BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

RESPONSE OF THE EMPIRE DISTRICT ELECTRIC COMPANY IN OPPOSITION TO DOGWOOD ENERGY, LLC'S APPLICATION TO INTERVENE, AND, IN THE ALTERNATIVE, REQUEST FOR PROTECTIVE ORDER

The Empire District Electric Company ("Empire" or "Company"), by and through its undersigned counsel, hereby responds as follows in opposition to the Application to Intervene ("Application'), which was filed by Dogwood Energy, LLC ("Dogwood"), on January 29, 2013:

1. On September 21, 2012, the Commission Staff ("Staff") filed its *Notice of Start of Third Prudence Audit* ("Notice"), which initiated the present case. Staff's filing notes that periodic reviews of the fuel and energy costs subject to Empire's fuel adjustment clause ("FAC"), which must occur no less frequently than every eighteen months, are required both by the Commission's rules and Empire's tariff.[1] Staff's Notice goes on to state that the purpose of this case is to "conduct a prudence review of the costs associated with Empire's FAC . . . for a third audit period of March 1, 2011, through August 31, 2012,"[2] and that the scope of that audit is limited to a review of (i) book costs of fuel consumed in Empire's Missouri generating units, (ii) costs associated with the Company's hedging program, (iii) purchased power charges and associated transmission fees, (iv) Southwest Power Pool variable costs, (v) emission allowances and revenues, and (vi) off-system sales for that eighteen-month period.[3]

2. In any prudence investigation of charges related to Empire's FAC, parties seeking to intervene must satisfy the requirements of 4 CSR 240-3.161(10)(A) or (B). Because Dogwood was not a party to a rate case where the Commission approved the Company's FAC, Dogwood is required to file its

[1] *Notice of Start of Third Prudence Audit*, at ¶ 1.
[2] *Id.* at ¶ 3.
[3] *Id*. at p. 3.

Application under 4 CSR 240-3.161(10)(B). That rule requires all applications to intervene to satisfy the requirements of subsections (2) through (4) of 4 CSR 240-2.075.[4]

3. Subsection (2) of 4 CSR 240-2.075 requires prospective intervenors to state their interest(s) in the case and reasons for seeking intervention, while subsection (4) additionally requires that the statement of interest demonstrate (i) both that the prospective party's interests are different from those of the general public and that those interests may be adversely affected by a final order arising from the case, or (ii) that granting intervention would serve the public interest. Dogwood's Application fails to satisfy any of those requirements.

4. Empire notes that because Dogwood's Application fails to comply with 4 CSR 240-2.060(1), which applies to all applications filed with the Commission, there are few facts alleged in the Application that would enable the Commission to either identify Dogwood's interests in the issues to be considered in this case or to determine the nature of Dogwood's interests that would be adversely affected by the Commission's final order. The Application similarly fails to allege facts necessary to determine why or how Dogwood's intervention would serve the public interest. The Application simply alleges (i) that Dogwood is a Delaware limited liability company that owns a majority interest in a 650 MW combined-cycle generating facility located in Pleasant Hill, Missouri, and (ii) that it is a potential provider of supply-side energy resources. Although the Company does not dispute the accuracy of either of those allegations, they do not establish interest(s) or expertise of Dogwood that are sufficient to justify its participation in this case as an intervenor.

5. Dogwood's statement of interest is similarly deficient because it, too, fails to provide information that satisfies the requirements of the Commission's rules governing intervention. In paragraph 5 of its Application, Dogwood states "[a]s an owner of a generating facility in western Missouri, Dogwood must ensure robust access for power supplies in the region." The Application further states in the same paragraph that Dogwood "seeks to intervene in this proceeding because the

[4] 4 CSR-240.075(3), which requires an association seeking to intervene in a Commission proceeding to list all of its members, does not apply to Dogwood.

Commission's decision could adversely affect Dogwood's interests as a potential supply side resource to Empire . . .." Both those statements are nothing more than Dogwood's self-serving conclusions, and, as noted previously in this response, they are conclusions that are not supported by any facts alleged in the Application – even assuming such support were possible.

6. As set out in the Notice, and as described in paragraph 1 of this response, the scope of Staff's audit in this case is very limited: only those costs (offset by off-system sales and emission allowance revenues) that were subject to Empire's FAC for the eighteen month period ending August 31, 2012, will be reviewed. The scope of potential action by the Commission in any final order in this case is similarly limited. If, at the conclusion of Staff's audit, the Commission finds that Empire imprudently incurred any of the costs that were subject to its FAC during the eighteen-month period under examination, Section 386.266(4), RSMo, requires that the Commission order the Company to refund those costs to its customers with interest. Thus, either explicitly or by clear implication, the scope of the Commission's inquiry in this case is limited to FAC-related energy costs incurred and passed through Empire's FAC during a prescribed, eighteen-month historical period. And the universe of parties who could be adversely affected by either the Staff's audit or a final Commission order is limited to the Company's customers who during the eighteen month period paid FAC-related costs found to be imprudent.

7. Based both on the standards governing intervention found in 4 CSR 240-2.075(2) and (4) and the universe of parties who could be adversely affected by a final Commission order in this case, the Application fails to provide any basis for granting intervention. Dogwood's status as a *potential* provider of supply-side energy resources to Empire has nothing whatsoever to do with the historical, FAC-related costs that are the subject of Staff's prudence audit. Similarly, because Dogwood's Application does not allege it was one of Empire's retail customers during the relevant period, Dogwood could not possibly be adversely affected by any final order of the Commission in this case. And, finally, whatever expertise Dogwood may have as part owner of a combined-cycle energy plant, that expertise has no bearing on, or

relevance to, any of the historical cost or accounting issues that are the subject of Staff's audit. Consequently, Dogwood's Application completely fails to establish that it has any legitimate interest in the issues or outcome of this proceeding or that its participation as an intervenor would serve the public interest in any meaningful way.

8. Because Dogwood has failed to satisfy the requirements for intervention prescribed in the Commission's rules, its Application should be denied. If, however, the Commission decides to grant Dogwood's Application, Empire moves the Commission, under 4 CSR 240-2.085, for a protective order that would limit Dogwood's access to, and its use and disclosure of, proprietary or highly confidential information that the Company is required to provide over the course of this case. Granting the Application would enable Dogwood to gain access to proprietary and highly confidential information regarding Empire's generation and purchased power costs, as well as the operating and efficiency characteristics of its generating facilities, which could be used to Empire's disadvantage in the future. More specifically, Empire asks the Commission to issue a protective order that incorporates all of the safeguards found in 4 CSR 240-2.135; however, because Empire believes the safeguards provided by that rule do not go far enough, the Company requests that the Commission include the following additional restrictions in the protective order. First, only Dogwood's attorneys and outside consultants will have access to information that Empire designates proprietary or highly confidential. Dogwood's officers, members, and employees would not be allowed access to such information. Second, information that Empire designates as proprietary or highly confidential can only be reviewed by Dogwood's attorneys and outside consultants at Empire's office or at the office of Empire's legal counsel, and the Company cannot be compelled to provide to Dogwood copies of that information. Finally, Dogwood's use of information that Empire designates as proprietary or highly confidential will be limited to the current case, and Dogwood and its attorneys and consultants are prohibited for using such information for any other purpose and in any other case. Without such enhanced protection granting Dogwood's Application and allowing Dogwood to participate in this case could cause irreparable damage to Empire and its interests.

WHEREFORE, for the reasons stated in this response, Empire asks the Commission to issue an order denying Dogwood's Application. Alternatively, if the Commission decides to grant Dogwood's Application and allow it to participate in this case as an intervenor, the Commission should condition that grant on Dogwood's consent to be bound by a protective order that includes, but is not necessarily limited to, the protections described in paragraph 8 of this response.

Respectfully submitted,

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By:

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ATTORNEYS FOR THE EMPIRE DISTRICT ELECTRIC COMPANY

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record on this 6th day of February, 2013.

_____/s/ L. Russell Mitten_____