructed, nor does it contain plant design details such as a schematic of the plant or "even a one line." (Tr. 300-301). Staff continues by stating that the PPA does not specify a delivery point or interconnection point. Additionally, Staff points out that even as of the date of the hearing Ahlstrom had not decided in what state the plant would be constructed.

Staff states that the PPA attached to the Complaint was never truly proposed by Ahlstrom to Empire. Staff points out that Ahlstrom has admitted that the PPA attached to the Complaint was prepared to be attached to the Complaint.

The Office of the Public Counsel (OPC) states that Ahlstrom has not created a legally enforceable obligation.

The Commission finds that Ahlstrom has failed to establish a legally enforceable obligation because the PPA attached to the Complaint neither describes a fully designed facility nor was a complete contract proffered to Empire. The Commission finds that to create a legally enforceable obligation, the proffered contract must be definite with respect to the major components of

the proposed project. It is significant that the developers have not committed to a specific site, or state. But of greater concern to the Commission is that the PPA contains two appendices, one for a 160 MW plant and another for a 260 MW plant. The only descriptive language as to the determination with respect to the facility's size are the words: "to be applied if Empire purchases from a 160 MW facility" in the case of Appendix 2, or the words: "to be applied if Empire purchases from a 260 MW facility" in the case of Appendix 2.1. Testimony of Ahlstrom witness Mr. Whiting confirms that it is unclear whether Ahlstrom or Empire has the right to determine the size of the facility based on the language in the PPA. The Commission finds that the PPA is so vague that one cannot discern what size facility is contemplated by Ahlstrom or how the size is to be determined.

The Commission finds that the ambiguity about the proposed facility's size, in conjunction with the absence of a reasonably complete facility design and lack of a specific site for the proposed facility, shows that the PPA is not sufficiently complete to trigger a legally enforceable obligation. It is worthy of mention that the PPA was not proffered to Empire. Rather, it was prepared to attach to the Complaint.

Avoided Costs

PURPA provides for the purchase by electric utilities of electric energy from qualifying small power production facilities at a rate which does not exceed the "incremental cost to the electric utility of alternative electric energy." 16 U.S.C. §824a-3(b). PURPA defines incremental cost of alternative electric energy as "the cost to the electric utility of electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. §824a-3(d).

Subsequently developed FERC regulations provided for rates for the purchase of electric energy and capacity provided pursuant to a legally enforceable obligation to be set based upon the avoided cost of the electric utility at the time of delivery or, at the option of the qualifying facility, at the time the obligation is incurred. 18 C.F.R. §292.304(d)(2). The Commission rules regarding cogeneration essentially mirror the federal rules. 4 CSR 240-20.060(5). In each case, while the rule provides for rates based upon avoided cost, the rules are silent on the question of how the avoided cost is to be calculated.

Ahlstrom argues that Empire's avoided costs should be based on the cost of Missouri 2000 over its 45-year expected life. Ahlstrom contends that a legally enforceable obligation was created on August 1, 1994, and Missouri 2000 was Empire's preferred option at that time.

Ahlstrom further contends that its offer is superior to the Iatan 2 and Tenaska options Empire was considering during its negotiations with Ahlstrom. Also, Ahlstrom contends that even when Empire's avoided costs are based on the WRI proposal made to Empire in November, 1994, Ahlstrom's offer is still below Empire's avoided costs over the long term.

Ahlstrom states that it is imperative that the Commission evaluate the offers over a 45-year period so as not to allow Empire to change the criteria by which it evaluates offers as a means to eliminate the Jayhawk Project from consideration. Ahlstrom argues that Empire's behavior since it learned of Ahlstrom's intention to file a complaint leads to the conclusion that Empire's sudden switch in procurement strategy was a hastily conceived plan the purpose of which was to allow Empire to escape its obligation under PURPA to buy power from the Jayhawk Project.

Ahlstrom points out that Empire witness Baylor's analysis shows that as of July 31, 1994, Ahlstrom's proposal was below Empire's avoided cost based

on the Missouri 2000 project. Ahlstrom maintains that its proposal is superior to Missouri 2000 in terms of risk, reliability and environmental performance.

Ahlstrom argues that Iatan 2 was not an alternative Empire could have purchased "but for" Ahlstrom's offer. Thus, Empire's avoided costs should not be based on Iatan 2. Ahlstrom contends that Iatan 2 did not have the necessary subscription (or, in fact, any committed purchasers) in August of 1994.

Ahlstrom states that if the Commission should allow Empire to reach forward in time and base its avoided cost on the WRI agreement, Ahlstrom's offer is still the better choice for Empire's ratepayers. Ahlstrom states that since prices are at an all-time low, now is the time for Empire to take advantage of the window of opportunity for low cost coal-fired capacity and lock into that low price for the long term. Ahlstrom states that utilities are not building capacity now so equipment manufacturers and construction firms have cut prices dramatically. Ahlstrom contends that prices will rise as utilities need to acquire capacity in the future. Ahlstrom states that in the future, demand will increase and small utilities, such as Empire, with large needs relative to their size will face a different market than today, with prices (and supplier margins) that reflect high demand and tight supply. Ahlstrom states that Empire does not mind taking this risk because it is gambling with ratepayers' money.

Empire states that the calculation of avoided costs has double significance in the context of this Complaint because Ahlstrom did not effectively offer to sell capacity and energy to Empire at unspecified avoided costs. Empire states that Ahlstrom has offered to sell capacity and energy to Empire at a specific price which Ahlstrom alleges to be less than or equal to Empire's avoided costs over a period of 45 years. Thus, according to Empire, in addition to determining the full avoided cost rate for a sale of capacity and energy, the avoided cost issue is also relevant to whether Ahlstrom's offer was legally sufficient to trigger the purchase obligation under the PURPA provisions.

Empire states that the determination of avoided cost must take into account all potential sources of capacity and energy. Empire states that two recent FERC orders indicate that the evaluation of avoided costs must include examination of all sources whether the utility is considering these sources or not. ***Metropolitan Edison Co.***, 72 F.E.R.C. ¶61,015, 1995 WL 397198 (July, 1995), and ***Southern Calif. Edison Co.***, 70 F.E.R.C. ¶61,215 at 61,666, 61,677 (February 23, 1995).

Empire argues that the Commission should focus on the WRI contract rather than Missouri 2000. Empire states that the WRI contract represents the low-cost alternative reasonably available to Empire during 1994 while using Missouri 2000 as a proxy would be speculative.

Empire contends that the rates reflected in the WRI contract represent the market price for this type of capacity and associated energy on August 1, 1994 or, at least, that the market price for power was less than the prices proposed by Ahlstrom on August 1, 1994. Empire further states that the WRI contract is a better indicator of Empire's avoided costs than Missouri 2000 because it is based on an established, known plant (i.e., the Jeffrey Energy Center).

Empire states that Ahlstrom's position of basing Empire's avoided costs on the now-terminated Missouri 2000 project is not logical. Empire states that the contract it executed with WRI represents Empire's commitment to purchase the capacity and energy. No similar commitment was ever made to Missouri 2000 or any other project under evaluation.

Empire states that the WRI contract represents a savings of $26,000,000 in unadjusted dollars each year from 2000 through 2009 as compared to the Ahlstrom proposals. Empire states that if it is allowed to proceed with the WRI contract and it turns out that its view of the future is flawed, the worst case scenario is that Empire will be forced to replace this 160 MW with

market-priced power at some point between now and 2009. Empire continues by stating that if Empire is forced into the PPA and Ahlstrom's view of the future is flawed, Empire will be burdened by overpriced power for potentially decades beyond 2009 -- a burden that could be disastrous to Empire's ratepayers and shareholders.

Staff presented avoided cost data for two time periods: (1) August 1, 1994, based on Ahlstrom's theory that the filing of the Complaint in this proceeding established a legally enforceable obligation; and (2) end of year 1994, based on Empire's final avoided cost figures as established by Empire's agreement with WRI. Staff states that avoided cost data from either time period shows that Ahlstrom's Jayhawk Project was significantly more expensive than many other projects available to Empire.

Staff states that for comparative purposes the Commission should employ the avoided cost data from the end of the year, that point in time at which Empire had concluded its bidding process with the execution of the WRI power purchase agreement. Staff states that after using this data, the Ahlstrom proposals (at the 160 MW or 260 MW facility site) have associated costs exceeding Empire's avoided costs.

Staff states that in its analysis it analyzed several key assumptions to determine how a change in assumptions affects the overall avoided cost rankings. In each situation the effect of the change was nominal, having no effect on the overall rankings relative to Ahlstrom.

Staff states that Empire was evaluating several proposals cheaper in price than Ahlstrom's proposals. In conclusion, Staff states that any Commission action requiring Empire to enter into a power purchase agreement with Ahlstrom would be deleterious to Empire's ratepayers.

The Office of the Public Counsel (OPC) states that Empire's analysis of its supply-side options was an ongoing process that continued through at least

early December of 1994. OPC further states that additional options and revisions to previously known options became available to Empire as the process continued beyond the date on which Ahlstrom filed its Complaint. OPC contends that avoided cost should be calculated for the purposes of this case based on all of the information available to Empire at the end of its solicitation process.

The Commission finds that Empire's avoided costs for capacity and associated energy for the years 2000 and beyond were not set on August 1, 1994, because Empire was in the midst of a competitive negotiation process at that time. The Commission finds that the competitive negotiation process ultimately resulted in the ten-year agreement between Empire and Western Resources, Inc., which was executed by those entities on January 16, 1995. Congress defined "incremental cost of alternative electric energy" as the cost to the electric utility of the electric energy which, but for the purchase from a qualifying cogenerator or qualifying small power producer, the utility would generate or purchase from another source. 16 U.S.C. §824a-3(d). In applying this definition to the facts presented in this case, the Commission finds that Empire would purchase power from WRI (under the terms of the WRI agreement) but for a purchase from the Jayhawk facility (Ahlstrom's proposal). Thus, the WRI agreement establishes Empire's avoided cost for the term of the WRI agreement (i.e., May 31, 2000, to May 31, 2009). However, the PPA attached to Ahlstrom's Complaint is a proposal to Empire for a term of 25 years with Empire having an option to purchase the power plant thereafter. Therefore, the Commission finds that Empire's avoided cost for purposes of deciding this case should be based on a 45-year avoided cost commencing in the year 2000.

The Commission finds that the most reasonable calculation of Empire's 45-year avoided cost is that presented by Staff witness Weatherwax. (Ex. 19HC, pp. 25-27; Ex. 22HC). Mr. Weatherwax performed a calculation using the ten-year WRI agreement and grafting on the charges for Iatan 2 after adjusting the Iatan 2

charges for inflation at an annual rate of from 3.50 to 3.75 percent. Mr. Weatherwax expressed all 45-year alternatives that he proposed on the basis of year 2000 dollars. The Commission finds that Mr. Weatherwax's calculation of Empire's avoided cost using the WRI 162 MW Jeffrey Unit purchase followed by Iatan 2 charges as adjusted for inflation is the most reasonable method presented for determining Empire's avoided costs. The Commission further finds that Mr. Weatherwax's calculations of the year 2000 dollar cost associated with either Ahlstrom proposal (i.e., Jayhawk 160 MW circulating fluidized bed (CFB) facility or 160 MW purchase from a Jayhawk 260 MW CFB facility) are reasonable.

The Commission finds that Empire's 45-year avoided cost is substantially less than the costs associated with either Ahlstrom proposal as reflected in the PPA attached to the Complaint, as reflected by Staff witness Weatherwax's analysis, the results of which are reflected in Exhibit 22HC.

The Commission would point out, however, that the Commission's adoption of the use of the WRI 162 MW Jeffrey Unit purchase followed by Iatan 2 charges for the purpose of establishing Empire's 45-year avoided cost is limited to that purpose. The Commission's finding as to Empire's avoided cost should not be construed as a limitation upon the ability of parties to attack the prudence of the WRI agreement or Iatan 2 charges in connection with future electric rate cases of Empire or other electric utilities. In particular, in all likelihood Empire's revenue requirement will be affected by the WRI agreement in future Empire rate proceedings. The Commission's finding in the instant proceeding with respect to Empire's avoided costs does not limit the ability of any party to attack the prudence of costs incurred under the WRI agreement in the context of future Empire rate proceedings. Additionally, if Iatan 2 is constructed at some future date, Iatan 2 costs may become part of a utility's revenue requirement in future rate proceedings. The Commission's finding in the instant proceeding with respect to Empire's avoided costs does not limit the ability of any party to

attack the prudence of costs incurred by any Missouri utility in connection with Iatan 2.

Generic Methodology for Calculating Avoided Costs

The parties have presented the issue of whether a generic method for calculating avoided costs should be established in this proceeding.

Staff states that it does not see this as truly being an issue in this case, and believes that it may have arisen as a result of the Commission's order granting limited intervention issued on or about October 28, 1994. Staff states that the issue is phrased as though it refers to a rulemaking proceeding, but this case is not a rulemaking and to Staff's knowledge no party has suggested that it is. Staff believes that the Commission's final Report And Order in this proceeding will have the same precedential value as other orders of the Commission in a complaint proceeding, whatever that may be.

Ahlstrom agrees with Staff on this issue.

Trigen-St. Louis states that this is not the proper proceeding for the Commission to establish a generic methodology for the calculation of avoided costs.

Kansas City Power & Light Company states "No".

Union Electric Company states that this is not the appropriate forum to establish a generic methodology for calculating avoided costs, if one is found to be needed.

KLT Power, Inc., states that the Commission should not establish a generic methodology for calculating avoided costs in this proceeding that would apply to any other proceeding in the future.

The Office of the Public Counsel states that the Commission should not establish a generic method for calculating avoided costs in this proceeding.

Cogentrix states that the instant case is not an appropriate vehicle within which to establish a generic method for calculating avoided costs applicable to the industry or to the proceedings in the future.

The Commission finds that this Complaint proceeding is not the appropriate case in which to establish a generic method for calculating avoided costs.

Pending Motions and Objections

Staff has moved that the Commission strike a portion of the direct testimony of Ahlstrom witness Martin. The testimony to which the Staff objects reads as follows:

> That is why Ahlstrom has asked this Commission to intervene and order Empire to negotiate a contract with Ahlstrom for the Jayhawk Energy Project.

(Ex. 2HC, p. 52, lines 11-13). The basis of Staff's objection is that this testimony is an improper attempt to amend the relief requested in the Complaint. Staff points out that Ahlstrom's prayer for relief in its Complaint is as follows:

> WHEREFORE, Complainants Ahlstrom Development Corporation and Cottonwood Energy Partners, L.P. respectfully request an order of this Commission directing Respondent Empire District Electric Company to purchase 160 MW of capacity and energy from the Jayhawk project in accordance with PURPA, the implementing FERC regulations and the Missouri regulations by entering into the attached power purchase agreement.

The Commission finds that the above-referenced testimony is not entirely consistent with the Complaint because the Complaint requested that the Commission order Empire to enter into the PPA attached thereto. However, the testimony complained of is not so egregious as to justify striking it from the record in that the proponent of the testimony may have simply mischaracterized the relief requested without any desire to effectuate a change in relief requested. Thus, the Commission will overrule Staff's motion to strike the above-referenced

testimony. However, the Commission's ruling on this objection is not to be construed as a de facto amendment of Ahlstrom's Complaint.

Staff has moved that the Commission strike a portion of the surrebuttal testimony of Ahlstrom witness Grundmann. The testimony to which the Staff objects reads as follows:

> I, therefore, recommend that the Commission order Empire to enter into negotiations with Ahlstrom and to execute a PPA for the sale of 160 MW of baseload capacity and energy from the Jayhawk Energy Project at the rates expressed in our draft PPA or at other rates, consistent with this testimony, to which the parties mutually agree so long as the restructured rates do not exceed the NPV of the draft PPA rates. Given the detailed, draft PPA attached to the Complaint filed in this case, I believe that these negotiations could be accomplished within a brief period of time, certainly within 45 days of a Commission order in this case. Commission direction for the parties to engage in negotiations will allow us to negotiate a PPA that provides the maximum benefits possible to Empire and Empire's ratepayers. I would request, however, that the Commission assist the parties in their negotiations by making a determination on Empire's avoided cost for the 25-year term of the PPA.

(Ex. 6HC, p. 34, lines 1-15). The basis of Staff's objection is that this testimony is an improper attempt to amend the Complaint. Empire joined in Staff's objection and also objected on the ground that the testimony is improper surrebuttal in that it is not responding to anything brought up in rebuttal.

The Commission will strike the above-referenced testimony because this testimony represents a request for relief which is clearly at odds with the relief requested in the Complaint. This testimony goes beyond merely mischaracterizing the relief requested in the August 1, 1994, Complaint. Rather, this testimony reflects a different request for relief the effect of which would be to fundamentally change the nature of this proceeding from the one framed by Ahlstrom's August 1, 1994, Complaint. To allow this evidence to remain in the record would unduly prejudice the positions of parties other than Ahlstrom. In addition, the Commission will strike this testimony because it does not respond to rebuttal testimony but merely attempts to inject a new request for relief.

Staff has moved that the Commission strike a portion of the surrebuttal testimony of Ahlstrom witness Whiting. The testimony to which the Staff objects reads as follows:

> As Mr. Grundman has explained, Ahlstrom is also prepared to fine-tune this proposed agreement to more efficiently address Empire's needs.

(Ex. 16, p. 21, lines 1-2).

> Mr. Grundmann voiced Ahlstrom's willingness to work with Empire to reduce the rates in the early years of the contract without increasing (and potentially decreasing) the total net present value cost of our offer.
>
> In short, PURPA entitles us to a power purchase contract based on avoided costs as of August 1994. Although we have a better offer than any which have surfaced since the filing of our petition, over the long term, we are willing to meet with Empire and the Missouri Commission Staff to enhance the benefits of our offer where possible.

(Ex. 16, p. 23, lines 16-19, and p. 24, lines 1-5). The basis of Staff's objection is that this testimony is an improper attempt to amend the Complaint. Empire joined in Staff's objection and also objected on the ground that the testimony is improper surrebuttal in that it is not responding to anything brought up in rebuttal.

The Commission will strike the above-referenced testimony because this testimony represents a request for relief which is clearly at odds with the relief requested in the Complaint. This testimony goes beyond merely mischaracterizing the relief requested in the August 1, 1994, complaint. Rather, this testimony reflects a different request for relief the effect of which would be to fundamentally change the nature of this proceeding from the one framed by Ahlstrom's August 1, 1994, Complaint. To allow this evidence to remain in the record would unduly prejudice the positions of parties other than Ahlstrom. In addition, the Commission will strike this testimony because it does not respond to rebuttal testimony but merely attempts to inject a new request for relief.

On September 29, 1995, Empire filed a motion to strike certain portions of the posthearing reply brief of Ahlstrom.

On October 10, 1995, Ahlstrom filed an answer in opposition to Empire's motion and, to the extent required, motion for admission into the record.

Also, on October 10, 1995, Empire filed a response to Ahlstrom's answer to Empire's motion.

The Commission has reviewed the portions of Ahlstrom's posthearing reply brief to which Empire has objected. The Commission has also reviewed the pleadings relating to this matter.

The Commission finds that no compelling reason to strike any portion of Ahlstrom's reply brief has been presented, nor has a compelling reason to admit any of the new materials into the record been presented. Thus, the Commission will deny Empire's motion to strike certain portions of Ahlstrom's posthearing reply brief and the Commission will deny Ahlstrom's motion to admit portions of its posthearing reply brief into the record.

At the hearing and again by means of a renewed motion, Ahlstrom has moved to strike certain portions of the surrebuttal testimony of Empire witness Jill S. Baylor. Ahlstrom objects to all of page 6 of Ms. Baylor's surrebuttal testimony which discusses fluidized bed combustion technology. Ahlstrom further objects to the testimony shown from page 7, line 17, through page 8, line 11 of Ms. Baylor's surrebuttal testimony. The basis of Ahlstrom's motion is that these portions of Ms. Baylor's surrebuttal testimony constitute improper surrebuttal because the testimony is that she agrees with Staff witness Weatherwax and then uses that agreement as a platform to enter new evidence against Ahlstrom.

The Commission has reviewed Ahlstrom's renewed motion, Empire's response to the renewed motion, the transcript pages wherein the motion was originally argued, and the Commission's rule about surrebuttal testimony in rate

cases (4 CSR 240-2.130(12)(C)). Although this is not a rate case, this rule lends some guidance in resolving this particular dispute in that it provides surrebuttal testimony is limited to material which is responsive to matters raised in another party's rebuttal testimony and schedules and is not to merely bolster matters previously presented in direct or rebuttal testimony or schedules.

The Commission finds that the above-referenced portions of Ms. Baylor's testimony primarily serve to bolster matters previously presented in direct/rebuttal of Staff witness Weatherwax and that these portions of Ms. Baylor's surrebuttal testimony are not genuinely responsive to Staff witness Weatherwax's testimony. Thus, the Commission will grant Ahlstrom's motion to strike certain portions of Ms. Baylor's surrebuttal testimony.

On November 7, 1995, General Power, L.L.C., and Cottonwood Energy Partners, L.P. (General Power) filed a Notice Of Intent To Submit Reduced Pricing Proposal And Supplement The Record, Motion To Briefly Stay The Issuance Of A Decision, Request For The Convening Of A Conference Or, In The Alternative, Request For The Issuance Of An Order Directing Empire To Negotiate An Agreement At The Revised Rate.

Ahlstrom has indicated in a letter dated October 19, 1995, that General Power is the successor to Ahlstrom with regard to the Jayhawk facility. In its November 7, 1995, pleading, General Power states that it intends to submit a reduced pricing proposal to The Empire District Electric Company on or before November 21, 1995.

On November 8, 1995, Empire filed a Response to General Power's November 7, 1995, pleading. Empire states that General Power's motion is inappropriate for numerous reasons. Empire requests that the Commission deny General Power's motion and decide the case on the record before it.

The Commission finds that General Power's pleading of November 7, 1995, is, for all practical purposes, an attempt to retroactively amend the August 1, 1994, Complaint which instigated this proceeding. The Commission finds that it would be inappropriate to allow General Power to amend the Complaint at this point in the proceeding. This pleading, filed during the eleventh hour, reflects a request for relief the effect of which would be to fundamentally change the nature of this proceeding from the one framed by Ahlstrom's August 1, 1994, Complaint. The interests of parties other than the Complainants, and/or their successors, would be unduly prejudiced if the Commission were to allow Ahlstrom or General Power to change its request for relief.

In addition to the fundamental fairness and due process problems with the filing, the pleading filed by General Power on November 7, 1995, is inconsistent with 4 CSR 240-2.080(3) in that General Power is attempting to amend the document which instituted the proceeding after submission of the matter to the Commission for its decision. Additionally, General Power's pleading is inconsistent with 4 CSR 240-2.110(22) in that petitions to set aside the submission of the record to the Commission and reopen the proceedings for the taking of additional evidence are to be filed before the filing of briefs.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Commission has jurisdiction over this matter under the Public Utility Regulatory Policies Act of 1978 (PURPA) and regulations promulgated by the Federal Energy Regulatory Commission to implement the qualifying facilities and small power production provisions of PURPA. 16 U.S.C. §824a-3. The Commission, further, has jurisdiction over this matter under the provisions of 4 CSR 240-20.060.

The burden of proof at hearing rests with complainant in cases where a complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions. ***Sheldon Margulis v. Union Electric Company***, 30 Mo. P.S.C. (N.S.) 517, 523 (1991).

Status of Facility Design/Contract Negotiations

The Commission determines that the standard applied by the New York Public Service Commission is reasonable in connection with the status of facility design/contract negotiations necessary for a qualifying facility to establish a legally enforceable obligation. ***Re: Long Island Lighting Co.***, 1993 WL 564914 (N.Y.P.S.C. 1993). The New York Commission stated:

> The test for determining compliance with the LEO standard is delineated in the [New York Commission's] Contract Price Ruling. It is met when a developer has done everything in its power to obtain a contract, by describing a fully-designed facility to a utility, proffering a complete contract for that facility to that utility which comports with existing policy, and negotiating all issues on which there is no existing policy either to the point of agreement or to the point of impasse.

This Commission has no Contract Price Ruling. However, the requirement of describing a fully designed facility and proffering a complete contract for that facility to the utility is applicable with or without the existence of a Contract Price Rule.

Avoided Costs

Several pleadings and briefs filed in this docket have suggested or implied that the issue of whether Ahlstrom created a legally enforceable obligation and the issue of Empire's avoided cost are mutually exclusive issues. However, given the form of the Complaint (i.e., specific pricing proposals in the PPA), the Commission concludes that the issue of Empire's avoided cost is inextricably intertwined with the issue of whether Ahlstrom created a legally

enforceable obligation. Thus, the Commission will address the issue of Empire's avoided cost.

Even if Ahlstrom had proven that its PPA was sufficiently complete and it had taken all reasonable steps to develop the Jayhawk facility, Ahlstrom would also have had to prove that the rates offered in the PPA for capacity and energy are equal to or less than Empire's avoided costs.

The Commission concludes that Empire's avoided costs for capacity and associated energy for the years 2000 and beyond were not set on August 1, 1994, because Empire was in the midst of a competitive negotiation process at that time. The Commission concurs with the reasoning applied by the Maryland Public Service Commission in the case of ***Re Baltimore Gas and Electric Company***, 84 Md. P.S.C. 104, 1993 WL 667142 (Md. P.S.C.). In ***BG&E***, the Maryland Commission stated that:

> [E]very contract submitted for our review and approval has contained a provision making the contract contingent upon the Commission's approval. Thus, ultimately, the enforceability of the QF's obligation is contingent upon the Commission's approval of the contract. As a consequence of the condition precedent in QF-utility contracts and the ambiguity of the meaning of "at the time a legally enforceable obligation . . . is incurred" in the PURPA regulations, the Commission has the authority to make a policy determination regarding what data will be used at which point in time to evaluate a QF-utility contract.

In the ***BG&E*** case, the Maryland Commission disapproved an agreement entered into by an electric utility and a qualifying facility (QF) because the agreement exceeded the utility's avoided costs and would not result in just and reasonable rates for the utility's consumers.

Congress established certain criteria to be followed by the Federal Energy Regulatory Commission (FERC) when prescribing rules with regard to cogeneration and small power production facilities. Congress provided that the rules shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small

production facility, the rates for such purchase shall be just and reasonable to the electric consumers of the electric utility and in the public interest. 16 U.S.C. §824a-3(b)(1), §210(b)(1), PURPA.

In addition, the FERC has stated that its "present rules and regulations implementing Section 210 of PURPA afford the states and nonregulated electric utilities a great deal of flexibility both in the manner in which avoided costs are estimated and in the nature of the contractual relationship between utility and QF." ***Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities***, IV FERC *Statutes and Regulations, (CCH)* ¶32,457 at 32,173 (1988).

Congress gave further direction to the FERC in relation to the implementation of PURPA. PURPA provides that no rule prescribed by the FERC shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy. 16 U.S.C. §824a-3(b). Congress defined "incremental cost of alternative electric energy" as "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. §824a-3(b),(d).

In applying this law to the facts of this case, the Commission finds that but for the purchase of 160 MW from Ahlstrom, Empire would purchase 160 MW of capacity and associated energy from Western Resources, Inc., for the ten-year period from May 31, 2000, to May 31, 2009.

The Commission has found that the cost of electricity to Empire under the WRI agreement is substantially less than the cost of electricity if purchased from the Jayhawk facility for the ten-year term of the WRI agreement. In order to prove that its proposed rates under the PPA are equal to or less than Empire's avoided cost, Ahlstrom would have to show that the Jayhawk facility would provide electricity at a lower cost than Empire would otherwise generate or purchase

during the period from May 31, 2009 (end of WRI agreement) to the year 2045 (assuming Empire bought the Jayhawk facility at year 2025). Also, Ahlstrom would have to show that the present value of those benefits (i.e., from May 31, 2009, to 2045) equals or exceeds the present value of savings to Empire's ratepayers resulting from the WRI agreement during the ten-year term of that agreement.

The Commission concludes that Ahlstrom has not demonstrated benefits associated with the Jayhawk Project as compared to other opportunities for power generation or purchase likely to be available to Empire in 2010 and beyond, which benefits would offset the savings to Empire's ratepayers occurring from May 31, 2000, to May 31, 2009, as a result of the ten-year agreement with WRI as compared to the Jayhawk Project.

The Commission concludes that this decision is consistent with PURPA's requirement that just and reasonable rates be ensured and the public interest be protected because the substantial relative savings captured by Empire's agreement with WRI are duly considered.

The Commission concludes that the above-stated analysis is necessary because if the Commission only looked at the status of contract negotiations and project development and then ordered a utility to execute a PPA with rates in excess of the utility's avoided cost, then that rate would be neither just and reasonable to the electric consumers of the electric utility nor in the public interest, thus being in direct contravention of PURPA. 16 U.S.C. §824 a-3(b).

The Commission has reviewed the entire record in this matter. The Commission concludes that Ahlstrom is not entitled to an order directing Empire to enter into the PPA attached to the Complaint filed herein. As discussed above, Ahlstrom has not proven that it has created a legally enforceable obligation at the time the Complaint was filed or at any time subsequent thereto.

IT IS THEREFORE ORDERED:

1. That the Complaint filed by Ahlstrom Development Corporation and Cottonwood Energy Partners, L.P., on August 1, 1994, be, and is, hereby dismissed.

2. That lines 1 through 15 on page 34 of Exhibit 6 and 6HC be, and are hereby, stricken.

3. That lines 1 and 2 on page 21, lines 16 through 19 on page 23, and lines 1 through 5 on page 24 of Exhibit 16 be, and are hereby, stricken.

4. That the motion to strike certain portions of the posthearing reply brief of Ahlstrom Development Corporation and Cottonwood Energy Partners, L.P., filed by The Empire District Electric Company on September 29, 1995, be, and is hereby, denied.

5. That the motion for admission of evidence into the record filed by Ahlstrom Development Corporation and Cottonwood Energy Partners, L.P., on October 10, 1995, be, and is hereby, denied.

6. That all of page 6, lines 17 through 22 on page 7, and lines 1 through 11 on page 8 of Exhibit 38 and 38HC be, and are hereby, stricken.

7. That those motions and objections not specifically ruled on in this order are hereby denied or overruled.

8. That the Motion To Briefly Stay The Issuance Of A Decision, Request For The Convening Of A Conference Or, In The Alternative, Request For The Issuance Of An Order Directing Empire To Negotiate An Agreement At The Revised Rate, filed by General Power, L.L.C., and Cottonwood Energy Partners, L.P., on November 7, 1995, be, and is hereby, denied.

9. That this Report And Order shall become effective on the 29th day of November, 1995.

BY THE COMMISSION

David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Kincheloe, Crumpton and Drainer, CC., concur and certify compliance with the provisions of Section 536.080, R.S.Mo. 1994.

Dated at Jefferson City, Missouri, on this 8th day of November, 1995.