BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of The Empire District Electric Company for Certificates of Convenience and Necessity Related to Wind Generation Facilities.	))))	File No. EA-2019-0010

JOINT INITIAL POST-HEARING BRIEF OF NRDC AND SIERRA CLUB

The Natural Resources Defense Council and Sierra Club file this brief simply to address the objections of OPC, filed after the hearing, to the Non-Unanimous Stipulation and Agreement (NUS). There is no other opposition; though NRDC and Sierra Club are not signatories they support the Stipulation reached between the company and the Department of Conservation and now the NUS.

OPC's Objections

OPC foresees falling power prices on SPP. Empire's forecasts indicate the contrary. The Commission must resolve this conflict in the evidence.

OPC argues that Empire has adequate capacity to serve native load. OPC purports not to object to Empire's building the project but says that it should do so as an independent power producer.

OPC maintains that the wind project is a speculative venture and that the Market Protection Plan incorporated into the non-unanimous stipulation is inadequate to protect ratepayers from the downside risks.

The issue of excess capacity

Paragraph 1 of OPC's objection asserts that Empire's "captive retail customers" should not be made to pay for generation that is not being used to serve them. OPC cites the anti-"cwip" (construction work in progress) statute, § 393.135, RSMo, for the proposition that the plant must

be "used for service," a/k/a "used and useful." This statute has nothing to do with excess capacity but only with the time for cost recovery.

A public utility's obligation is to "provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable," and to do so at "just and reasonable rates." § 393.130.1, RSMo. This is not a ceiling on megawatts. Empire acknowledged its duty as a public utility and rejected the idea that it should have a split personality:

> In doing so, Empire seeks to invest in ways that will provide its customers with opportunities for savings and that will reduce price risks in the future. The Wind Projects for which Empire seeks CCNs in this case fit this description. The weighing of unregulated vs. regulated profit potential, as suggested by OPC witness Mantle, is not anything in which Empire should or does engage.[1]

Missouri's Public Service Law is in many respects antiquated, but it does not support OPC's contention. Concepts like exclusively serving a confined territory no longer match the reality of utilities bidding all their energy into an RTO wholesale market and purchasing back their needs. OPC cannot point to a statute, even one from 1913, that enshrines this narrow idea of serving native load. "The safety and adequacy of facilities" are still "proper criteria" for what is "necessary **or** convenient for the public service." *State ex rel. Intercon Gas v. PSC,* 848 S.W.2d 593, 597 (Mo.App. W.D. 1993); § 393.170.3, RSMo (emphasis added).

A better metric is the Chapter 22 IRP policy objective of minimizing long-run utility costs as measured by the net present value of revenue requirement (NPVRR).[2] Empire used this for its customer savings plan and realized "significant benefits for its customers."[3] Staff witness Luebbert testified that Empire "substantially demonstrated" that the wind projects would reduce PVRR over 20- and 30-year periods.[4]

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[1] Exh. 3P, Mertens Surrebuttal, p. 19 lines 1–5.
[2] 4 CSR 240-22.010(2)(A), 22.060(2)(A)1 and (B).
[3] Exh. 8, McMahon Surrebuttal, p. 7 lines 10–12.
[4] T. 329 lines 11–17.

The real question is, will Empire's means of serving its customers be economical? OPC's testimony in this case focused on what it deems speculative risk, not on rebutting Empire's case for customer savings. Empire made the case for its Customer Savings Plan, financing the Plan through the use of tax equity partners and production tax credits, in Case No. EO-2018-0092. While the Commission did not make a finding of reasonableness in that case, it did say:

> Empire presented credible and persuasive evidence that the CSP, if implemented as contemplated in the Joint Position, would generate customer savings in the approximate amount of $169 million over 20 years and $295 million over 30 years, relative to Empire's current resource plan, and significantly reduce financial risk for those customers. Empire has stated that it is looking for an indication from the Commission that it is "headed in the right direction". While the Commission cannot make the legal conclusion that Empire requests, the Commission finds that the millions of dollars in customer savings and the addition of renewable wind energy resulting from the CSP and the Joint Position could be of considerable benefit to Empire's customers and the entire state.[5]

This conclusion stands unrefuted. Existing capacity is not automatically the best; for the year ending January 2018 Empire was bidding Asbury into the market at $28/MWh but buying power at $30/MWh.[6]

The case of *Application of GMO for a CCN,* 515 S.W.3d 754, 760 (Mo.App. W.D. 2016), ratifies many aspects of this case, albeit on the much smaller scale of a 3 MW utility-scale solar project. The Court in *GMO* found that GMO had no need for new capacity but found it not unreasonable to conclude that the project was needed to satisfy increasing customer demand for solar energy. 515 S.W.3d at 762. In deciding convenience and necessity, the future must be considered. *Id.* at 760. The solar investment tax credit would benefit customers by defraying 30% of the cost, analogously to the wind production tax credit in this case. *Id.* at 757. The Court relied on the well settled law that in a CCN case "necessary" does not mean essential or indispensable, but covers any improvement that is highly important to the public and desirable

[5] Report and Order, pp. 21–2, EO-2018-0092.
[6] T. 237, lines 9–14 (Holmes).

for the public welfare, and of sufficient importance to warrant the expense. *Id.* at 759, 764. Finally, the Court cited Missouri's policy to pursue renewable energy, which had been embraced by customers. *Id.* at 764. The Court therefore upheld the CCN.

Empire's addition of wind could open the door to a significant new customer base of corporations seeking to meet renewable energy goals. A utility that failed to anticipate such demand would disserve not only its own interest but the interest of its territory in economic development. The non-unanimous stipulation provides for a "green tariff" to meet this demand for wind energy.[7]

The issue of SPP market prices

OPC criticizes Empire's price forecast as three years out of date.[8] In OPC's view, power prices on the Southwest Power Pool's integrated marketplace will go down rather than up based on the expectation that more wind on SPP will "dampen" prices.[9] The LBNL and MIT papers cited by OPC[10] are not forecasts; they are "qualitative," as the Lawrence Berkeley report says.[11]

OPC overrelies on SPP's queue of interconnection requests (50 GW according to Marke,[12] 54 GW according to Mantle[13]). The majority of interconnection requests are withdrawn.[14] OPC therefore overestimates the downward price pressure of increased wind penetration.

[7] Exh. 13P, p. 8, ¶ 18.
[8] Mantle, Transcript of hearing (T.) 427; Marke, T. 378, 385.
[9] Mantle, T. 423; Marke, T. 378.
[10] Exh. 206P, Mantle Surrebuttal p. 9
[11] *Id.,* Schedule LMM-S-1, p. 7 (vii).
[12] Exh. 200P, p. 14.
[13] Exh. 206P, p. 10 lines 19–20.
[14] Exh. 8, McMahon Surrebuttal, p. 11, lines 13–8; T. 286.

Empire's witnesses testified that OPC's criticisms are irrelevant to what the company actually did. Instead of historic data, Empire used a fundamental pricing model to emulate the marginal price of the marginal unit in each hour.[15] It simulates the SPP day-ahead market.[16]

In the nature of things, an "intelligent forecast" is all that is possible or required. *State ex rel. PSC v. Fraas,* 627 S.W.2d 882, 886 (Mo.App. W.D. 1981). Substantial and competent evidence on the record as a whole supports Empire's analysis of future prices. *State ex rel. Intercon Gas v. PSC,* 848 S.W.2d 593, 597 (Mo.App. W.D. 1993).

Hedging has no ratemaking effect.

OPC witness Riley insisted on adding hedge costs back in to show the hedge as "a true cost to the ratepayer."[17]

The hedging agreement is a "fixed for floating price swap;" it sets a fixed price and Empire and the wind projects (which Empire owns) pay each other any difference in the price.[18] This makes tax equity financing possible by assuring tax equity partners, who provide up to half the capital, of a return of and on their investment.[19] The hedge agreement has no ratemaking implications because it "nets out," leaving Empire in the identical cash flow situation.[20]

> As described above, the Hedge does not guarantee that each Wind Project receives a certain amount of revenues. Rather, it ensures that each Wind Project receives a fixed price for a defined quantity of electricity production. Thus, the Hedge provides the Wind Project with greater certainty of its revenues, allowing it to obtain tax equity financing.[21]

OPC can hardly complain that customers save capital expense and avoid risk. Yet Mr. Riley sees the hedge as a cost to ratepayers in the event that the wind project comes up short on SPP

[15] Exh. 8, p. 20, line 18–p. 22 line 8; T. 286.
[16] *Id.,* p. 24, lines 6–8.
[17] T. 405 lines 24–5 line
[18] Mooney, T. 246 line 24–247, line 13.
[19] Exh. 7P, Mooney Surrebuttal, p. 3 lines 3–22
[20] *Id.* p. 6 lines 1–13; T. 179 lines 8–19 (Holmes).
[21] Exh. 7P, p. 8, lines 12–16.

revenue.[22] This ignores the other side of the equation, the upside, and treats the hedge as a floating price rather than the fixed price it is.

The Market Protection Plan

The MPP protects customers from a regulatory liability of up to $52.5 million plus carrying costs; in the event of a larger liability the parties would recur to the Commission.[23] This covers even the low-probability P 95 low-market, low-wind case.[24]

OPC's position statement (pp. 3–4), filed before the NUS was reached, proposed as a condition to the CCNs that the Commission adopt a customer protection provision based on a $25 million cap. OPC never updated this position in testimony after the cap was raised to $52.5 million; indeed witness Marke testified at the hearing, "As far as a social good here, there's $25 million that ratepayers would be willing to put up, but the revenues based off of those models and the assumptions all of those benefits would, if they're right, would then go to shareholders…"[25]

This apparently presages the Objection filed after hearing, that even with a $52.5 million cap the MPP would "leave unresolved until the end of those ten years any downside that exceeds the $105 million shared."[26] But Empire witness Homes testified:

> …there's one adjustment being made to rates. You don't get an up or down during the interim periods.
>
> Q. And that may alleviate some volatility concerns, would you agree?
>
> A. It would, yes.

[22] T. 406 line 2–407 line 8.
[23] T. 171 line 13–172 line 9 (Holmes).
[24] T. 172 line 15–173 line 7; 202 lines 18–9.
[25] T. 384 lines 6–11.
[26] Objection to NUS ¶ 2.

Q. Okay. And final– and also, any regulatory liability, according to the stipulation, would also car– include carrying costs over and above the 52.5 million; is that correct?

A. That is my understanding.[27]

This satisfied the other parties to the NUS,[28] and OPC has failed to put forth any evidence or specify any alternative that the Commission could consider as a condition. Empire as the applicant has met its burden of proof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct PDF version of the foregoing was filed on EFIS and sent by email on this 29th day of April, 2019, to all counsel of record:

/s/ Henry B. Robertson
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[27] T. 171 line 19–172 line 4.
[28] See Luebbert, T. 327 line 21, "basically all of the up side potential goes to customers;" Oligschlaeger T. 341; Lange T. 353, lines 9–13; Eubanks, T. 370 line 11–371 line 1.