BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of The Empire District Electric Company for a Certificate of Convenience and Necessity Related to its Customer Savings Plan	))))	Case No. EA-2019-0010

THE OFFICE OF THE PUBLIC COUNSEL'S REPLY BRIEF

Respectfully submitted,

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**** Denotes Redacted Confidential Information****

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Introduction

After the Public Service Commission ("Commission") resolves the legal issue of whether it has the power to issue certificates for these projects when they will not be "used and useful," and will not be "used for service," if it concludes it has that power then it will be faced with the merits of issuing the certificates. The challenge for the Commission on the merits is deciding whether The Empire District Electric Company's ("Empire" or "Company") analysis, using outdated 2016 data, provides enough assurance to gamble millions of dollars of hard-earned income from only 149,000 Missouri citizens and businesses. The Commission is also challenged with deciding whether it is lawful and in the public interest for ratepayers to fund investments proposed as profit-making opportunities for the utility and not meant to fund a single component of providing service to customers. The issue in this case is *not* whether renewable energy is in the public interest – all parties would agree renewable energy can serve the public interest when additional generation is necessary. The issue of this case is whether *this* proposal, at *this* time, under *these* conditions are in the public interest. The Office of the Public Counsel ("Public Counsel" or "OPC") does not believe so given the lack of objective, empirical analysis, the 40% increase to rate base, and the shift in risk to be borne by ratepayers.

As the other parties point out, there are many policies promoting the development of renewable supply-side resources for generating electricity. Likewise, there are many policies promoting sound economic planning when developing supply-side resources, which is an appropriate and important responsibility for a group charged with economic regulation of a natural monopoly. The Commission is an economic regulator—a substitute for the free market charged with preventing a natural monopoly's overreach. Despite arguments to the contrary, Public Counsel does not oppose wind energy. Public Counsel's objection to the proposed projects is how

Empire intends to recover the cost of these projects from its retail customers when Empire already has excess capacity for electricity to serve them for the next decade.

The Commission's Staff provides little assistance to the Commission since, contrary to its own witness' testimony, Staff has bought into Empire's pitch without performing the independent analysis that Staff's reply brief chastises Public Counsel for not performing. Moreover, there is a clear disconnect between the serious concerns with Empire's proposal raised by Staff's experts in sworn testimony, and the Non-Unanimous Stipulation and Agreement signed by Staff that discards those concerns.

For all the reasons Public Counsel pointed out in its initial brief, including that Empire intends that these projects be used to sell electricity into the SPP market, not to provide electricity to Empire's customers; the obvious flaw in Empire's assumption of increasing SPP market prices when history shows them declining and present circumstances show there soon will be massive influx of wind capacity coming into the SPP market, with more to follow; and, the uncertainty of many costs of the projects due to the nonexistence of SPP generation interconnection agreements, tax equity partnership agreements, the Commission should not issue any CCN for any of these projects at this time.

Flawed assumptions and unknowns notwithstanding, other parties agree upon a "market protection plan," that is focused on limiting the investors'—Empire and it tax equity partner(s)—economic exposure to project revenues from the SPP market, the value of production tax credits realized, not the exposure of Empire's retail customers to those unknowns. Voters demonstrated by 1976's Proposition No. 1 that they view such risks should not be borne by the customers of investor-owned electric utilities in Missouri, and the proposed "plan" does not adequately protect Empire's retail customers. Instead, the Non-Unanimous Stipulation and Agreement dramatically

limits Empire's risk in comparison to its exposure if these projects were owned and operated as independent power producers.

Rather than attempting to respond to all of the arguments other parties raise in their briefs, the Office of the Public Counsel (OPC) is limiting this reply brief to pointing out certain aspects of this case upon which the Commission should focus when deciding it. Not responding to argument of a party is not concession by this office to the merits of that argument. The Office of the Public Counsel is limiting its reply to four points: (1) The relevance of § 393.135, RSMo.; (2) The inadequate evidentiary record; (3) The deficiencies in Empire's modeling; (4) The inconsistent positions of the Commission's Staff; (5) The misapplication of State public policy; and (6) the particularly inappropriate position taken by Renew Missouri.

Section 393.135, RSMo is Indeed Relevant

Renew Missouri's argument on page five of its post-hearing brief, that § 393.135, RSMo, has absolutely nothing to do with this CCN case, is patently wrong. Whether Empire can recover investment in these projects is relevant to the Commission issuing CCNs for them.

In a case Renew Missouri, the Natural Resources Defense Council (NRDC) and Sierra Club, and the Commission's Staff cite in their briefs, *Office of Pub. Counsel v. Mo. PSC (In re KCP&L Greater Mo. Operations Co.), 515 S.W.3d 754*, parties challenged the Commission issuing KCP&L Greater Missouri Operations company a certificate of convenience and necessity for a three megawatts solar generating plant, on this point, the Missouri Western District Court of Appeals stated,

> Appellants' argue that the Commission's decision was unreasonable because it was based on future needs and benefits and such evidence is not substantial and competent. "However, in matters of public convenience and necessity there must be consideration of the future." Consideration of the future should be "part of a ***comprehensive*** evaluation of whether the public convenience and necessity would be served[.]" An applicant does not meet its burden of proof "by mere speculation,

> guesswork, hopes[,] or aspirations[,]" however, and a present need must be established. Because the future must be part of a comprehensive evaluation in matters of public convenience and necessity, we will not disregard this evidence in our review of the whole record to determine whether the Commission's order was reasonable.[1]

This requirement to consider the future when making decisions in the present is a broad obligation of the Commission as shown by the court's holding in 2003 that required the Commission to consider UtiliCorp United, Inc.'s recoupment of the amount over book value it was paying to acquire St. Joseph Light & Power Company when determining whether to authorize that acquisition, even though the Commission was not determining rates.[2]

By claiming future economic benefits for why the Commission should issue it CCNs, Empire cannot dispute that whether the Commission has the power to include the projects in Empire's revenue requirement in the future is irrelevant now to the Commission issuing CCNs for these projects. Unless the Office of the Public Counsel's legal analysis of § 393.135, RSMo, presented in its initial brief is wrong and Empire's rates can include recovery of Empire's or its tax equity partner's(s') investment in these wind projects, then the Commission cannot approve the requested CCNs.

Several Signatories do not Understand Burdens of Proof and Failed to Provide an Adequate Record to Support the Wind Projects Proposal

Applicants for CCNs bear the burden of proof, persuasion, and production of evidence to support that the foundational requirements of a CCN.[3] A record demonstrating that the benefits from an application justify its cost must support findings of convenience and need.[4] "The

[1] *Id*. at 761, citations omitted; emphasis added by Court.
[2] *State ex rel. AG Processing, Inc. v. PSC, 120 S.W.3d 732* (Mo. Banc 2003).
[3] "The burden of proof, meaning the obligation to establish the truth of the claim by the preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue." *Clapper v. Lakin*, 343 Mo. 710, 723, 123 S.W.2d 27, 33 (1938).
[4] *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. Ct. App. W.D. 1993).

determination of what is necessary and convenient has long been, and continues to be, a matter of debate."[5] Therefore, the Commission has used the *Tartan* criteria as guiding principles to determine whether the requested CCN is truly necessary or convenient. Accordingly, the signatories to the Non-Unanimous Stipulation and Agreement, as the proponents for the CCN, bear the burden to prove up the case for Empire's wind projects.

A proper case from the proponents would then rely on evidence in the record supporting their claims. The Signatories do not do this. Multiple Signatories refer back to Empire's fifty-four model results that supposedly demonstrate the economics and need for the wind projects.[6] To be clear, Empire performed those models in the EO-2018-0092 case, but Empire did not include them in this docket. No Signatory counsel offered them into the record. Without those models, the underlying rationalization for the levelized cost of energy (LCOE) being a customer benefit is absent. Empire also failed to include any working files of the Non-Unanimous Stipulation and Agreement's Market Protection Plan (MPP) models for the Commission in this docket. Empire can claim that it is still "negotiating a binding term sheet for Wells Fargo's tax equity investment" after two years, but this case's record does not contain any actual terms of service maintenance agreements, which are a large component of the total cost Empire is asking customers bear. [7]

The most the Commission has to work with to substantiate the Signatories' claims is one thirty-year projection of costs and benefits attached to Empire witness Todd Mooney's testimony,[8] four modeling examples attached to Empire witness David Holmes' testimony at the surrebuttal stage,[9] and the similar examples attached to the Non-Unanimous Stipulation and Agreement. The

[5] *Off. of Pub. Counsel v. Pub. Serv. Comm'n (In re KCP&L Greater Mo. Operations Co.)*, 515 S.W.3d 754, 759 (Mo. App. W.D. 2016).
[6] *Empire's Initial Brief*, EA-2019-0010 p. 7 (Apr. 29, 2019); *Staff's Initial Brief*, EA-2019-0010 p. 11 (Apr. 29, 2019); *Renew Missouri's Post-Hearing Brief*, EA-2019-0010 p. 9 (Apr. 9, 2019).
[7] *See Empire's Initial Brief*, p. 20.
[8] Ex. 7, *Surrebuttal Testimony of Todd Mooney*, EA-2019-0010 Schedule TM-S-4 (Mar. 5, 2019).
[9] Ex. 4, *Surrebuttal Testimony of David Holmes*, EA-2019-0010 (Mar. 5, 2019).

Signatories certainly employ condescension towards the OPC's supposed failure to perform independent modeling, but they have not built their case. Without more evidence, the Signatories leave the Commission with little to support an Order.

Oddly enough, several signatories fail to grasp how burdens of proof work and instead devote significant energy focusing on OPC. Staff, NRDC, and the Sierra Club initiate their briefs not by proving their case, but by attacking the OPC's position and doubts as to Empire's claims. The NRDC and Sierra Club entitle their first section "OPC's Objections" and the remainder that follows only attempts to rebut the OPC rather than meet their burden as proponents.[10] Similarly, Renew Missouri begins chastising the OPC in its Introduction, and continues onward to an ad hominem accusation that the OPC's objections are rooted in mere "philosophical disagreements" as opposed to good faith arguments as to law and economics.[11]

Staff devotes nearly its entire forty-seven page brief to the OPC, but does not explain why the Stipulation furthers the public interest.[12] Staff even goes so far as to admit that it "would not discount or question [Company provided] data without providing substantial evidence."[13] This admission demonstrates Staff's fundamental misunderstanding of burdens of proof. In any case, civil or otherwise, proponents bear the burden of proof. However, Staff presumes that whatever the Company offers is refutable only by "substantial evidence," thereby foisting the burden of proof onto critics. Why the utilities receive this deference from Staff, but not the public is disconcerting. This deference is particularly troubling because the "spirit of [utility regulation] is the protection of the public. The protection given the utility is incidental."[14] One shudders to

[10] *Joint Initial Post-Hearing Brief of NRDC and Sierra Club*, EA-2019-0010 (April 29, 2019).
[11] *Renew Missouri's Post-Hearing Brief*, p. 6.
[12] Staff begins its attempted rebuttal primarily on page nine. *Staff's Initial Brief*, EA-2019-0010 (April 29, 2019).
[13] *Id.* at 25.
[14] *Off. of Pub. Counsel*, 515 S.W.3d at 759-60.

consider how many innocent people would be behind bars under Staff's understanding of burdens because the accused failed to prove their innocence against a prosecutor demanding substantial evidence from them.

Rather than being distracted by this misapplication of argumentative burdens though, the Commission should consider what the Signatories actually offered into the record. What is in the record is that:

- Empire's models are dependent on data from 2016 (or earlier) and no longer reflect the SPP market;
- Staff has no testimony against OPC;
- NRDC and Sierra Club have no testimony against OPC;
- The Division of Energy has no testimony against OPC;
- MECG has no testimony against OPC; and
- Empire had a total of two cross questions for OPC technical witnesses (both yes/no). Not one non-company party crossed OPC witnesses.

What they offered actually proves that any of the purported benefits from Empire's wind projects do not justify their costs.

Empire's Wind Projects are Not Necessary in that Their Benefits do not Justify the Costs

The Signatories must demonstrate that their Stipulation supporting Empire's requested CCN is necessary.[15] "An applicant does not meet its burden of proof "by mere speculation, guesswork, hopes[,] or aspirations[,]" however, *and a present need must be established*."[16] Note however, that, contrary to Staff's misrepresentation, OPC has not argued that merely because

[15] *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n*, 848 S.W.2d 593, 597 (Mo. Ct. App. W.D. 1993).
[16] *Off. of Pub. Counsel*, 515 S.W.3d at 760 (quoting *State ex rel. Gulf Transport Co. v. Pub. Serv. Comm'n*, 658 S.W.2d 448, 458 (Mo. App. W.D. 1983) (emphasis added).

"Empire does not need the generation for capacity purposes, so the Wind Projects do not meet the Tartan Criteria."[17] Rather, after making the point that Empire does not have a literal need for the Wind Projects, the OPC then analyzed the merits as its application as a revenue generating proposal that could evidence a "present need." OPC would not normally judge a CCN in the same manner as an investment proposal, but as the Signatories have sold this project as a money making venture the OPC approaches it accordingly. By that standard, and under their burden of proof, the Signatories opting instead to rely on mere promises of sufficient returns.

Staff, Renew Missouri, Sierra Club, and the NRDC employ the 2016 Missouri Appellate Court case quoted above. That case is important to this case because that Court took care to pay attention to the contested CCN being for a three-megawatt solar pilot program.[18] The Court noted that such a miniscule amount would not enable a utility significantly larger than Empire "to discontinue the use of any of its nonrenewable electric generation sources" and that the "cost of the proposed solar plant is small relative to GMO's current rate base and its $180 million in annual capital expenditures."[19] In contrast, Empire's wind projects would be a forty percent addition to its rate base. The Missouri Appellate Court also upheld the CCN grant in part because the solar facility would be receiving tax credits "would offset thirty percent of the plant's cost," but Empire's tax equity partner (TEP) subsumes nearly all of the production tax credits (PTC) from Empire's wind projects.[20]

Thus, the Appellate Court justified a "need" for the solar plant because of its relatively small rate base impact, research potential and other public benefits. The facts implicated by this case versus the Appellate case the Signatories rely on are simply too distinguishable. Attempting

[17] *Staff's Initial Brief*, p. 12.
[18] *Off. of Pub. Counsel*, 515 S.W.3d at 757.
[19] *Id.*
[20] *Id.*

to apply this unique situation for a relatively small pilot project to a 600 MW mega-project encompassing forty percent of an applying utility's rate base is to focus on form over substance.

As for actual substance, what little is in the record plainly demonstrates that the future ***potential*** benefits trumpeted by the Signatories do not outweigh the ***known*** costs. The costs outweigh the benefits because none of the foretold "savings" offered by them meets or exceeds the investment forced upon ratepayers. Consider again that Empire is asking for nearly $600 million to be added to its rate base in the form of three wind projects, and in exchange customers are promised reduced rates in the future due to the revenues Empire will make selling its excess wind energy generation. Empire's Brief claims that there will be "$169 million of savings to customers over the twenty year period used to assess integrated resource plans and up to $295 million in savings over a thirty year period."[21] Staff relies upon Empire witness James McMahon's promise of anywhere from a $69 to $320 million reduction in Empire's revenue requirement.[22] All of the Signatories also point to four other possible scenarios they attached to their Stipulation. The scenarios included have customers either receiving certain amounts of revenues over ten years or a credit via a regulatory liability.[23] Of the "range of options"[24] available to demonstrate the MPP, the Stipulation contemplates Empire enjoying $145,039,951, $346,967,013, or $9,776,501 in profit over ten years from selling the wind energy into SPP; or a $39,712,233 regulatory liability for customers.[25]

Assuming all of these figures are reliable, which OPC does not concede, none of them matches or exceeds the $600 million that Empire is seeking to put into rate base with these Wind

[21] *Empire's Initial Brief*, p. 18.
[22] *Staff's Initial Brief* p. 14.
[23] Tr. p. 200-09.
[24] Tr. p. 204.
[25]Ex. 13, *Non-Unanimous Stipulation and Agreement*, EA-2019-0010 (Apr. 5, 2019); *See also* Tr. p. 208-09.

Projects.[26] The highest promised benefit still leaves over $150 million deficient return after ten years, but as Staff puts it, "the most probable scenario" is only $169 million.[27] To reiterate, the Signatories portray situations where customers pay a return of and on $600 million for the possibility of either receiving far less than $600 million ten, twenty, or thirty years later, or a regulatory liability for even less, as being economic for its customers.

To put this into perspective, assuming an interest rate of 1.3% and a monthly compounding, $600 million accrues $ 286,001,423.85 in interest over thirty years. Empire's Brief extolls its economic acumen by claiming it can potentially make up to $295 million over that same period, but that any actual benefits are more likely to be lower than $295 million. Evidence corroborated by the Lawrence Berkeley National Laboratory (LBNL) and MIT Center for Energy and Environmental Policy Research (MIT CEEPR) indicates that wind projects will actually make far less money, as the markets become flush with supply.[28] When comparing this promoted gain to a basic savings account, it is apparent that Empire's customers would likely make more money if they simply put their funds away in a bank vault and do nothing for thirty years. Moreover, those customers would likely have more overall savings because they would not be concerned with offsetting Empire's higher revenue requirement that comes with increasing your rate base by forty percent.

Public Counsel struggles to share the Signatories' view that receiving less than an initial investment, and where a traditional savings account or certificate of deposit will likely outperform Empire's business strategy, is a situation where the benefits justify the costs under the best-case scenario. This is especially true when the risks to ratepayers and the local economy are both so

[26] *See* Tr. p. 208-09.
[27] *Staff's Initial Brief* p. 14.
[28] Ex. 205, *Surrebuttal Testimony of Lena Mantle*, EA-2019-0010 p. 9 (Mar. 5, 2019).

great given the size, and so likely given the conscious decision to cease modeling with accurate market data.

As the Commission noted in its Report and Order in EA-2016-0358:

> "We are witnessing a worldwide, long-term comprehensive movement towards renewable energy in general and wind energy specifically."[29]

OPC agrees. Unless the Commission has somehow changed its opinion, it should be skeptical of Empire's application that suggests large wholesale energy revenues from wind over the next thirty years to materialize. For Empire's specific renewable application "to work" that is, to cover the costs of the project, Empire's ratepayers and the Commission will have to hope that only Missouri, or better yet, only Empire will be promoting wind generation. If Arkansas, KCPL, the City of Springfield, Missouri Rural Electric Cooperatives, or wind rich utilities situated in Oklahoma or Kansas, etc. all bring on more wind generation as SPP's generation interconnection queue points to an increasing basis month over month—then the ability of these projects to realize the espoused benefits will be impaired, which will increase the likelihood of the much more predictable scenario of needlessly raising rates and hurting the local economy.[30]

Staff's Positions in this Case are Inconsistent

Staff has recommended three distinct positions, in three different versions of what is called the "market protection provision," without explaining the positions, or why they changed. Staff recommended the first version of the market protection provision before these certificate cases began. In Case No. EO-2018-0092 Staff entered into an agreement with Empire and others that included a version where Empire and its retail customers share equally the annual amounts by

[29] *Report and Order on Remand*, EA-2016-0358 p. 47 (Mar. 20, 2019).
[30] Ex. 120, *Rebuttal Testimony of Geoff Marke*, EA-2019-0010 (Feb. 5, 2019).

which SPP revenues are inadequate to insulate customers from bill increases totaling $2 million due to these projects, up to Empire contributing a maximum aggregate total of $35 million.[31]

Staff only supplied testimony in the form of a Rebuttal Report against Empire's position. In that Report, Staff noted several remaining unknowns that increase the risk of the wind projects being economically infeasible. Those unknowns included **_____, _____.**[32] Staff noted that the **_____, _____.[33] _____, _____ _____.[34] ** Staff's Report also repeatedly advised, "the Commission not rely on certain evidence Empire puts forth to suggest that meeting a specific LCOE threshold constitutes need."[35] Staff stressed, "Empire's own modeling of the financial impact of the wind additions shows that in the first ten years of the windfarms' operation *minimal net customer savings are expected*."[36]

Because of these unknowns and non-reliability, Staff's Report recommends foregoing its previously negotiated $35 million cap on Empire's exposure, and instead having an equal sharing of risk exposure as between Empire and its customers.[37] Staff provided no rationale for eliminating the $35 million limit on Empire's contribution, stating only that the $35 million was negotiated.

[31] Ex. 101, Staff witness J. Luebbert, pp. 4-5; Staff witness Natelle Dietrich, p. 37.
[32] Public Counsel does not know why Staff treats simply listing off variables as confidential. Regardless, Public Counsel will respect that designation absent an explanation from Staff or Empire. *Id.* at 17.
[33] *Id.* at 31.
[34] *Id.* at 33.
[35] *Id.* at 21, 37.
[36] *Id.* at 28 (emphasis added).
[37] Ex. 101, p. 4.

Regardless, Staff's Report described an equal sharing of risk as the "appropriate treatment of risk associated with the projects."[38]

A recommendation of equal risk sharing was the last word from Staff before the evidentiary hearing. Staff did not file surrebuttal testimony against OPC, nor did Staff Counsel question any OPC witness. Instead, after the filing of the last round of written testimony and scant days before the main evidentiary hearing started, Staff entered into an agreement with Empire and other parties that included a third "market protection plan." That version eliminated the $2 million offset, but limited Empire's contribution exposure to the maximum aggregate total of $52.5 million.[39] Again, the Commission's Staff has provided no rationale for that position.

Staff's Counsel then devoted its Brief almost entirely to attacking the OPC. Staff's Brief also disagrees with Staff's own Rebuttal Report. Whereas, Staff's Report advised the Commission to not rely upon Empire's LCOE figures, Staff's Brief now praises Empire's efforts to use the LCOE to "ensure that the three purchase sale agreements are within the economics modeled and thus will deliver the same level of benefits to customers as was put forward in [EO-2018-0092]."[40] The Report described net customer savings as "minimal," but now Staff's counsel asserts that the risks are "minimal" but that savings will be "significant . . . for many years to come."[41]

The different stances between Staff's Brief and its Report makes it appear as if Staff is divided into two separated organizations. Whereas, Staff technical agrees with OPC that Empire's modeling should not be trusted, Staff's management settled. Staff's financial and technical experts said that only an equal sharing of risk was "appropriate treatment" for Empire's customers, but now Staff's counsel argues that a $52.5 million cap on shareholder exposure as "appropriate,"

[38] *Id.* at 5.
[39] Ex. 13.
[40] Ex. 101, p. at 21.
[41] *Id.* at 9, 21.

while leaving open the option that ratepayers absorb far more losses in a future rate case.[42] Staff's brief also sees the wind projects as having value because of their potential to replace the Elk River and Meridian Way PPAs,[43] but Staff's Rebuttal Report noted that the renewable energy credits from Empire's PPA with Meridian Way are still available for future redemption for renewable energy standard (RES) compliance purposes.[44] The Report also observed, "only one of the three proposed wind farms is necessary for Empire's long-term compliance with the Missouri's renewable energy standard" and that all three would be only necessary for RES purposes if the RES required fifty percent of Empire's portfolio to be composed of renewable energy.[45]

Staff's Rebuttal and Brief are complete reversals of each other. Despite Empire giving up virtually nothing from its application, Staff has completely switched from shareholders having equal risk sharing to shareholder enrichment and ratepayer financial exposure. Literally, what economic regulation is supposed to prevent. Perhaps it is because of this abandonment of prior testimony that Staff's Brief relies almost exclusively on Empire's witness, including numerous block quotes, but only quotes one of its eight expert witnesses once in its 47-page tome.[46] Whereas technical and financial experts expressed doubts and advised against relying on Company evidence, Staff's Counsel sees Empire's claims as sufficient but demands that OPC alone perform better modeling.

A Public Policy of Supporting Renewable Energy does not Justify the Bad Investment

Perhaps it is because the Signatories know that their own supporting models cannot justify the rate base increase, even if presumed accurate, that they all find refuge in normative public

[42] *Id.* at 30-31.
[43] *Id.* at 15.
[44] *Id.* at 16.
[45] *Id.*
[46] *See Staff's Initial Brief*, p. 20.

policy. Empire heavily relies upon the Commission's prior order stating that it "is the public policy of this state to diversify the energy supply through the support of renewables."[47] Staff sings the same refrain,[48] and Renew Missouri turns to other Report and Orders expressing Missouri utility customers "strong interest in the development of economical renewable energy."[49]

OPC agrees with all of those sentiments, but asks that the Signatories also respect the Commission's qualifier for "economical" renewable energy. There is nothing in a public policy of supporting energy diversification necessitating an investment into any one or more renewable energy projects with unjustified costs. A desire to support renewable energy does not excuse buying into a bad investment. Arguments that OPC simply disdains renewable energy are disingenuous.[50]

Furthermore, nothing about addressing environmental concerns, climate change, or greening the grid necessitates supporting this plan. If these wind projects end up losing hundreds of millions of dollars, as Empire's own numbers indicate they will, that loss could even have a resounding dampening effect on renewable energy policy in Missouri. All opponents to renewable energy would need to do is point to the Empire's failure to obstruct wind energy in other states.

Although Empire has not explicitly made it a part of its application this time, its first rendition in EO-2018-0092 connected the retirement of the Asbury coal facility as a potential environmental benefit of the wind projects. It is evidently still a factor in many parties' minds as

[47] *Empire's Initial Brief*, p. 5 (citing *Report and Order*, EO-2018-0092 p. 20 (July 11, 2018)).
[48] *Staff's Initial Brief, p. 11.*
[49] *Renew Missouri's Initial Brief*, p. 2 (quoting *Report and Order*, EA-2016-0208 p. 20)
[50] Renew's mischaracterization of OPC as renewable obstructionists is not supported by fact. For the two prior wind CCNs cited by Renew, OPC recommended granting the CCN in one and did not oppose the CCN in the other. Of the two solar projects identified by Renew, the OPC director and OPC attorney on one case was the *same* director and attorney now with Renew, criticizing OPC for positions formulated and argued *by them.* Renew also selectively ignores additional solar projects where OPC raised no objections.

evidenced by the Stipulation's language as to Asbury.[51] The silent argument presumably being made in tandem with Empire's proposal then appears to be that approving these wind projects will hasten the retirement of Asbury and consequentially the environment will be bettered. Nothing is preventing Empire from shutting down Asbury today. It can shut down Asbury now without this plan. Empire will still be long on capacity even with the loss of Asbury.[52] If Empire makes the managerial decision to shut down Asbury, then the Commission may address cost recovery in a future rate case. In fact, if the Commission wishes to altruistically promote the retirement of coal facilities, perhaps it should consider simply deeming the Asbury investment imprudent. If a utility is not making a return on or of its investment, it will likely abandon it. Approaching Asbury in that manner avoids the imposition of a $600 million rate base addition with no capacity justification.

The Signatories Have Not Demonstrated that the Wind Projects are Economically Feasible Because of their Flawed Underlying Assumptions

The simple fact that the purported benefits from all of the Signatories do not match or exceed the investment costs should be enough to dispute their arguments that the wind projects are economic. Additionally though, one could assume that the models are in the evidentiary record, and still find foundational problems underlying their assumptions. Proper modeling should use valid assumptions, and the most recent and relevant data. Empire has neither.

The biggest flawed assumption that Empire's modeling, and by proxy the Signatories, make is that energy prices will continually increase within the SPP market. Any freshman

[51] The Stipulation contains terms regarding Empire's obligation to a local union chapter, and for the creation of a regulatory liability in the event of Asbury's retirement. Ex. 13.

[52] The Midwest Energy Consumers Group notes that Empire's generating assets amount to an accredited capacity of 200 MW plus over the Company's Historic Peak. *See Initial Posthearing Brief of Midwest Energy Consumers Group*, EA-2019-0010 p. 12 (Apr. 29, 2018). Meanwhile, Asbury has a 200 MW nameplate capacity. Ex. 8, *Surrebuttal Testimony of James McMahon*, EA-2019-0010 p.9 fn 11 (Mar. 5, 2019).

economics student will tell you that a rising supply leads to falling prices. In a falling price environment, associated revenues also plummet.

The supply of wind energy is clearly increasing in the SPP market. Again, as this Commission has phrased it: "We are witnessing a worldwide, long-term and comprehensive movement towards renewable energy in general and wind energy specifically."[53] Empire and Staff's briefs both quote the same language, and yet do not consider what effect that will have on energy prices.[54] Evidence presented by Public Counsel also substantiates the Commission's view, while also considering consequential impacts. OPC witness Lena Mantle included two reports with her testimony. Empire witness James McMahon may dispute the actual amount of wind entering the market as his Surrebuttal testimony argues that SPP is instead ***only*** forecasting "6.5 GW to 11.5 GW of additional capacity by 2025."[55] The point remains that an immense amount of supply is going to enter the market. If even a fraction of that impending influx comes into the market, then the worth of 600 MW of wind and associated wind energy revenues will drop precipitously.

In spite of this evidence, Empire maintains its view of ever increasing prices and associated revenue despite acknowledging the macro-economic truth that supply and price are inversely related.[56] The Signatories then simply follow Empire's lead. The Company continues to hold its rosy view of wind prices despite recognizing real-world examples of gas prices dropping as its supply increased.[57] Holmes in particular maintains that energy prices will increase as wind supply increases despite previously describing his ability to speak to future SPP revenue forecasts possibly decreasing as "speculation."[58] That is to say, he inconsistently will not speak confidently that an

[53] *Report and Order on Remand*, EA-2016-0358 p. 47 (Mar. 20, 2019).
[54] *Empire's Initial Brief*, p. 23; *Staff's Initial Brief*, p. 12.
[55] Ex. 8, p. 11.
[56] Tr. p. 184.
[57] Tr. p. 185.
[58] Tr. p; 191.

increasing supply of wind energy will exert downward pressure on energy prices, but boldly testifies that energy prices and associated SPP revenues will assuredly increase.[59] No Signatory witness offered testimony or any briefing to substantiate Holmes and Empire's assumption that supply does not inversely relate to price in the SPP market. Any modeling that denies simple economic axioms such as price falls as supply increases is fundamentally unsound and dangerous.

Along with an inherently flawed assumption, the Signatories offered modeling is not using the most up-to-date data available. Staff asserts to the contrary, "Mr. Holmes clearly states . . . that the modeling includes updated capital costs, production values, O&M expenses, and tax equity expenses."[60] Unfortunately, Staff's statement and reliance on a Company witness is misleading. What Staff does not offer to the Commission is that Empire only updated its modeling with AAB's 2017 forecast, using 2016 data, as a negotiated result of the EO-2018-0092 case. Empire has conducted no updates since.[61] That is to say, the Signatories are confident in an "updated" model that uses three-year-old data, at best. Moreover, Empire refuses to improve its modeling with readily available data that it is required to submit. Empire has the data for its 2019 integrated resource planning (IRP) with ABB and Charles River Associates' work.[62] Empire has also known for some time that it was to provide an updated IRP filing earlier last month.[63] However, Empire has delayed that filing. Empire has done so despite this Commission requiring all electric utilities to "keep abreast of evolving electric resource planning issues."[64] The Commission should seriously consider why Empire simply refuses to bring the most updated models possible for the

[59] Tr. p. 193.
[60] *Staff's Initial Brief*, p. 32.
[61] Ex. 200, *Rebuttal Testimony of Geoff Marke* GM-2, EA-2019-0010 (Feb. 5, 2019).
[62] Tr. p. 188.
[63] *See* 4 CSR 240-22.080(1).
[64] 4 CSR 240-22.080(4).

Commission to consider. There is only one reason to not update the model, and that is because you do not want to see the results.

Conclusion

OPC cautions the Commission against approving the CCNs or the Stipulation offered by the Signatories because of the lack of statutory authority to issue the certificates and the scant evidentiary record supporting Empire's rosy claims. Alternatively, Public Counsel prays that the Commission adopt the proposal offered in its position statement that customers' risk exposure be capped versus a proposal that shields shareholders.[65] When deliberating, the Commission should also consider the abject reality that even if the benefits touted by the Signatories come true, they will not offset the costs to customers. Empire's proposal does not make its customers better than they would be without the wind projects, and there are no true "savings." The only party that benefits in this exchange is Empire that receives an immediate $600 million boost to its rate base.

Respectfully,

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[65] It is worth noting that the Staff's brief is critical of OPC for taking a position first seen in OPC's March 22, 2019 position statement. Staff's argument overlooks that Staff's new position was first seen in the April 5, 2019 Non Unanimous Stipulation and Agreement filed two weeks after OPC filed its position statement.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been electronically mailed to all counsel of record this 7th day of May 2019.

/s/ Nathan Williams