

It is well established that the Commission is a “creature of statute” and its “powers are limited to those conferred by the above statutes.” (See, *Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979). Consistent with its limited authority, a reviewing court demands that the Commission provide specific authority for its actions. (*Id.*). In this regard, the Commission may not simply divine the desired authority out of the broad general authority conveyed in Sections 386 and 393. (*Id.* at 51).

The Commission lacks the statutory authority to make “a finding that Empire’s investment related to the Customer Savings Plan (“CSP”) should not be excluded from Empire’s rate base on the ground that the decision to proceed with the Plan was not prudent.” In fact, the Commission’s lack of authority to grant pre-approval of a utility’s resource plans is reflected through its Integrated Resource Plan rule.

- Compliance with these rules shall not be construed to result in commission approval of the utility’s resource plans, resource acquisition strategies, or investment decisions. (4 CSR 240-22.010(1));
- Acknowledgment is an action the commission may take with respect to the officially adopted resource acquisition strategy or any element of the resource acquisition strategy including the preferred resource plan. Acknowledgement means that the commission finds the preferred resource plan, resource acquisition strategy, or the specified element of the resource acquisition strategy to be reasonable at a specific date, typically the date of the filing of the utility’s Chapter 22 compliance filing or the date that acknowledgment is given. Acknowledgment may be given in whole, in part, or not at all. **Acknowledgment shall not be construed to mean or constitute a finding as to the prudence, pre-approval, or prior commission authorization of any specific project or group of projects.** (4 CSR 240-22.020(1) (emphasis added)).
- This rule specifies the requirements for electric utility filings to demonstrate compliance with the provisions of this chapter. **The purpose of the compliance review required by this chapter is not commission approval of the substantive findings, determinations, or analyses contained in the filing.** The purpose of the compliance review required by this chapter is to determine whether the utility’s resource acquisition strategy meets the requirements of Chapter 22. (4 CSR 240-22.080 (emphasis added)).
- The commission may acknowledge the preferred resource plan or resource acquisition strategy in whole, in part, with exceptions, or not at all. **Acknowledgment shall not be construed to mean or constitute a finding as to the prudence, pre-approval, or prior commission authorization of any specific project or group of projects.** In proceedings where the reasonableness of resource acquisitions are considered, consistency with an acknowledged preferred resource plan or resource acquisition strategy may be used as supporting evidence but shall not be considered any more or less relevant than any other piece of evidence in the case. Consistency with an acknowledged preferred resource plan or resource acquisition strategy

does not create a rebuttable presumption of prudence and shall not be considered to be dispositive of the issue. (4 CSR 240-22.080(17) (emphasis added).

The inability to engage in pre-approval is made even clearer in the Commission's Order of Rulemaking for 4 CSR 240-22.080.

The Commission does not wish to move down the path toward preapproval of projects as part of the resource planning process. . . . The Commission will adopt modified language that defines acknowledgment in a manner that will make it clear that acknowledgment is not preapproval and will not bind a future commission in any future case. (*Order of Rulemaking*, Case No. EX-2010-0254, issued March 2, 2011).

In recent years, the utilities have sponsored legislation that would have granted the specific authority that Empire now asks the Commission to exercise. In each instance, that legislation failed. For instance, HB2056, introduced in the 2018 legislative session specifically authorized the Commission "to approve decisional pre-approval with a postconstruction review of construction projects." Still again, HB1 introduced during the 2017 extraordinary session also provided specific authorization for "decision pre-approval." As can be seen from the definition contained in that bill, decisional pre-approval is exactly what Empire is seeking in this case.

Decisional pre-approval with a post-construction review of construction projects", a process in which the electrical corporation may request commission pre-approval of a decision to undertake major construction projects, whereby, if pre-approval is granted, the electrical corporation shall remain subject to a post-construction review of the prudence and reasonableness of the incurred costs of the projects prior to inclusion of the costs in customer rates.

Recognizing that the Commission lacks statutory authority to grant the decisional pre-approval that Empire now asks the Commission to exercise, the Commission should refrain from granting Empire's requested relief. Bottom line, the decision to retire Asbury and 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.

2. Which of Empire's requests, if any, should the Commission grant?

Position: As reflected in the testimony of Staff, Public Counsel and MECG, the Commission should not grant any of Empire's requested relief. Each of these parties independently reached the conclusion that, because of the significant amount of time prior to savings being realized by customers, and the number of factors that may impact those savings in the meantime, the benefits to customers are tenuous. Given the lack of tangible benefits to customers, the Commission should reject Empire's proposed plan.

- “[A]s Mr. Rogers explains, little of this savings is realized during the first 10 years of the CSP while the equity partners achieve their anticipated returns, and after 10 years, the expected savings for customers are extremely uncertain. In contrast, Plan 10, one of the scenarios parties asked Empire to analyze, demonstrates there are other plans Empire could consider that would allow it to invest \$20 million to bring Asbury into compliance with Environmental Protection Agency regulations, provide more favorable customer savings, and have a lower annual revenue requirement when Asbury would be retired.” (Dietrich Rebuttal, page 5).
- “While customers are expected to realize a net savings from the CSP, customers’ savings are very uncertain, because customers’ savings are dependent upon the competitive electricity marketplace behaving over the next 20 to 30 years as it is presently modeled by Empire’s analysts.” “Expected customers’ savings are minimal or possibly nonexistent in the first 10 years.” (Rogers Rebuttal, pages 2 and 5).
- “The savings in Empire’s “Customer Savings Plan” are built on very uncertain assumptions that do not reflect current reality – a reality that is still changing. Even so, Empire is asking its customers to “foot the bill” on this enormous gamble of building 800 MW of wind generation that will shift to its customers all risk that the benefits are not realized while ensuring that Empire’s shareholders and tax equity partners realize a tidy profit.” (Mantle Rebuttal, page 19).
- “Based on our review of the Company’s proposal, OPC recommends that the Commission reject the “Customer’s Savings Plan” due to the heightened risk to ratepayers and the uncertainty regarding the terms of the transaction. The espoused benefits to ratepayers appear both overstated and are dependent on modeling assumptions that do not fully reflect the changing regulatory and market landscape even since the initial filing.” (Marke Rebuttal, page 2).
- “I recommend that the Commission not approve Empire’s CSP. As demonstrated, the alleged customer benefits are overstated by an implicit assumption of annual rate cases. Moreover, the benefits are tenuous given the current and planned additions of wind in the SPP marketplace. The increasing prevalence of wind in SPP will lead to a higher frequency of negative market prices that would have a tremendous impact on potential future benefits.” (Meyer Rebuttal, page 29).

3. What requirements should be applied to the Asbury regulatory asset?

Position: In its Rebuttal Testimony, MECG provides several requirements that should be applied to the regulatory asset associated with the premature retirement of the Asbury generating station. While MECG makes such suggestions, the adoption of such requirements are not sufficient to offset the detrimental nature of the Empire CSP. “It is important to recognize that while I provide certain adjustments, in MECG’s opinion, those adjustments are not sufficient to negate the potential harm and risk associated with the CSP.” (Meyer Rebuttal, page 2). “It should be noted that these conditions do not mean that I am endorsing the CSP plan to add wind and retire the Asbury plant.” (*Id.* at page 20). Those requirements, many of which were also proposed by Staff, are as follows:

- a) Depreciation: “I believe the regulatory asset for amortization and rate base should be reduced by the monthly amount of depreciation expense included in customer rates from Empire’s last general rate case (Case No. ER-2016-0023). This reduction would occur until the month when customer rates are changed from either a rate case or complaint case.” (Meyer Rebuttal, pages 21-22; See also, Oligschlaeger Rebuttal, page 8).
- b) Return: “[I]n addition to depreciation, the Asbury plant is also providing a return (profit) in current rates. Again, Empire will continue to realize this return until the next rate case regardless of whether Asbury is retired. Any regulatory asset associated with the approval of the CSP, and the retirement of Asbury, should be reduced by the monthly return included in customer rates from Empire’s last general rate case.” (Meyer Rebuttal, page 22; See also, Oligschlaeger Rebuttal, page 8).
- c) Deferred Taxes: “I would recommend that the regulatory asset be reduced for the value of the excess deferred taxes associated with the TCJA [Tax Cut and Jobs Act of 2017]. The TCJA reduced the federal tax rate from 35% to 21% for Empire. As a result, the taxes previously deferred at an effective federal tax rate of 35% will now be recognized at a 21% federal tax rate. This requires that the incremental tax change from 35% to 21% must be addressed. Since the Asbury plant will be retired, it is possible to use those excess deferred taxes as an offset to the regulatory asset immediately. I would propose that those excess taxes be used to immediately reduce the regulatory asset for amortization and rate base.” (Meyer Rebuttal, pages 22-23).
- d) Amortization Period: “Empire has requested a 30-year amortization period. . . I believe this period can be reduced as a result of my recommended carrying cost that should be applied to the regulatory asset.” (Meyer Rebuttal, page 23).
- e) Carrying Cost: “I recommend that Empire’s cost of long-term debt should be used to calculate the return on the regulatory asset. . . . The latest retrofit to the Asbury plant occurred in December 2014 costing over \$112 million. Asbury’s net plant balance increased by over \$138 million in 2014. Those retrofits were intended to allow the Asbury

plant to continue operations to at least 2033. However, just three years later, customers are being asked to allow Asbury to retire nearly 15 years before its anticipated retirement date. Given that ratepayers received such little benefit underlying the investment in Asbury environmental improvements, it seems inequitable to charge ratepayers the full weighted average cost of capital for the Asbury regulatory asset. Applying Empire's long-term interest rates to the regulatory asset seems to be a reasonable balance between the customers and shareholders of Empire." (Meyer Rebuttal, page 24).

4. Should Empire be required to make any additional filings in relation to the CSP? If so, what filings?

Position: MECG does not oppose additional filings suggested by other parties so long as those filings are made available to all parties.

5. Should the Commission impose any requirements in regard to tax equity financing? If so, what requirements?

Position: MECG takes no position on this issue at this time.

6. What conditions, if any, should be applied to the Asbury Employees?

Position: MECG takes no position on this issue.

7. Should the Commission require conditions related to any impacts on local property taxes? If so, what conditions?

Position: MECG takes no position on this issue.

8. Should there be any requirements associated with the Tax Cuts and Jobs Act of 2017? If so, what requirements?

Position: As reflected in Issue 3, the reduction in the corporate tax rate has a direct impact on deferred taxes. MECG recommends that the excess deferred taxes excess taxes be used to immediately reduce any regulatory asset associated with the premature retirement of Asbury. (Meyer Rebuttal, pages 22-23).

9. Should there be any requirements associated with potential impacts of the Wind Projects on wildlife? If so, what requirements?

Position: MECG takes no position on this issue.

10. Should the Commission grant waivers of its affiliate transaction rules for the affiliate agreements associated with the CSP?

Position: MECG agrees with Staff's position that "[i]f the Commission grants Empire's Application, including the granting of a variance upon a proper showing of good cause, the Staff would recommend that the Commission limit the variance to the three affiliate agreements for which the variance has been requested." (Oligschlaeger Rebuttal, page 10).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: April 4, 2018