BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of	)	
The Empire District Electric Company for	)	**Case No. EA-2019-0010**
a Certificate of Convenience and Necessity	)	Case No. EA-2019-0118
Related to Wind Generation Facilities	)	

STAFF'S REPLY BRIEF

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Introduction

The purpose of a *Reply Brief* is to respond to the arguments made by parties' opponents. Rather than replying to every argument other party's make in their initial briefs, having presented and argued its positions in its initial brief, Staff is limiting its replies to where it views further explanation will most aid the Commission in its deliberations. Arguments that Staff believes were already refuted in its *Initial Brief* will not be repeated as to not burden the record with repetitious arguments. One minor correction Staff would like to point out initially, is that on page 30 of its *Initial Brief*, Empire references capacity value being included on the revenues side for the Wind Projects when calculating the MPP. Staff believes this was mistakenly included in the Empire brief, as the Non-Unanimous Stipulation and Agreement ("Stipulation") does not contain value for capacity.[1]

OPC's statutory interpretation of §393.135, RSMo., and its view of the concept of "used and useful" ignores plain meaning, the history behind the statute, and relevant case law.

The Office of the Public Counsel opens its *Initial Brief of the Office of the Public Counsel* ("Initial Brief") with a discussion of why it is not legally permissible to allow the Wind Projects into rate base, based on its puzzling conclusions about §393.135 RSMo., and a somewhat tortured interpretation of "used and useful" only applying to facilities providing energy directly to customers.[2] Both conclusions are incorrect. §393.135 merely

[1] Ex. 13HC, Non-Unanimous Stipulation and Agreement, p. 16.
[2] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 5-13.

prohibits construction work in progress (CWIP) from being in rates and "used and useful" is not so narrowly tailored that only facilities delivering energy to Empire's customers are used and useful. This definition ignores case law and shows a fundamental misunderstanding of how the markets work.

Plain Meaning

OPC discusses plain meaning at length in its *Initial Brief*.[3] However, it is OPC who ignores the plain meaning of §393.135, RSMo. §393.135, RSMo., states:

> Charges based on nonoperational property of electrical corporation prohibited. — Any charge made or demanded by an electrical corporation for service, or in connection therewith, which is based on the costs of construction in progress upon any existing or new facility of the electrical corporation, or any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service, is unjust and unreasonable, and is prohibited.

The plain meaning of this statute is quite clear. It captures two categories of costs. The first is the actual "construction costs" for the not yet in service facility. The second is "any other cost" associated with the not yet in service facility, such as operating, maintenance, finance or other costs of ownership. The statute must be read as a whole, and the context of the phrase "any other cost" must be read in reference to the first portion, the costs of construction. This allows all costs, not merely just construction costs, associated with construction work in progress (CWIP) to be excluded from service. To arbitrarily disjoint the two clauses is contrary to the plain reading of the statute. OPC's reading, would allow the construction costs of plant not directly providing energy to Empire's customers, when

[3] *Id.* at p. 10.

it is clear that the entire statute is relating to CWIP. This interpretation is supported by relevant case law.

The seminal case on §393.150, RSMo., is the Callaway II case. Union Electric d/b/a as Ameren Missouri (Ameren) abandoned construction at Callaway II, after its experiences with Callaway I, a poor load growth forecast, and general economic conditions.[4] The Commission found the abandoned construction must be disallowed and the case was appealed.[5] The Court overturned the Commission, finding:

> It is argued that the second clause of § 393.135 dispels any confusion or uncertainty about recovering the cost of abandoned construction, by prohibiting charges for services based on "owning, operating, maintaining, or financing any property before it is fully operational." This clause should be read in the context of the first clause. So read, we believe that it is designed to cover adhesions to the costs of construction, such as interest on borrowed funds, and not to relate to abandoned construction.[6]

The Court also found:

> The manifest purpose of Proposition One was to make the utility wait until completion of new construction before including the cost in its rate base, or otherwise recovering its expenditures. Charges for construction work in progress had been expressly authorized by the Commission just a few months earlier. The language contains no express reference to cancellation. There are substantial indications that Proposition One was primarily concerned with timing, and that the possibility of abandonment was not present in the thoughts of the sponsors or of the voters. There was then much discussion in reports of regulatory commission decisions about the treatment of construction work in progress but little case law, judicial or administrative, about allowances for abandoned projects.[7]

Finally, the Court reasoned:

> Reasons for requiring deferral can be easily perceived. (1) If construction charges are assessed in advance persons who will never have the benefit of the completed facilities such as those who die or move before the facility goes on line, will have to bear a part of the cost. (2) It has been demonstrated that the costs of both Callaway projects were substantially underestimated. If reimbursement is deferred

[4] State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, 687 S.W.2d 162, 166 (Mo. 1985).
[5] *Id.*
[6] *Id.* at 167.
[7] *Id.* at 166.

> until the facility is on line the Commission may have more effective continuing control. (3) If the utility must wait until construction is completed to obtain reimbursement or return, it may be impelled to complete necessary construction more expeditiously. This enumeration may be far from complete, but it serves to highlight some of the arguments which might be made in favor of legislation such as Proposition One.[8]

It would be a patently absurd result to allow abandoned construction costs into rates, but disallow the costs of Wind Projects providing savings to customers for the next 30 years.

Other case law supports the more rationale view of used and useful as requiring facilities be useful to customers, as in providing service, offering better reliability, and lowering rates. The Supreme Court on two occasion has refuted the view that only facilities necessary to serve current customers is allowable in rates. In a case involving disputes over what objecting parties felt was not useful property, the Supreme Court stated: "The value of property for rate-making purposes depends upon use and is measured by profitableness of present and **prospective services** rendered at rates that are just and reasonable as between owner of, and those served by, property."[9] This view that looking to the future to determine if a facility will be "used and useful" was again supported in a case where parties objected to including all of what they viewed as an overbuilt system in rates. The water system owner countered that it had contemplated serving neighboring towns in the future.[10] The Supreme Court dismissed the objecting parties' concerns stating

> The review of the legislation touching the power of the city, and the conclusion of the circuit court of appeals from that legislation, that the city had the power to acquire the system as it existed, and **has the power to operate so much of it as**

[8] *Id.*
[9] Denver Union Stock Yard Co. v. United States, 304 U.S. 470, 58 S. Ct. 990, 82 L. Ed. 1469 (1938).
[10] City of Omaha v. Omaha Water Co., 218 U.S. 180, 200, 30 S. Ct. 615, 619, 54 L. Ed. 991 (1910).

> **is intended to supply the suburban towns adjacent which may be acquired**, is full and satisfactory, and meets our approval.[11]

OPC presented nearly identical arguments in the Greenwood Solar case, at both the Western District and the Commission. The Western District summarized the arguments as:

> Although Appellants' respective arguments are structured differently, both generally argue four reasons that the solar plant is not necessary or convenient for the public service: (1) the plant is not needed to serve GMO load, (2) the plant costs in excess of reasonable alternatives, (3) the plant is not needed to comply with environmental regulations, and (4) the plant protects the utility rather than the public[12]

The Western District agreed the plant is not needed to serve load of current customers, but claimed OPC's arguments on the subject missed the mark:

> Appellants' substantial emphasis on considerations such as "failure, breakdown, incompleteness[,] or inadequacy in the existing regulated facilities" is misplaced. *See Pub. Water Supply*, 600 S.W.2d at 154 (citation and inner quotation marks omitted). These considerations have typically been applied in factually distinct cases wherein a CCN is being sought by a utility provider attempting to enter the existing service area of another utility provider or to extend service to a new area. *See, e.g.*, *id*. (application for CCN where current water district not providing adequate service). Here, GMO is not competing with another utility or attempting to expand into a new service area but instead desires to provide improved service to its customers in its current service area[13]

The Court concluded in regards to necessity:

> Moreover, Appellants fail to acknowledge that the same cases they generally rely on also emphasize "a necessity for the conservation of energy and of natural resources." *Pub. Water Supply*, 600 S.W.2d at 154 (citing *Atkinson*, 204 S.W. at 898–99) (inner quotation marks omitted). The public policy of the state to conserve natural resources and pursue renewable energy sources is reflected in Missouri's RES. *See Moorshead v. United Rys. Co.*, 119 Mo.App. 541, 96 S.W. 261, 271 (1906) ("[T]he very highest evidence of the public policy of any state is its statutory law").

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[11] *Id.*

[12] 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. Ct. App. 2016).

[13] *Id.*

> Although GMO is compliant with Missouri's RES, the Commission additionally found that "GMO's customers have shown their enthusiasm for solar power by collecting $50 million in solar rebates" made available through the act. Moreover, GMO is not the first electric company "to pursue solar power as a renewable alternative to coal-based electric generation[.]" "In 201[4], the Commission approved a similar *764 solar plant in O'Fallon, Missouri[,] to be operated by Union Electric Company, d/b/a Ameren Missouri."[14]

The court upheld the Commission's decision. The Commission has also operated under the same view of used and useful as can be seen in the Greenwood Solar case[15] and in Ameren's application to construct Ameren owned solar facilities on 3rd party property.[16]

All of the above cases support the fact that property not directly serving customers can meet both the used and useful standard and §393.135 RSMo.

OPC's case law in the best cases do not stand for the proposition they are citing it for, and in the worst cases, actively supports the position of the signatories.

OPC's attempts to buttress its interpretation with quotations or summarizations of Commission case law, but a quick review of the cases shows that these cases either directly support the position of the signatories, or just do not expand the meaning of "used and useful" or the statutory goal of §393.135, RSMo., contrary to OPC's claims. At a glance:

- State ex rel. Missouri Pub. Serv. Co. v. Fraas, 627 S.W.2d 882, 889 (Mo. Ct. App. 1981),[17] Staff cannot find any references in this case to "actually

[14] *Id.* at 763-764.
[15] In the Matter of the Application of KCP&L Greater Missouri Operations Company for Permission and Approval of a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage Solar Generation Facilities in Western Missouri, File No. EA-2015-0256 (**Report and Order** issued March 2, 2016).
[16] In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing It to Offer a Pilot Distributed Solar Program and File Associated Tariff, File No. EA-2016-0208 (**Report and Order,** issued December 21, 2016).
[17] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 6, ftn 14.

used to provide utility service to them" or anything resembling an attempt to basis the notion of used and useful on the basis of direct service to customers. Nor would this case stand for that proposition, as it was found that common plant was required to operate the unit. "He further testified that in his expert opinion all of those systems were used and useful for the first unit, that the first unit could not be operated without them, and that all of the facilities mentioned would be required even if for example unit No. 2 was somehow canceled." The relevant question was, is this plant necessary to operate the unit, not is this plant necessary to directly serve customers.

- The Summit case[18] is an inappropriate comparison; excess capacity would not be used in any fashion. There are no off-system sewage sales to benefit customers, making it easily distinguishable from the current case, in which the capacity would not be idle but producing off system sales revenue (OSSR) which flows through the fuel adjustment clause (FAC) to the benefit of customers.
- The 2006 Empire rate case:[19] Staff cannot find any reference to the Commission making a decision on the inclusion of facilities, of any sort. The only reference to §393.135 is footnote 43, which in turn is a clarification to the statement the Commission has the power to ascertain the value of utility property, and the footnote is a reminder the property to value must not include CWIP.
- The Wolf Creek case:[20] This case actually supports the Signatories' case. In that case, OPC argued for an adjustment for economic excess capacity, based on

[18] *Id.* at p. 14-15.
[19] *Id.* at p. 7, ftn. 17.
[20] *Id.* at p. 21-22.

theory it was not used and useful.[21] The Commission refused to do so.[22] The Commission stated, "However, the commission still believes that 30-year projections, although **appropriate for planning purposes**, are speculative for purposes of calculating permanent rate base exclusions."[23] In other words, when determining what to build, which is the entire point of a planning process, 30 year projections are appropriate, especially in light of the long view integrated resource planning (IRP) takes. This is exactly what Empire did by utilizing IRP level modeling with the goal of lowering the net present value of revenue requirement (NPVRR), which is the number one consideration and goal in an IRP not to mention a benefit to customers, ultimately determining that building the Wind Projects would lower NVPRR.[24] The Wolf Creek case indicates that Empire's actions in this case were appropriate. Furthermore, although OPC states that Empire's refusal to do this as an independent power producer (IPP) means Empire has no confidence in its plan,[25] Empire is instead, doing its duty under the same planning process, to reduce NVPRR for the benefit of customers.[26] Instead, what the Wolf Creek case stands for is the proposition that 30 year projections are too speculative to disallow, permanently, costs from rate base. However, allowing a project to move forward under 30 year projections does not require a permanent

[21] In Re Kansas City Power & Light Co., 75 P.U.R.4th 1, 110 (Apr. 23, 1986).
[22] *Id.* at 113.
[23] *Id*
[24] Tr. Vol. II, p. 105, l. 8-13.
[25] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 15.
[26] Tr. Vol. IV, p. 329, l. 11-25.

> action on inclusion; OPC, and any party who wished, is free to challenge the inclusion or prudency of these costs in every rate case it chooses.[27]

APL CASE

OPC discusses a 1986 Arkansas Power and Light (APL) case it deems analogous to the current situation.[28] It is important to note at the outset that OPC is taking case discussion regarding a prudency review of *costs* during a rate case and applying it to an application of certificate of convenience and necessity (CCN). In a rate case, all relevant factors, including utility costs are examined. In a rate case, a presumption of prudence sets out an evidentiary presumption in a proceeding on utility rates which provides that the utility's expenditures are presumed to be prudent until adequate contrary evidence is produced, at which point the presumption disappears from the case.[29] In order to disallow a utility's recovery of costs from its ratepayers, a regulatory agency must find both that (1) the utility acted imprudently, and (2) such imprudence resulted in harm to the utility's ratepayers.[30] In a CCN case, the utility must prove that the service is necessary or convenient for the public service.

> The PSC has authority to grant certificates of convenience and necessity when it is determined after due hearing that construction is "necessary or convenient for the public service. The term "necessity" does not mean "essential" or "absolutely indispensable", but that an additional service would be an improvement justifying its cost.[31]

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[27] Tr. Vol. II, p. 207, l. 4-10.
[28] Although OPC's brief lacks citations or footnotes in multiple places, Staff Counsel believes this case to be In Re Arkansas Power & Light Company; Cominco Am. Co., Gaf Corp., Ozark Lead Co., St. Joe Minerals Corp., Amax Lead & Zinc, Asarco Inc., Arkansas-Missouri Cotton Ginners Ass'n, S. Cotton Ginners Ass'n, Local 1439 of Int'l Bhd. of Elec. Workers, Office of Pub. Counsel of Missouri, 74 P.U.R.4th 36 (Apr. 24, 1986).
[29] Matter of Water Rate Request of Hillcrest Util. Operating Co., Inc., 523 S.W.3d 14 (Mo. Ct. App. 2017), reh'g and/or transfer denied (Apr. 27, 2017), transfer denied (June 27, 2017).
[30] Atmos Energy Corp. v. Office of Pub. Counsel, 389 S.W.3d 224 (Mo. Ct. App. 2012)
[31] State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n of Missouri, 848 S.W.2d 593, 597 (Mo. Ct. App. 1993)

The Commission usually conducts this evaluation through the lens of the Tartan Criteria: need, qualified to own, operate, control and manage the facilities and provide the service, financial ability, economic feasibility, and promotion of the public interest.[32] Although an examination of costs can be valuable in reviewing an application and evaluating if the Tartan Criteria have been met, the prudency review of costs is appropriately conducted in a rate case.[33] All that Empire asks in this case is for CCNs. The Stipulation explicitly acknowledges that a prudency review, like the one discussed in the APL case, will still be conducted, and Empire's costs are subject to audit.[34] Furthermore, the Commission has already authorized Empire to record its capital investment to acquire wind generation assets as utility plant in service subject to audit in Empire's next general rate case.[35]

If one would simply read OPC's summation of the APL case,[36] the conclusion drawn would be that the Commission disallowed the excess capacity in accordance with the reasoning presented. As OPC failed to include the relevant factual background, a brief summation of the background facts is as follows. APL did seek to include generation

[32] In Re Tartan Energy, GA-94-127, 3 Mo.P.S.C.3d 173, 177 (1994

[33] "This argument improperly intermixes the issue of prudency, which is determined in a general rate proceeding" In the Matter of the Application of Spire Missouri Inc. to Change Its Infrastructure Sys. Replacement Surcharge in Its Spire Missouri E. Serv. Territory in the Matter of the Application of Spire Missouri Inc. to Change Its Infrastructure Sys. Replacement Surcharge in Its Spire Missouri W. Serv. Territory, No. GO-2018-0309, 2018 WL 6724358, at *12 (Sept. 20, 2018).

[34] Ex. 13HC, p. 7. "EDE should be authorized to record its capital investment to acquire the Wind Projects as utility plant in service **subject to audit** in EDE's next general rate case consistent with the Commission's Report and Order in Case No. EO-2018-0092." "**Prudency not waived.** This Stipulation does not preclude the Commission or the Signatories from reviewing the reasonableness and prudency of the costs of each Wind Project in a general rate proceeding following the date when that/those Wind Project(s) is/are fully operational and used for service."

[35] In the Matter of the Application of The Empire District Electric Company for Approval of Its Customer Savings Plan, Case No. EO-2018-0092 (***Report and Order,*** issued July 11, 2018, p. 24.)

[36] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 14.

costs in rates at a time when capacity was not needed.[37] APL justified the capacity with an argument about anticipated savings in variable energy costs, as well as citing to a 1980 study by Energy Management Associates, which justifies an excess reserve margin of up to 70% purely for economic reasons.[38] This resulted in 1,096 megawatts (MW) of capacity that was not required, nor reasonable in the Commission's view.[39] In contrast, Empire's requested 600 MW will lead to an excess reserve margin of 33.2%,[40] not 70% as in the APL case. Empire is currently working on an integrated resource plan (IRP) to determine if any early retirements are appropriate; that would decrease the reserve margin starting in 2020.[41] Even without early retirements, the Wind Projects have an assumed life of 30 years,[42] which means by the end of its current assumed useful life in 2050, four plants will have been retired, as well as two purchased power agreements (PPAs) for wind will have expired, all reducing excess reserve margins.[43] However, due to expiration of the production tax credits (PTCs), Empire has to act now to acquire these Wind Projects for *at least* half cost.[44] The amount of capital contribution is another important distinguishing factor between the APL case and the current. APL's excess capacity would be entirely on ratepayers to cover, here, effectively only 300 MW (almost the amount of MW needed to replace the expiring PPAs) of the 600 MW will be

[37] In Re Arkansas Power & Light Company; Cominco Am. Co., Gaf Corp., Ozark Lead Co., St. Joe Minerals Corp., Amax Lead & Zinc, Asarco Inc., Arkansas-Missouri Cotton Ginners Ass'n, S. Cotton Ginners Ass'n, Local 1439 of Int'l Bhd. of Elec. Workers, Office of Pub. Counsel of Missouri, 74 P.U.R.4th 36 (Apr. 24, 1986).
[38] *Id.*
[39] *Id.*
[40] Ex. 8, *Surrebuttal Testimony of James McMahon*, p.6, l. 1.
[41] *Id.* at p. 9, Figure 2.
[42] Ex. 3HC, *Surrebuttal Testimony of Blake A. Mertens*, p. 7, l. 6.
[43] Ex. 8, *Surrebuttal Testimony of James McMahon*, p.9. Figure 2.
[44] *Id.* at p. 7, l. 13-19.

included in rate base.[45] Another important consideration in comparing this case to the APL case is the dates. In 1986, the Southwest Power Pool (SPP) Integrated Market (IM) did not exist.[46] It is striking that OPC neglects to mention this distinction, as one of its major contentions is that the SPP IM has not existed long enough to provide reliable data.[47] SPP was not a regional transmission organization (RTO) until 2004 after the Federal Energy Regulatory Commission (FERC) issued Order No. 2000, in, as one may guess, 2000. The potential of realizing a profit from off system sales revenues (OSSR) was not a substantial, tangible benefit to consider in a case decided 18 years before the formation of SPP as a RTO.

The Commission also noted that APL claimed, "there are nonetheless substantial benefits flowing to its customers from these units" but the "Company's brief does not enumerate those benefits nor does it cite the record where the benefits are enumerated."[48] Again, this is contrasted with not one, but now two hearings in which Empire has enumerated, with supporting evidence and modeling, the benefits to customers from the Wind Projects. And the Commission has previously found this evidence convincing and credible, stating:

> Adding wind generation to Empire's portfolio significantly reduces financial risk for Empire customers. Wind in the portfolio mitigates the impact that rising fuel and market prices have on Empire's retail rates. In a rising market price environment, Empire would be able to sell wind output at higher prices without any incremental fuel costs. Empire's credible analysis shows that adding up to 600 MW of wind to its portfolio would result in lower

[45] *Id.*
[46] Ex. 205, *Rebuttal Testimony of Lena M. Mantle*, p. 10, l. 8-16.
[47] *Id.*
[48] In Re Arkansas Power & Light Company; Cominco Am. Co., Gaf Corp., Ozark Lead Co., St. Joe Minerals Corp., Amax Lead & Zinc, Asarco Inc., Arkansas-Missouri Cotton Ginners Ass'n, S. Cotton Ginners Ass'n, Local 1439 of Int'l Bhd. of Elec. Workers, Office of Pub. Counsel of Missouri, 74 P.U.R.4th 36 (Apr. 24, 1986).

> risk to that portfolio under three different market scenarios, relative to Empire's current resource plan.[49]

as well as:

> It is the public policy of this state to diversify the energy supply through the support of renewable and alternative energy sources. In past decisions, the Commission has stated its support in general for renewable energy generation, which provides benefits to the public. Empire's proposed acquisition of 600 MW of additional wind generation assets is clearly aligned with the public policy of the Commission and this state.[50]

Finally, the remedy in the APL case was not, as OPC has implied, analogous to not granting a CCN, and having the entire cost of excess capacity treated below the line. Instead, as the Report and Order continues a mere two lines after OPC's quote ends:[51]

> Public counsel witness Thompson recommends that *risk sharing be imposed between the shareholders and the ratepayers* as a result of any excess capacity determination. Thompson's proposal is that risk sharing could be accomplished by denying one-half of the equity return associated with the Grand Gulf plant until such time as Grand Gulf's capacity is needed. As previously noted, the commission will not declare Grand Gulf as excess capacity in this case but we are of the opinion that it is proper to apply Mr. Thompson's proposal to the non-Grand Gulf excess capacity which we have found. *The public counsel's brief cites ample authority for the imposition of this risk-sharing concept*.[52]

A risk sharing mechanism is exactly what the Signatories are proposing to ensure the Wind Projects are used and useful, and customers do receive benefits.[53] Furthermore, the Commission did not disallow the return of the excess capacity, nor any other related

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[49] *Id.* at p. 14-15.
[50] In the Matter of the Application of The Empire District Electric Company for Approval of Its Customer Savings Plan, Case No. EO-2018-0092 (***Report and Order,*** issued July 11, 2018, p. 20.)
[51] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 14.
[52] In Re Arkansas Power & Light Company; Cominco Am. Co., Gaf Corp., Ozark Lead Co., St. Joe Minerals Corp., Amax Lead & Zinc, Asarco Inc., Arkansas-Missouri Cotton Ginners Ass'n, S. Cotton Ginners Ass'n, Local 1439 of Int'l Bhd. of Elec. Workers, Office of Pub. Counsel of Missouri, 74 P.U.R.4th 36 (Apr. 24, 1986).
[53] Ex. 13 HC, *Exhibit A, Non-Unanimous Stipulation and Agreement*.

costs, besides one-half of return on the excess capacity.[54] Not even the entirety of the return on was disallowed.[55] This undermines OPC's entire premise that §393.135, RSMo., does not allow plant that is not directly being utilized for service to be included in customers' rates.[56] The Commission, in the APL case, even after finding that the excess capacity was not used and useful, still allowed some costs relating to that capacity, contrary to OPC's belief that such action would be unlawful under §393.135, RSMo., or prohibited under the concept of used and useful. OPC stated "§ 393.135, RSMo., and the requirement that investments be "used and useful" both independently would make it *unlawful* for Empire to recover any of its investment in or profit on these wind projects through its Missouri retail customer rates".[57] There is no legal distinction between return on and return of or other related costs, when it comes to inclusion of costs under OPC's argument.[58] If all investment related to excess capacity is excluded from rates, it follows that all investment in non-excess capacity is eligible for inclusion, making it an either/or situation. Either all the costs relating to a project are disallowed because the project is not used and useful or is legally prohibited due to §393.135, RSMo., or costs can be included because the project met the legal threshold of §393.135, RSMo., and was deemed used and useful. Under OPC's interpretation, these are the only two options. The existence of a partial disallowance would mean that the disallowance was not due to a legal mandate that no costs relating to excess capacity be included in rates, but instead due to a

[54] In Re Arkansas Power & Light Company; Cominco Am. Co., Gaf Corp., Ozark Lead Co., St. Joe Minerals Corp., Amax Lead & Zinc, Asarco Inc., Arkansas-Missouri Cotton Ginners Ass'n, S. Cotton Ginners Ass'n, Local 1439 of Int'l Bhd. of Elec. Workers, Office of Pub. Counsel of Missouri, 74 P.U.R.4th 36 (Apr. 24, 1986).
[55] *Id.*
[56] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 11.
[57] *Id.* at p. 5.
[58] *Id.* at p. 13.

prudency determination or policy rationale. A case with an outcome of an ordered risk sharing mechanism and the inclusion of costs of excess capacity seems to provide the Commission support for ordering the Signatories' position, not OPC's.

The APL case was a departure from Commission practice.

OPC notes that the Commission in the APL case had the benefit of hindsight.[59] This is true, the Commission itself stated, "The question for the commission's resolution is whether the ratepayers suffer for the unfortunate results of increased capacity costs if the expansion was not originally imprudent."[60] In other words, the project was not imprudent, but based on the outcomes and information at this time, the expectations it was built on did not materialize.[61] Although no prudency determination is appropriate in this instance, and is suited for a general rate case, a review of relevant case law and reports and orders shows that the determination made by the Commission to disallow any portion of APL costs based on hindsight, and without the determination that a utility made an imprudent decision, is unusual.[62] Any Commission decision making a prudency determination based on hindsight is an outlier in the Commission's long jurisprudential history.[63] It would also be contrary to a long line of established case law detailing the

[59] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 13.
[60] In Re Arkansas Power & Light Company; Cominco Am. Co., Gaf Corp., Ozark Lead Co., St. Joe Minerals Corp., Amax Lead & Zinc, Asarco Inc., Arkansas-Missouri Cotton Ginners Ass'n, S. Cotton Ginners Ass'n, Local 1439 of Int'l Bhd. of Elec. Workers, Office of Pub. Counsel of Missouri, 74 P.U.R.4th 36 (Apr. 24, 1986).
[61] *Id.*
[62] In Re Arkansas Power & Light Company; Cominco Am. Co., Gaf Corp., Ozark Lead Co., St. Joe Minerals Corp., Amax Lead & Zinc, Asarco Inc., Arkansas-Missouri Cotton Ginners Ass'n, S. Cotton Ginners Ass'n, Local 1439 of Int'l Bhd. of Elec. Workers, Office of Pub. Counsel of Missouri, 74 P.U.R.4th 36 (Apr. 24, 1986).
[63] In fact, Staff Counsel found Commission rejection of an adjustment based on a hindsight analysis to Kansas City Power & Light Company's (KCPL) LaCygne plant in a 1974 case, 12 years before the APL case. Matter of Kansas City Power & Light Co. of Kansas City, 19 Mo. P.S.C. (N.S.) 16 (May 7, 1974).

Commission's authority. The courts have stated that the Commission must recognize that utilities have to active prospectively, and thus there is not the benefit of hindsight.

> The utility's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the utility had to solve its problem prospectively rather than in reliance on hindsight. In effect, the PSC's responsibility is to determine how reasonable people would have performed the tasks that confronted the utility.[64]

In the same case the Court went on to state "The prudence test should not be based upon hindsight but upon reasonableness[.]"[65] As stated above, the Commission has taken this guidance to heart, and continually reaffirmed this view of prudency determinations. For instance, in determining that the Sierra Club did not carry its burden of proof in demonstrating Union Electric Company d/b/a Ameren Missouri's ("Ameren") decision to install electrostatic precipitators was imprudent, the Commission stated:

> A utility's costs are presumed to be prudently incurred. The presumption does not, however, survive a showing of inefficiency or improvidence. If some other participant in the proceedings alleges that the utility has been imprudent in some manner, that participant has the burden of creating a serious doubt as to the prudence of the expenditure. If that is accomplished, the utility then has the burden of dispelling those doubts and proving the questioned expenditure was in fact prudent. The prudence test should not be based upon hindsight but upon reasonableness. The utility's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the utility had to solve its problem prospectively rather than in reliance on hindsight. In effect, the PSC's responsibility is to determine how reasonable people would have performed the tasks that confronted the utility.[66]

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[64] Atmos Energy Corp. v. Office of Pub. Counsel, 389 S.W.3d 224, 228 (Mo. Ct. App. 2012). *See also* State ex rel. Associated Nat. Gas Co. v. Pub. Serv. Comm'n of State of Mo., 954 S.W.2d 520, 529 (Mo. Ct. App. 1997).

[65] *Id.*

[66] In the Matter of Union Elec. Co., d/b/a Ameren Missouri's Tariff to Increase Its Revenues for Elec. Serv., 320 P.U.R.4th 330 (Apr. 29, 2015).

In another Ameren case, Staff raised a challenge to the prudency of costs incurred during the installation of scrubbers at a generating plant.[67] Ameren decided to temporarily suspend construction activities for an environmental upgrade at the Sioux Plant due to the 2008 financial crisis.[68] Staff concluded, after its audit, that Ameren's decision to suspend construction added $31.8 million to the construction costs, while Ameren contended the delay was necessary to avoid a cash liquidity issue that would have detrimental effects on the overall health of the utility.[69] The Commission rejected Staff's arguments, stating:

> The Commission established its standard for determining the prudence of a utility's expenditures in a 1985 decision regarding Union Electric's construction of the Callaway nuclear plant. In that decision, the Commission held that a utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt as to the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.
>
> The 1985 Union Electric decision also established the standard by which the prudence of a utility's decision would be evaluated when it said: In reviewing UE's management of the Callaway project, the Commission will not rely on hindsight. The Commission will assess management decisions at the time they were made and ask the question, 'Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?
>
> The Commission's use of that prudence standard is consistent with judicial precedent and has been accepted and applied by reviewing courts.
>
> In order to disallow a utility's recovery of costs from its ratepayers, a regulatory agency must find both that the utility acted imprudently and that such imprudence resulted in harm to the utility's ratepayers.[70]

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[67] In the Matter of Union Elec. Co., d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Elec. Serv., No. ER-2011-0028, 2011 WL 2962024 (July 13, 2011)
[68] *Id.*
[69] *Id.*
[70] *Id.*

The Commission also went on to refute the argument that as the utility has the burden of proof, this means it must always be responsible for proving what is allowable; it is not opposing parties' burden to prove what is disallowable. The Commission stated:

> If as Staff suggests, the presumption of prudence is only a matter of convenience, then it could be overcome by a simple statement by a party that it wants to challenge a particular decision on some reasonable basis without presenting a shred of evidence to show that the utility did anything wrong.
>
> Staff's suggestion is not correct, the presumption of prudence is not just a matter of convenience. The United States Supreme Court in the *West Ohio Gas* case indicated that the presumption of prudence is real and is not overcome absent a showing of inefficiency or improvidence. That is what "serious doubt" means. By statute, the utility has the burden of proving that its proposed rates are just and reasonable. However, before the presumption of prudence is overcome, the challenging party must present sufficient evidence to create a serious doubt about a decision of the utility. Staff failed to create a serious doubt in this case.[71]

The Commission concluded Staff had not raised a serious doubt as to the prudency of Ameren's action, but did note:

> Even assuming that Staff was able to raise a serious doubt about the prudence of Ameren Missouri's decision to slow down work on the Sioux scrubbers at the height of the global financial crisis, Ameren Missouri presented more than enough evidence to dispel those doubts and to prove that the questioned expenditure was prudent. Ameren Missouri demonstrated that measured by what it knew at the time, without the benefit of hindsight, it was justifiably concerned that it faced the potentially cataclysmic danger of running out of liquidity.[72]

Finally, the Commission applies this standard consistently in FAC and Missouri Energy Efficiency Investment Act (MEEIA) program prudency reviews.[73] For example, the

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[71] *Id.*

[72] *Id.*

[73] *For example, please see* In the Matter of the First Prudence Review of Kansas City Power & Light Company's (Kcpl) Implementation of Its Cycle 2 Energy Efficiency Programs in Furtherance of the Missouri Energy Efficiency Inv. Act (Meeia) in the Matter of the First Prudence Review of Kcp&l Greater Missouri Operations Company's (Gmo) Implementation of Its Cycle 2 Energy Efficiency Programs in Furtherance of Missouri Energy Efficiency Inv. Act (Meeia), No. EO-2018-0363, 2019 WL 1130246, at *1 (Mar. 6, 2019),

Commission stated in an Empire FAC review, in regard to OPC's challenge of a hedging agreement:

> This is a prudence review. That means the Commission will review Empire's conduct to determine whether it was reasonable, at the time, without the benefit of hindsight. During the course of the hearing, Public Counsel examined several individual hedging transactions to show that Empire experienced financial losses on those transactions. Public Counsel asserts the company should have anticipated and avoided those particular losses, but Public Counsel's proposed adjustment was based on the prudence of Empire's overall hedging program, not on any particular hedging transaction. The mere fact that Empire's hedging program sustained financial losses does not mean that program was imprudent. Empire convincingly established that it operated a prudently designed and reasonable hedging program based on the information available to it at the time it made its decisions.[74]

The Western District affirmed this decision when it was subsequently appealed by OPC.[75]

Arguments requiring facilities to directly provide energy to Empire's customers ignores how RTOs and the IM function.

How the SPP functions is similar to most RTOs. There are two markets, day ahead and real time. Empire plans to bid the Wind Projects, like all its generation, into the day ahead market.[76] As another point of clarification, despite fears that Empire will bid in at

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In the Matter of the Sixth Prudence Review of Costs Subject to the Comm'n-Approved Fuel Adjustment Clause of Union Elec. Co. d/b/a Ameren Missouri, No. EO-2018-0067, 2018 WL 1609456, at *1 (Mar. 21, 2018), and In the Matter of the Second Prudence Review of Kcp&l Greater Missouri Operations Company's Implementation of Energy Efficiency Programs in Furtherance of the Missouri Energy Efficiency Inv. Act (Meeia)., No. EO-2017-0210, 2017 WL 3434274, at *1 (Aug. 3, 2017).

[74] In the Matter of the Sixth Prudence Review of Costs Subject to the Comm'n-Approved Fuel Adjustment Clause of the Empire Dist. Elec. Co., No. EO-2017-0065, 2018 WL 1452749, at *12 (Feb. 28, 2018).
[75] Matter of Sixth Prudence Review of Costs Subject to Comm'n - Approved Fuel Adjustment Clause of Empire Dist. Elec. Co., No. WD 81627, 2019 WL 1028453, at *1 (Mo. Ct. App. Mar. 5, 2019).
[76] Tr. Vol. II, p. 181, l. 3 - 7.

a negative number to the detriment of customers,[77] the market price paid to Empire is not the same as the offer price.[78] The LMP is what determines what Empire receives, and that is typically set by a gas plant.[79]

So in the day ahead market, Empire offers all of its generation into the market and buys back what it needs to serve load from SPP.[80] There is no "native load" that Empire dedicates its generation to, so there is not generation tied directly to any customers.[81] Furthermore, as one is unable to trace electrons, so it would be impossible to tell if Plum Point or the Wind Projects were serving Empire customers, or even if Empire's generation is serving its customers versus another 3rd party nearby generating unit.[82] At any given point, it would be arbitrary to determine what generating unit is serving Empire's customers and which ones aren't, in order to determine which are used and useful.

OPC's view of Empire's modeling as historical and "stale" is inaccurate

A sizable portion of OPC's Initial Brief is devoted to what it characterizes as "stale information". According to OPC, "The SPP market prices that Empire used as inputs to its modeling that it relies on in this case are projected SPP market prices that Empire obtained from ABB for Empire's triennial integrated resource plan," and "…Empire is

[77] There are also times when it is financially beneficial to customers for Empire to bid at a negative price. Tr. Vol. II, p. 149, l. 1 - 2.
[78] Tr. Vol. II, p. 149, l. 4 – 6.
[79] Tr. Vol. II, p. 222, l. 17 – 22.
[80] Tr. Vol. II, p. 181, l. 18 – 22.
[81] Tr. Vol. II, p. 181, l. 12 - 22.
[82] Tr. Vol. II, p. 229, l. 15 – 17.

using market forecasts that were essentially created the same way that market forecasts were done in 2005 and 2007."[83] However, what is factually correct, as OPC itself states on the page following the above quoted statements, "The modeling presented by Empire is "based on projected SPP market prices that Empire obtained from ABB in its 2017 forecast."[84] Empire is not merely recycling old data in attempt to pull the wool over the Commission's eyes. In fact, as explained by Empire witness James McMahon,

> …Empire did not develop its price forecast using a historical time series analysis. Rather Empire used a fundamental pricing model that evaluates how load is being served by supply in each house. OPC Witness Mantle has nothing to say about Empire's actual approach to price forecasting in her testimony.[85]

It appears that OPC's Initial Brief also has nothing to say about Empire's actual modeling methodology.

OPC's Initial Brief continues to ignore information already presented throughout the case, and at several points contradicts itself. According to OPC,

> It was not until Empire witness Todd Mooney filed his surrebuttal testimony that Empire provided a spreadsheet table to its projected customers' benefits form the wind projects over thirty years in his Schedule TM-S-4. This schedule shows the results of the modeling Empire did for Case No. EO-2018-0092, but those results do not include updates to cost information about that case.[86]

The footnote immediately following the second sentence quoted above states, "The ten-year net present value shown on Schedule TM-S-4 is the same as the ten-year net present value shown in Ex. 205HC, Public Counsel Lena Mantle rebuttal testimony, p. 7."[87] First, the reason Empire provided Schedule TM-S-4 in surrebuttal testimony is

[83] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 17.
[84] *Id*. at p. 18.
[85] Ex. 8, Surrebuttal Testimony of James McMahon, p. 22, l. 4-8.
[86] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 18.
[87] *Id*. at p. 18, footnote 45.

because Empire was *rebutting* claims made by OPC witness Mantle in her rebuttal testimony about that spreadsheet. Complaints about Mr. Mooney not updating the spreadsheet ignore the context in which the spreadsheet was reproduced; it makes no sense for Mr. Mooney to update a spreadsheet to counter claims about that exact spreadsheet. The information was not being hidden as OPC insinuates. Also, the information could not have been hidden from OPC since it included the same spreadsheet in its rebuttal testimony, as stated in Footnote 45 of OPC's Initial Brief, which logically means OPC had it before surrebuttal.

OPC appears to be unsatisfied with the modeling provided by ABB and Empire, stating:

> …no one from ABB testified in this case. Instead, in their surrebuttal testimonies Empire witness Todd Mooney sponsored the projection, and Empire witness James McMahon provided brief description of what ABB did for Empire.[88]

To Staff's knowledge, OPC never questioned the qualifications of Todd Mooney or James McMahon as expert witnesses, nor did they request to depose an ABB employee. OPC has a multitude of discovery options available to it; if OPC was not satisfied with the information provided regarding ABB, OPC was free to exercise any of those options to remedy that issue.

Further critiquing Empire, OPC states its concern that:

> A prudent investor would want to know the best information available before committing to make a billion dollar investment. Here Empire is asking retail customers be treated as investors, and Empire has failed to provide the Commission with the best information that is available regarding impacts its projects will have on those customers. Not only has Empire not updated its models to reflect changes in SPP market price forecasts, it has delaying filing its triennial integrated resource plan until

[88] *Id.* at p. 18.

> after the Commission decides this case, which allows it to not show its updated resource planning models in other cases, such as this one. [89]

While OPC presents this as a smoking gun argument proving Empire's questionable tactics, it is factually incorrect. Initial stakeholder meetings for Empire's 2019 IRP have already taken place and Empire Witness McMahon even includes a chart in this surrebuttal, filed on March 5, 2019 titled, "Empire's Portfolio Modeling Approach in the 2019 IRP." This does not seem to be a situation of a company delaying a filing to alter information. It is also worth noting that continuing to rerun modeling would delay a filing even further. At what point is the information provided considered sufficient? It is unclear what standard OPC would have the Commission use.

Conclusion

The Commission should grant the CCNS as conditioned by the terms of the Stipulation. It is a reasonable solution, representing a variety of interests, and is supported by ample evidence on the record. OPC raises specters such as, no tax equity partner,[90] a 1. 2 billion dollar impact on rates,[91] and the alleged "set in stone fact" of 50 gigawatts of wind generation to be built SPP.[92] However, as is clear through the record, Empire has a tax equity partner, Wells Fargo,[93] and Wells Fargo is responsible for securing other tax equity partners,[94] the amount in rate base is not 1.2 billion, as OPC

[89] *Id*. at p. 18.
[90] *Initial Brief of the Office of the Public Counsel*, filed April 29, 2019, p. 3.
[91] *Id.* at p. 16.
[92] *Id.* at p. 23.
[93] Tr. Vol. II, p. 252, l. 11 – 15.
[94] Tr. Vol. II, p. 281, l. 4 - 15. Furthermore, these tax equity partners will participate on the same terms for Wells Fargo, which have been outlined in the record.

conflates through its Initial Brief, but at most half of that amount,[95] and, as Mr. McMahon demonstrated with actual research, the majority of projects in the SPP queue do not get built.[96] OPC has provided little to no support for most of its positions. The conditions that OPC requests be imposed on Empire were first introduced in a Position Statement, and have only 12 lines of evidence on the record to support their imposition.[97] The Stipulation outlines resolutions to the contested issues that are in the public interest and will provide benefits for Empire ratepayers. Opposing parties have not presented compelling evidence to support resolving any issue in their favor.

On the basis of all the foregoing, Staff prays that the Commission will resolve all contested issues, and impose such conditions, as recommended herein by Staff and contained in the Stipulation.

[95] Tr. Vol. p. II, p. 107, l. 21 – 24.
[96] Tr. Vol. II, p. 286, l. 15 – 18.
[97] Tr. Vol. IV, p. 384, l. 1-12.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission, on this 7th day of May, 2019.

/s/ Nicole Mers