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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	)))	Case No. EO-2018-0092

INITIAL POST-HEARING BRIEF OF THE CITY OF JOPLIN

Respectfully submitted,

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COME NOW the City of Joplin and for its Initial Post-Hearing Brief state as follows:

Introduction

On October 31, 2017, Empire filed its "Application For Approval of Its Customer Savings Plan" asking this Commission to approve the addition of 800 MW of wind generation and the retirement of the Asbury facility. In its Application, Empire seeks to add approximately 40% of a $1.5 billion dollar project to its rate base and recover through rates of its customers – customers which, since 2006, have already experienced increases in their rates over 60%.[1] Empire now wants this Commission to hurry and make a decision before the property tax credits expire, despite the credits having been available since 1994.[2] Empire is purposely evading the existing and exclusive statutory process under Section 393.170, RSMo, which provides for certificates of convenience and necessity to be issued by the Commission. Empire is taking the current action because it would fail to meet the test in Section 393.170, RSMo. Because Empire is seeking an unlawful advisory opinion from the Commission and Empire is requesting pre-approval without following the proper procedure in Section 393.170, RSMo, Empire's Application should be dismissed.

[1] Exhibit 206, Marke Rebuttal, 9:4-8.

[2] Hrg. Tr. Vol. 3, 241:21-25 (McMahon).

Unable to get more than nominal support for its initial Application, Empire now seeks approval, through a Non-Unanimous Stipulation and Agreement[3], for the construction of 600 MW of wind generation with a price tag of more than $950 million dollars. By Empire's own numbers, the "Customer Savings Plan" would result in a 17% rate increase (12 percent after factoring in the decrease associated with the Tax Cuts and Jobs Act).[4] The rate increase would be on the backs of customers who have no present need for the additional generation. In fact, Empire currently has a surplus of electricity now and for the foreseeable future. While Empire speculates there will be future "savings," the numbers Empire used are so unreasonable and unsupported in fact, that it is impossible for the Commission to have enough certainty to fulfill its principal interest in serving and protecting ratepayers. There is no competent and substantial evidence to support the Non-Unanimous Stipulation and thus any approval of the same would, by operation of law, be unreasonable. For these reasons, the Non-Unanimous Stipulation should be rejected and the Application dismissed.

I. The Commission Should Dismiss Empire's Application because Empire is Seeking an Advisory Opinion

Empire's Application should be dismissed because the Commission cannot issue the advisory opinion that Empire seeks. It is well settled that "[C]ourts do not render advisory opinions nor decide non-existent issues." *Cole v. Carnahan*, 272 S.W.3d 392, 395 (Mo. App.

[3] The Non-Unanimous Stipulation and Agreement (hereinafter "Non-Unanimous Stipulation"). was filed on April 24, 2018 by The Empire District Electric Company ("Empire"), Midwest Energy Consumers Group ("MECG"); Staff of the Missouri Public Service Commission ("Staff"); Renew Missouri Advocates ("Renew Missouri"); and, Missouri Department of Economic Development – Division of Energy ("DE") (hereinafter, the "Signatories").

[4] Exhibit 351, Meyer Affidavit, 8; Hrg. Tr. Vol. 7, 722:5-24 (Meyer); Hrg. Tr. Vol. 5, 523: 14-16 (Krygier).

W.D. 2008). "An opinion is advisory if there is no justiciable controversy, such as if the question affects the rights of persons who are not parties in the case, the issue is not essential to the determination of the case, or the decision is based on hypothetical facts." *State ex rel. Heart of Am. Council v. McKenzie*, 484 S.W.3d 320 n.3 (Mo. banc 2016). The same is true for this Commission. The Court of Appeals has explained:

> Like other administrative agencies, the [Public Service] Commission is not authorized to issue advisory opinions. The Commission, the circuit court, and this court should not render advisory opinions. *See Wasinger v. Labor & Indus. Relations Comm'n,* 701 S.W.2d 793, 794 (Mo.App.1985). "The function of each is to resolve disputes properly presented by real parties in interest with existing adversary positions." *Id.* The Commission was restricted to determining the complaint before it, and it should not be issuing decisions with "no practical effect and that are only advisory as to future, hypothetical situations." *State ex rel. Mo. Parks Assoc. v. Mo. Dept. of Natural Res.,* 316 S.W.3d 375, 384 (Mo.App.2010). "The petition must present a 'real, substantial, presently existing controversy admitting of specific relief as distinguished from an advisory or hypothetical situation.' " *Akin v. Dir. of Revenue,* 934 S.W.2d 295, 298 (Mo. banc 1996) (citation omitted).

State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of State, 392 S.W.3d 24, 38 (Mo. App. W.D. 2012).[5]

In the *Middle Fork Water* case, Case No. WO-2007-0266,[6] the utility made three requests before the Commission. The company summarized its requests as requests that the Commission ascertain:

[5] The prohibition against the issuance of advisory opinions is consistent with the Commission's principal interest. In *State ex rel. Capital City Water Co. v. Public Service Commission*, 850 S.W.2d 903 (Mo. App. W.D. 1993), the court stated: "The Commission's principal interest is to serve and protect ratepayers…and as a result, the Commission cannot commit itself to a position that, because of varying conditions and occurrences over time, may require adjustment to protect the ratepayers[.]" (internal citations omitted).

[6] The Style of WO-2007-0266 was: "In the Matter of the Application of Middle Fork Water Company for an Order Initiating an Investigation to Ascertain the Value of the Company's Property Devoted to the Public Service."

> 1) the value of the Company's current investment in plant devoted to the public service;
> 2) the standards and principles that will govern the valuation of future investments that the Company may make in plant betterments, improvements, additions, or extensions; and
> 3) how these investments will be characterized and treated by the Commission for ratemaking purposes.

See Case No. WO-2007-0266, Application of Middle Fork Water Company (Jan. 12, 2007). The reasons for the Application were set forth therein:

> 8. Middle Fork needs to make additional investments in its plant and facilities, but requires some assurance that these future investments, as well as investments made in the past, will be properly valued and categorized for ratemaking purposes.
> …
>
> 9. In order to move forward with these investments and to effectively participate in MDNR's planning process, Middle Fork must have some certainty that additional investments that it makes in its water system will be appropriately valued and properly treated for ratemaking purposes. At a minimum, therefore, the Company needs the Commission, as part of its valuation determination, to state whether it endorses Staff's characterization of a large portion of the Company's existing plant investment as contributions-in-aid-of-construction. Such a decision will enable the Company to determine whether the future investments it plans and needs to make will be financially viable.

Id. (emphasis added). Both Staff[7] and OPC[8] agreed that the Commission was without jurisdiction to grant Middle Fork's second and third requests for relief. The Commission agreed and with respect to those items concluded:

[7] See WO-2007-0266, Staff's Response to Order Directing Filing (Feb. 2, 2007) ("12. In items 2 and 3, the Company is essentially requesting either that the Commission render an advisory opinion regarding how future investments will be treated for ratemaking purposes, or that the Commission issue an order that will be binding on future Commissions. Neither of these actions is permitted under present law.").

[8] See WO-2007-0266, Office of the Public Counsel`s Response to Staff`s Response to Order Directing Filing (Feb. 9, 2007) ("3. Public Counsel agrees with Staff that Middle Fork's request that the Commission make determinations regarding the standards and principals which will govern the valuation of future investments made by Middle Fork as well as how these future investments will be characterized and treated by the Commission for ratemaking purposes do not state a claim on which relief may be granted by the Commission.").

> In Item #2, Middle Fork is effectively requesting that the Commission issue an order regarding the standards and principles that will govern its valuation of certain unspecified future investments in plant improvements that Middle Fork may or may not make. And in Item #3, Middle Fork seeks a determination of how those hypothetical future investments would be characterized and treated by the Commission for ratemaking purposes should Middle Fork file another rate case in the future. Both would require the Commission to render an advisory opinion regarding hypothetical questions and future events which would bind the Commission in future, yet-to-be-filed cases involving Middle Fork. As the Commission does not decide hypothetical issues and "will not render an advisory opinion where there is no case in controversy," neither Item #2 nor Item #3 state a claim upon which relief may be granted by the Commission. Therefore, they will be dismissed pursuant to Commission Rule 4 CSR 240-2.070(6).

WO-2007-0266, Order Partially Dismissing Application for Failure to State a Claim (Mar. 20, 2007).

Empire makes the same requests here. Empire wants the Commission to sanction certain unspecified future investments and also seeks a determination of how those hypothetical future investments would be treated for ratemaking purposes. Empire asks this Commission to declare that if Empire builds 600 MW of wind, then the Commission will allow certain treatment of that investment.[9] Like *Middle Fork*, Empire seeks assurances, endorsements or more certainty regarding future investments.

As stated in its initial Application, "a key component of Empire's Customer Savings Plan ["Plan"] is special accounting treatment that will allow it to move forward with the proposed projects."[10] Empire characterizes its Application as seeking "regulatory validation."[11] At the

[9] 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." This is exactly the request that was made in *Middle Fork.* Empire has attempted to pivot to ask for a "reasonableness" finding but such finding is not authorized by law. Notably, Empire has not sought to amend its Application.

[10] EO-2018-0092, Application of Empire District Electric Company for Approval of its Customer Savings Plan, ¶15.

evidentiary hearing, Empire characterized its Application as a need for "regulatory certainty."[12] Mr. Swain testified "It's hard for me to see how there's a path forward without some assurance from the Commission[.]"[13] As the Staff argued in *Middle Fork*, any determination regarding how future investments will be treated for ratemaking purposes is an advisory opinion, and this Commission cannot issue an order that will be binding on future Commissions. Therefore "regulatory certainty" is not something which this Commission can legally offer to Empire. The Commission is without jurisdiction to grant the requested relief -- on hypothetical facts that may or may not occur in the future. Because the relief requested by Empire constitutes an impermissible advisory opinion, the Commission should dismiss Empire's Application.

II. The Commission Should Dismiss Empire's Application because Empire is Seeking Pre-approval

The City Joplin concurs with MECG's (Original) Statement of Positions: "Bottom line, the decision to…add wind generation is solely within the discretion of Empire management. As such, Empire does not need, and the Commission does not have, the authority to approve this management decision."[14]

At the hearing, the question was raised whether the statutes prohibit the Commission from granting Empire the requested relief.[15] The Commission's authority works in the inverse.

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[11] EO-2018-0092, Application of Empire District Electric Company for Approval of its Customer Savings Plan, 1.

[12] Hrg. Tr. Vol. 5, 507-508 (Krygier).

[13] Hrg. Tr. Vol. 5, 605:7-8 (Swain).

[14] MECG Statement of Positions, 1 (filed April 4, 2018).

[15] Hrg. Tr. Vol. 3, 126:11-15.

As a creature of statute, the Commission only has those express powers granted to it, and any actions outside those express powers are prohibited. As the Missouri Supreme Court has explained:

> The Public Service Commission is a creature of statute and can function only in accordance with the statutes. Where a procedure before the Commission is prescribed by statute, that procedure must be followed….The question of lawfulness turns on whether or not the Commission had statutory authority to act as it did.

State ex rel. Monsanto Co. v. Pub. Serv. Comm'n of Mo., 716 S.W.2d 791, 796 (Mo. banc 1986). Not only did Empire not follow the appropriate prescribed statutory procedure, there is no authority for the Commission to act pursuant to Empire's current Application.

First, there is a procedure established by statute, which Empire chose not to utilize -- Section 393.170, RSMo. That procedure specifically allows for the Commission to consider future needs and benefits.[16] At the Hearing, counsel for Empire explained that the reason this case wasn't brought as a Certificate of Convenience and Necessity ("CCN") proceeding was a timing issue.[17] Section 393.170 does not contain a pre-CCN approval process nor does it contain an exception from the CCN process when "the timing" is inconvenient.

The reality is that Empire wants to evade Section 393.130, RSMo, not due to timing, but because in a CCN case, the standard is different as well. Empire would have to show such projects were "necessary or convenient for the public service." In a CCN case, Empire would have the burden " to establish by substantial and competent proof… a present need" for the

[16] See *Matter of Application of KCP&L Greater Missouri Operations Co. for Permission & Approval of a Certificate of Pub. Convenience & Necessity Authorizing It to Construct, Install, Own, Operate, Maintain & Otherwise Control & Manage Solar Generation Facilities in W. Missouri*, 515 S.W.3d 754, 760 (Mo. App. W.D. 2016).

[17] Hrg. Tr. Vol. 3, 61:12-15.

projects.[18] Here, the evidence shows, and Empire admits, that there is no present need for the additional generation, as described more fully below in Point III. Moreover, the public interest weighs in favor of not putting such a substantial risk on the backs of Empire's customers.

Second, the Company and signatories to the Non-Unanimous Stipulation cannot point to any statutory authority for this Commission to grant the relief requested by Empire's Application. Even MECG, a signatory to the Non-Unanimous Stipulation, agrees the Commission is not authorized to make a pre-approval "prudency" finding in this case.[19] Thus, the Signatories attempt to distinguish a finding of "reasonableness" from a finding of "prudency."[20] Such distinction has no basis in law.

Instead, the Signatories point to Missouri American ("MAWC" hereinafter) Case No. WA-97-46 (Oct. 9. 1997) ("CCN Case"), for the proposition that this Commission has the authority to make a finding of "reasonableness." The Signatories point to a *single* line in the Findings of Fact of the Report and Order as the sole authority for this Commission to proceed ahead.[21] That single line in CCN Case was the source of much debate in the subsequent Missouri American rate case. The decision this Commission should examine is the Report and Order in Case No. WR-2000-281 (Aug. 31, 2000). In that case, MAWC used the single line from the CCN Case regarding "reasonableness" to attempt to strike all witness testimony

[18] See *State ex rel. Oliver v. Pub. Serv. Comm'n,* 542 S.W.2d 595, 602 (Mo. App. 1976).

[19] MECG Statement of Positions, 1-2 (filed April 4, 2018).

[20] 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." This is a request for a prudency finding. Notably, Empire has not sought to Amend its Application.

[21] Hrg. Tr. Vol. 3, 25:23-26:16; Hrg. Tr. Vol. 3, 92:9-24.

regarding the issues of the prudence of MAWC's decision to build a new treatment plant and whether the plant was overbuilt.[22] MAWC argued (1) the Commission already determined the issues in the certificate case (2) the parties are estopped from taking positions contrary to positions they took in the certificate case, and (3) the commission was equitably estopped from redetermining the issues.[23] The Commission rejected MAWC's Motion to Strike (as well as a Motion for Summary Judgment on the issue of prudence).[24] The Commission explained:

> MAWC relies on the Commission's prior decision, In the Matter of Missouri-American Water Company, Case Nos. WA-97-46 and WF-97-241 (Report and Order, issued October 9, 1997), which has already been discussed herein in connection with MAWC's motion to strike. In that pair of cases, MAWC sought a certificate of public convenience and necessity for the new project, necessary because it is located in part outside of MAWC's original St. Joseph service area, as well as approval of the financing for the project. MAWC attempted in that case to also secure preapproval by the Commission of the project. However, after a lengthy analysis, the Commission refused to preapprove the project, stating:
>
> > Therefore, the Commission will make no finding regarding the prudence of the actual costs incurred and the management of construction of the proposed project. However, based on the extensive evidence presented, the Commission finds that the proposed project, consisting of the facilities for a new groundwater source of supply and treatment at a remote site, is a <u>reasonable</u> alternative.
>
> Missouri-American Water Company, supra, at page 11 (internet version). This language, together with the reservation of ratemaking treatment in Ordered Paragraph No. 5, already quoted in full herein, make it plain that <u>the Commission purported to do no more in Case Nos. WA-97-46 and WF-97-241, than to grant a certificate of public convenience and necessity</u>[.[25]]

It is tempting to bifurcate "reasonableness" and "prudence." But there is no statutory authority for such bifurcation. It was that single line about "reasonableness" that led to much confusion

[22] Case No. WR-2000-281, Report an Order, 15.

[23] *Id.*

[24] *Id.*

[25] Case No. WR-2000-281, Report an Order, 39-40 (emphasis added).

and debate in the subsequent rate case and which the company attempted to use in the subsequent rate case to preclude testimony on the issue of prudency. Case No. WA-97-46 does not give the Commission authority to do any "more" than grant a CCN. Since the Company has not sought a CCN in this case, the Commission should do no more, and dismiss Empire's Application.[26]

III. The Commission Should Reject the Non-Unanimous Stipulation and Agreement Because the Additional Generation is Not Needed to Serve Empire's Customers

The competent and substantial evidence shows no present need for additional generation. Empire Witness Mertens admits "[W]e [Empire] do not need to add additional capacity to meet the peak load of our retail customers." [27] Excluding Asbury, Empire's current generation resources total 1,233 MW.[28] Asbury has an accredited capacity of 198 MW.[29] At the evidentiary hearing, Mertens revised his testimony stating a new peak was reached in January 2018 of 1,211 MW.[30] Mertens also noted that Empire is characterized as "net seller" in the SPP market, and sells approximately half a million megawatt hours to SPP annually.[31]

[26] Chairman Hall specifically asked for parties' reaction to a Report and Order which included two factual findings of "reasonableness." Hrg. Tr. Vol. 7, 906:1-14. As described in Points I and II, such an order is not authorized by law, and would constitute an impermissible advisory opinion and impermissible pre-approval.

[27] Hrg. Tr. Vol. 5, 374:6-8 (Mertens).

[28] Exhibit 9, Mertens Direct, 17:6-7.

[29] Exhibit 9, Mertens Direct, 16:13-15.

[30] Hrg. Tr. Vol. 5, 342:18-24 (Mertens).

[31] Hrg. Tr. Vol. 5, 399:14-400:10. (Mertens).

While Empire suggests that when its Power Purchase Agreements ("PPAs") expire it will need additional wind generation to meet the Missouri renewable requirement,[32] it does not explain why the best option for ratepayers is not simply to negotiate additional PPAs. Furthermore, this does not demonstrate a present need. The Meridian Way PPA does not expire until 2028, and the existing Elk River PPA contains an option to extend until 2030. Combined the capacity of those two PPAs is 255 MW.[33] Empire offers no explanation why it would need 800 MW (or even 600 MW) to replace 255 MW, especially when it is already a net seller into SPP. Empire offered no evidence of expected future growth in demand. Because there is no present need for additional generation, the Commission should reject the Non-Unanimous Stipulation.

IV. The Commission Should Reject the Non-Unanimous Stipulation and Agreement Because it is Not Based on Substantial and Competent Evidence

Even if this Commission determines it has the authority to consider Empire's requests, it should reject the Non-Unanimous Stipulation and Agreement because there is no competent and substantial evidence to support it.

The Commission's decision must be based on competent and substantial evidence. "[A reviewing court will determine] first, whether the Commission's order is lawful[.]."[34] Next, the court will determine whether the order is reasonable and based on competent and substantial

[32] Hrg. Tr. Vol. 5, 494:32-495:9 (Wilson).

[33] Hrg. Tr. Vol. 494:17-22 (Wilson).

[34] *State ex rel. Pub. Counsel v. Missouri Pub. Serv. Comm'n*, 289 S.W.3d 240, 246 (Mo. App. W.D. 2009) (citing *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 381 (Mo. App. W.D. 2005)).

evidence.[35] "Whether the order is reasonable depends on 'whether (i) the order is supported by substantial and competent evidence on the whole record, (ii) the decision is arbitrary, capricious or unreasonable, or (iii) the Commission abused its discretion.'"[36] Failure of any one of the three elements makes the Commission's order unreasonable. "[S]ubstantial evidence" means evidence "which, if true," has "probative force upon the issues" and "implies and comprehends competent, not incompetent evidence."[37]

Empire's "Customer Savings Plan" is entirely predicated on "the model." That model, in turn, is highly dependent upon and sensitive to various inputs.[38] Not only are many of the inputs uncertain, the competent and substantial evidence shows that the inputs Empire did use are unreasonable and unsupported by any evidence. Empire's model is so unreasonable that it fails to give this Commission any confidence whatsoever that customers might actually see "savings" at all. It also fails to give this Commission any confidence that Customers will not be significantly harmed by Empire's proposal, which is particularly important given the Commission's principal interest is to serve and protect ratepayers.[39]

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[35] *Id.*

[36] *State ex rel. Pub. Counsel v. Missouri Pub. Serv. Comm'n*, 289 S.W.3d 240, 246 (Mo. App. W.D. 2009) (citing *Mo. Gas Energy*, 186 S.W.2d at 382).

[37] *State ex rel. Marco Sales, Inc. v. Pub. Serv. Comm'n*, 685 S.W.2d 216, 218 (Mo. App. W.D. 1984) (citing *State ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 64 (Mo. banc 1949)).

[38] Generally, such inputs involve forecasting, as the model is about future events. The danger for ratepayer is, as Mr. Holmes testified, "all forecasts are wrong." Hrg. Tr. Vol. 5, 594:23-24.

[39] *State ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo. Ct. App. 1993).

Empire agrees that the "Customer Savings Plan" and "the model" are largely dependent on both wind generation and market prices.[40] The quantity of wind is a function of the wind projects' capacity and capacity factor.[41] The revenues generated are a function of the quantity of wind and market prices.[42] The model is flawed because Empire's inputs regarding capacity factors, capital investment, and market prices are not supported by competent and substantial evidence.

The most disturbing part is that it is Empire's customers, rather than its shareholders, who bear the risk of these flaws in the modeling. In the first ten years, to the extent Empire's forecasts fall short, customers will bear 50% of the risk up to $70 million, and then after $70 million, customers bear 100% of the risk.[43] Customers also bear 100% of the risk after year 10.[44]

It is not disputed that that Empire's modeling witness never calculated bill impacts for customers,[45] and the same is not in evidence.[46] How can the Commission possibly discharge its

[40] Hrg. Tr. Vol. 5, 584:17-21 (Holmes).

[41] Hrg. Tr. Vol. 5, 584:8-13 (Holmes).

[42] Hrg. Tr. Vol. 5, 584:8-13 (Holmes).

[43] Non-Unanimous Stipulation, ¶17(c) and Appendix A; Hrg. Tr. Vol. 5, 579:4-14 (Holmes).

[44] Non-Unanimous Stipulation, ¶17(c) and Appendix A.

[45] Hrg. Tr. Vol. 595:11-13 (Holmes).

[46] While MECG Witness Meyer has stated customers will see a 17% rate increase (12 percent after factoring in the decrease associated with the Tax Cuts and Jobs Act), he admitted the estimate was based on the assumption of 44.7% capital investment by Empire. Hrg. Tr. Vol. 718:9-15. That assumption is unreasonable as described in Point IV.B. In addition, Meyer was unable to establish which of the twelve possible scenarios (four wind production scenarios and three market price scenarios) were used to arrive at his calculation. Hrg. Tr. Vol. 7: 718:2-5. His estimate of a 17% increase could have been based on the *best* possible scenario – the most wind production and the highest market prices. One is left to speculate what the increase would be under the worst case scenario.

duty of protecting ratepayers without knowing the actual bill impacts? The evidence before this Commission shows that at best, Empire's inputs to its model are highly uncertain, and at worst, are wrong. The Commission should reject the Non-Unanimous Stipulation on this basis.

A. Empire's Capacity Factor Assumption is Not Supported by Competent and Substantial Evidence

Empire's model estimated the capacity factor at more than 47 percent.[47] Yet, a review of the evidence in the record regarding capacity factors shows the input used by Empire is unreasonable. First, one of the Kansas wind farms Empire currently purchases power from, Elk River, only has a capacity factor of 43%.[48] The capacity factors of Kansas Wind Farms for 2014-2017 is also in the record.[49]

Empire Witness McMahon confirmed "[C]apacity factors in Missouri are generally lower than in Kansas. That's not controverted."[50] Empire has stated it is currently developing two sites in southwest Missouri.[51] Despite none of the actual capacity factors in Kansas being in excess of 50%, Empire's original modeling estimated the capacity factor higher than 54%. After Empire received RFP responses, it revised the capacity factor to 47%. Even so, that is 4% in excess of Elk River. Of the 19 Wind Farms in Kansas on Exhibit 512, only six have achieved a

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[47] 47% is actually an average, which accounts for degradation over time. Hrg. Tr. Vol. 5, 364:18-21 (Mertens); Hrg. Tr. Vol. 5, 579:4-14 (Holmes).

[48] Hrg. Tr. Vol. 5, 364:18-21 (Mertens).

[49] Exhibit 512, Table-Annual Capacity Factors of Kansas Wind Farms, 100+ MW 2014-17.

[50] Hrg. Tr. Vol. 3, 257:22-24 (McMahon).

[51] Hrg. Tr. Vol. 5, 496:15-20 (Wilson).

capacity factor of in excess of 47%, and only two have done it consistently (for three or more years).[52] In 2016, five *Kansas* wind farms reported actual capacity factors lower than 40%.[53]

Empire offered no reason or support for its choice to use 54%+ in the original modeling and 47%+ after the RFP responses. Both Mertens and McMahon suggested "capacity factors have risen over time" but presented no actual support for this statement.[54] Mertens confirmed that the Kansas Waverly Wind Farm was installed in 2015 or 2016.[55] Even one of the newest wind farms in *Kansas* only had a capacity factor of 44.0%.[56]

Empire suggested that a number of things are lowering the cost of wind energy and potentially increasing capacity factor: lower turbine pricing, improved technology, improved construction efficiency and local manufacturing.[57] Still, Empire offered no support for any of these propositions.[58] Empire did not offer any information regarding turbine pricing. Empire offered no facts regarding improved technology, construction efficiency and local manufacturing either. Empire's only "evidence" was Mr. Mertens' blanket assertions regarding these topics.[5960]

[52] Exhibit 512, Table-Annual Capacity Factors of Kansas Wind Farms, 100+ MW 2014-17.

[53] *Id.*

[54] Hrg. Tr. Vol. 3, 257:13-16 (McMahon); Hrg. Tr. Vol. 5, 333:7-17 (Mertens).

[55] Hrg. Tr. Vol. 5, 332:6-8 (Mertens).

[56] Exhibit 512, Table-Annual Capacity Factors of Kansas Wind Farms, 100+ MW 2014-17.

[57] Exhibit 9, Mertens Direct, 6:20-7:27.

[58] Hrg. Tr. Vol. 5, 322:6-7 (Mertens).

[59] Mertens is not an expert on wind projects, as he hass worked for Empire for nearly twenty years and Empire has never owned any wind projects. Exhibit 9, Mertens Direct, 3-4; Hrg. Tr. Vol. 5, 322:11-14 (Mertens).

The capacity factor directly impacts any customer "savings."[61] In less than a year's time (from the filing of the Application to the receipt of the RFP responses) Empire has already reduced its capacity factor estimate by nearly 15% (54% to 47%). Yet, Empire is asking this Commission to trust that its capacity factor estimate is correct for the next ten years and beyond, despite no evidence to suggest Empire's wind projects could actually achieve a 47%+ capacity factor, even in Year 1.

B. Empire's Capital Contribution Assumption is Not Supported by Competent and Substantial Evidence

Empire also admits that it used 44.7% as the percent of capital contributed by Empire to the project in "the model."[62] Specifically, McMahon's Affidavit provides that the tax equity partner is expected to contribute $529 million, with Empire contributing $429 million.[63] This percentage is important because Empire is seeking to put the amount of capital contributed by Empire into rate base and recover the same through Empire's rates paid by customers.[64] This was an unreasonable assumption and should not have been input into the model, in that the Non-Unanimous Stipulation provides that the capital contribution could be ***_____ _____.*** The difference would mean approximately ***_____

[60] While Empire Witness Mertens stated he has seen reports of "50 percent" capacity factors for wind farms in *Kansas*, no such reports or data were offered by Empire to support its capacity factor estimate of 44.7%. Hrg. Tr. Vol. 5, 319: 14-15 (Mertens).

[61] In addition, a lower capacity factor also means that a tax equity partner would be willing to invest less (Hrg. Tr. Vol. 5, 467:20-468:8 (Mooney)), .and therefore shifting more of the risk and burden on to Empire's customers.

[62] Exhibit 8, McMahon Affidavit, ¶3.

[63] *Id.*

[64] Hrg. Tr. Vol. 5, 440:20-441:5 (Mooney).

_____*** being added to rate base, and ultimately recovered from ratepayers. Because of the sensitivity of "the model," [65] that single change could completely eliminate any customer "savings" and in fact cause a shortfall of revenues of more than ***_____.***[66] Empire has refused to voluntarily present its actual estimates for the range of capital contributions permitted under the Non-Unanimous Stipulation and that, in and of itself, should give this Commission pause. The parties mostly agree that the model contains estimates for capacity factor and forecasting for market prices. These inputs, among others, are uncertain. However, the potential range of capital contributions under the Stipulation is known. The absolute baseline of reasonableness should be that a Company has to include known variables in its model. Yet, Empire still refused to offer numbers based on known inputs for "the model."

So why did Empire choose 44.7%? ***_____

_____***[67] Empire offered not a single reason to support its use of 44.7%. There was no evidence that 44.7% was used in a similar project, no evidence that 44.7%. is the standard in tax equity partner relationships, no evidence that the percentage was reasonable given preliminary discussions with potential tax equity partners. It is unreasonable to allow a company to cherry pick numbers for a model without any evidentiary basis whatsoever. It is also unreasonable to approve a stipulation when the Company has refused to provide estimates based on the actual and known inputs.

[65] Empire Witness McMahon agrees that "changing an input in a model can have an impact on the results, and it can be large if one of the inputs is large and changed." Hrg. Tr. Vol. 3, 237:25-238:4.

[66] Exhibit 511C, Confidential Spreadsheet.

[67] Hrg. Tr. Vol. 6-IC, 450:6-9 (Mooney).

C. Empire's SPP Market Price Assumptions are Not Supported by Competent and Substantial Evidence

First, Empire's modeling assumed no negative prices.[68] This assumption is patently unreasonable as it was known to Empire at the time of the original GFSA modeling and at the time of the Stipulation modeling that negative prices were not only a possibility, but an increasing trend.[69] The SPP State of the Market 2017 Report explains, "The incidence of negative prices doubled in 2017 to around seven percent of all real-time intervals, up from about 3.5 percent of intervals in 2016."[70] This is of particular concern because "[t]he mere presence an increase in negative prices is going to depress the overall market."[71]

Beyond the negative pricing issue, Empire's assumption that it can predict thirty years of data from just three years of actual data is unreasonable. In just a single year, ABB's forecast regarding market prices dropped 19.35%.[72] There exists only three years of nodal pricing data on which Empire attempts to project market prices thirty years into the future.[73] This creates substantial risk that the market prices predictions are wrong, specifically in light of the ever-increasing supply of wind into the SPP market,[74] and that risk falls squarely on ratepayers.[75]

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[68] Hrg. Tr. Vol. 7, 751:23-752:9 (Mantle).

[69] Hrg. Tr. Vol. 5, 592:11-15 (Holmes).

[70] Exhibit 514, SPP State of the Market 2017, 1 (published May 8, 2018).

[71] Hrg. Tr. Vol. 7, 845: 21-23 (Marke).

[72] Exhibit 505, Graph-ABB Fall 2016 to 2017 (Wind).

[73] Exhibit 6, McMahon Direct, 24:7-8.

[74] Exhibit 514, SPP State of the Market 2017, 2 (published May 8, 2018) ("Wind generation totaled 23 percent of all generation in 2017, up from 18 percent in 2016.").

[75] Hrg. Tr. Vol. 5, 640:16-17. (Rogers)

Finally, Empire's "model" did not use one of Empire's current wind generation facilities, but rather the Asbury node.[76] Using the Asbury node to estimate future market prices is unreasonable as Asbury has not had negative pricing,[77] and Asbury has had higher annual prices than Empire's wind generating node Elk River.[78] There is no competent or substantial evidence to justify the market price assumptions made by Empire.

D. Empire Witnesses' Testimony Regarding the Plan and Model is not Credible

Empire Witnesses' testimony at the hearing often contradicted previously filed testimony or other testimony of Empire witnesses. Given the numerous contradictions, Empire's witnesses cannot be found credible and their testimony cannot be relied upon as competent or substantial evidence.

Empire identified four and only four factors that affect savings when questioned by the Chairman: market prices, quantity of wind generated, costs to construct wind, and payments to the tax equity partner.[79] Empire's Direct Testimony indicates there are other costs that will also affect savings: Third Party Operation and Maintenance agreement cost, Labor & materials for Balance of Plant maintenance, Third Party Administrative and General Expense, and Labor for asset management.[80]

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[76] Hrg. Tr. Vol. 3, 265:2-9 (Rogers).

[77] Hrg. Tr. Vol. 751:23-752:9 (Mantle).

[78] Hrg. Tr. Vol. 3, 267:12-19 (McMahon).

[79] Hrg. Tr. Vol. 3, 270-272 (McMahon).

[80] Exhibit 1, Mooney Direct, 19.

Empire included the approximately $12.8 million of "Asbury environmental [sunk] costs" in its model even though Empire admitted the costs would be incurred whether Asbury is retired or not.[81] Still, Empire excluded other sunk costs, like the cost to dismantle Asbury from its modeling.[82] Despite stating such costs weren't a "significant dollar value in our overall analysis," the dismantlement costs are estimated at $24 million.[83]

Krygier's Direct Testimony shows that Empire's original modeling assumed a zero for "wind revenue requirement" for 2018,[84] despite Empire having known costs in 2018 and possibly 2017. As Empire's Wilson testified, "For several months now, Empire has been developing two spots in southwest Missouri for which we have applied to the [SPP] 250 mw generator interconnect request at both of those sites. And we have procured options on land leases in that area as well."[85] Wilson further testified "the money spent to develop those sites would be sought [to be recovered from ratepayers] in terms of the total capital cost."[86]

At the evidentiary hearing, Empire suggested "small operating costs for the wind,"[87] despite needing the nearly the same number of employees to operate the new wind projects as are currently employed at Asbury.[88]

[81] Hrg. Tr. Vol. 5, 308:14-18 (Mertens); Hrg. Tr. Vol. 5, 347:17-22 (Mertens).

[82] Hrg. Tr. Vol. 5, 326: 9-23 (Mertens).

[83] Hrg. Tr. Vol. 5, 326:23 (Mertens); Hrg. Tr. Vol. 5, 637:1-6 (Rogers).

[84] Exhibit 2, Krygier Direct, CDK-1.

[85] Hrg. Tr. Vol. 5, 496:15-20 (Wilson).

[86] Hrg. Tr. Vol. 5, 497:3-9 (Wilson).

[87] Hrg. Tr. Vol. 3, 270:17-18 (McMahon).

With respect to managing the effects of degradation, Mertens testified "you…often make capital investments to maintain your integrity [of the wind projects]." [89] But Empire's "model" does not account for any such additional capital costs or additions to rate base.[90]

Empire presented contradictory and inconsistent testimony. Such testimony does not constitute competent and substantial evidence upon which this Commission could approve the Non-Unanimous Stipulation or grant Empire's Application.

V. The Commission Should Reject Empire's Application Because There is No Need for the Additional Generation and Because There is No Substantial and Competent Evidence to Support its Approval

To the extent the Commission rejects the Non-Unanimous Stipulation and Agreement, and considers Empire's original Application, the Commission should reject the Application for all of the reasons stated in Section III and IV. There is no present need for additional generation, especially for a project as large as 800 MW. For the same reasons as there is not substantial or competent evidence to support the 600 MW wind project in the Stipulation, there is no substantial or competent evidence to support an 800 MW wind project.

Conclusion

The Commission should dismiss Empire's current Application on the basis that it seeks an advisory opinion and pre-approval. In the event the Commission reaches the merits of the Application, the Commission must stay focused on its principal interest -- to serve and protect ratepayers. Chairman Hall raised a question at the hearing which should remain in the forefront

[88] Mertens suggested 40 employees would be needed to operate the wind projects. Exhibit, 10, Mertens Surrebuttal 3:5-7. Asbury currently has 45 Empire employees. Hrg. Tr. Vol. 5, 330:13-18 (Mertens).

[89] Hrg. Tr. Vol. 5, 337:11-13 (Mertens).

[90] See Appendix A, Exhibit B to the Non-Unanimous Stipulation and Agreement.

as the Commission considers the Application: "[W]hy it would be in the best interest…of ratepayers for the company to own … wind generation as opposed to obtaining it through PPAs?"[91] Empire has wholly failed to establish by competent and substantial evidence the Customer "Savings" Plan is in the public interest or would in any way serve or protect ratepayers. Without competent and substantial evidence, any order approving the Non-Unanimous Stipulation or Application is unreasonable as a matter of law.

WHEREFORE, the City of Joplin urges this Commission to dismiss Empire's Application and reject the Non-Unanimous Stipulation for all of the reasons set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing were sent by email this 31st day of May, 2018, to the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Stephanie S. Bell

[91] Hrg. Tr. Vol. 5:479:3-7.