

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of The Empire)
District Electric Company for Approval of) **Case No. EO-2018-0092**
Its Customer Savings Plan)

THE OFFICE OF THE PUBLIC COUNSEL’S POSITION STATEMENTS

COMES NOW the Office of the Public Counsel and states its positions on the listed issues as follows:

JOINT LIST OF ISSUES:

1. Does the Commission have authority to grant Empire’s requests?

OPC Position: Some, but not all of them. OPC addresses each of Empire’s requests separately following the request as stated in Empire’s application.

Request:

- a. *(1) Authorization to record its investment in, and the costs to operate, the Wind Projects as described in Empire Witness Mooney’s Direct Testimony, (2) including a finding that Empire’s investment related to the Customer Savings Plan (“CSP”) should not be excluded from Empire’s rate base on the ground that the decision to proceed with the Plan was not prudent.*

OPC Position: Commission rule 4 CSR 240-20.030 already authorizes electric utilities such as Empire “to record its investment in, and the costs to operate, the Wind Projects as described in Empire Witness Mooney’s Direct Testimony.” Additionally § 393.140(8), RSMo., authorizes the Commission “after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.”

The Commission only has the authority the Legislature has given it.¹ The Office of the Public Counsel the Commission is unaware of any Legislative authority for the Commission to find in this case “that Empire’s investment related to the Customer Savings Plan (“CSP”) should not be excluded from Empire’s rate base on the ground that the decision to proceed with the Plan was not prudent.”

Request:

- b. Authorization to create a regulatory asset for the undepreciated balance of the Asbury facility, as described in Empire Witness Sager’s Direct Testimony,² so that it may be considered for rate base treatment in subsequent rate cases.*

OPC Position: Because of Commission rule 4 CSR 240-20.030, by which the Missouri Public Service Commission adopted the 1992 FERC Uniform System of Accounts, the Missouri Public Service Commission cannot authorize that undepreciated balances of the Asbury Facility be recorded in account 182.2 Unrecovered plant and regulatory study costs. The account in which “a regulatory asset for the undepreciated balance of the Asbury facility, as described in Empire Witness Sager’s Direct Testimony” should be recorded appears to be 182.2 Unrecovered plant and regulatory study costs. In pertinent part, that account includes the language following: “when authorized by the Commission, significant unrecovered costs of plant facilities where construction has been cancelled or which have been prematurely retired.” But for account 182.2 “Commission” is defined to be the FERC, not the Missouri Public

¹ [In re Ameren Transmission Co. v. PSC of Mo., 523 S.W.3d 21, 2017 Mo. App. LEXIS 244, 2017 WL 1149139](#)

² Empire Witness Mooney indicated in his surrebuttal testimony that he would be adopting Empire Witness Sager’s testimony.

Service Commission. Therefore, because the Missouri Public Service Commission has limited itself by the FERC Uniform System of Accounts (“USOA”) it has adopted by rule, unless or until Empire has FERC authorization to book the unrecovered costs of Asbury if it is prematurely retired, the Commission is without authority to order Empire to book the undepreciated balance of the Asbury facility in USOA account 182.2.

Request:

- c. *Approval of depreciation rates as described in Empire Witness Watson’s testimony, so that depreciation can begin as soon as the assets are placed in service.*

OPC Position: The Legislature has authorized the Commission to ascertain and determine, and by order fix, proper and adequate depreciation rates for classes of property such as the wind assets Empire would acquire as part of its plan. § 393.240.2, RSMo.

Request:

- d. *Approval of the arrangements between Empire and affiliates necessary to implement the Customer Savings Plan, to the extent necessary.*

OPC Position: While rule 4 CSR 240-20.015(10) authorizes the Commission to grant relief from the requirements of rule 4 CSR 240-20.015 for dealings between electrical corporations and their affiliates when compliance with all of the requirements of that rule would not be in the best interests of the utility’s regulated customers, rule 4 CSR 240-2.060(4) requires such an application to include the following:

- (4) In addition to the requirements of section (1), applications for variances or waivers from commission rules and tariff provisions, as well as those

statutory provisions which may be waived, shall contain information as follows:

- (A) Specific indication of the statute, rule, or tariff from which the variance or waiver is sought;
- (B) The reasons for the proposed variance or waiver and a complete justification setting out the good cause for granting the variance or waiver; and
- (C) The name of any public utility affected by the variance or waiver.

Empire's application satisfies none of these requirements. As Empire has failed to meet these standards, the Commission is without justification to approve such request, and any such approval would be arbitrary and capacious.

Request:

- e. Issuance of an order that is effective by June 30, 2018, so that Empire can take advantage of a limited window of opportunity to bring these savings to customers.*

OPC Position: The Commission has authority to issue an order in this case that is effective on or before June 30, 2018.

Request:

- f. For such other and further relief as may be appropriate.*

OPC Position: The Commission has authority to grant relief other than the relief Empire specifically has requested; however, by its request for authority to create a regulatory asset for the undepreciated balance of Asbury, Empire impliedly is requesting the Commission to find that it would be prudent for Empire to retire Asbury prematurely. To the knowledge of the Office of the Public Counsel the Commission does not have authority to make that finding in this case.

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

OPC Position: None of them.

Requests:

- a. (1) Authorization to record its investment in, and the costs to operate, the Wind Projects as described in Empire Witness Mooney's Direct Testimony, (2) including a finding that Empire's investment related to the Customer Savings Plan ("CSP") should not be excluded from Empire's rate base on the ground that the decision to proceed with the Plan was not prudent;
- b. Authorization to create a regulatory asset for the undepreciated balance of the Asbury facility, as described in Empire Witness Sager's Direct Testimony,³ so that it may be considered for rate base treatment in subsequent rate cases;
- c. Approval of depreciation rates as described in Empire Witness Watson's testimony, so that depreciation can begin as soon as the assets are placed in service;
- d. Approval of the arrangements between Empire and affiliates necessary to implement the Customer Savings Plan, to the extent necessary;
- e. Issuance of an order that is effective by June 30, 2018, so that Empire can take advantage of a limited window of opportunity to bring these savings to customers; and
- f. For such other and further relief as may be appropriate.

OPC Position: There are many reasons why the Commission should not grant any of Empire's requests. Among them are the following:

³ Empire Witness Mooney indicated in his surrebuttal testimony that he would be adopting Empire Witness Sager's testimony.

- The Commission does not have authority now to determine that Empire's investment related to the Customer Savings Plan ("CSP") should not be excluded from Empire's rate base because it is prudent for Empire to proceed with its "Customer Savings Plan." Similarly, the Commission does not have authority now to determine that it is prudent for Empire to retire Asbury prematurely. Because Empire has presented its CSP on an all or nothing basis;⁴ for this reason alone, the Commission should give Empire no relief.
- Empire has not specifically identified the statutes, rules, or tariffs from which it seeks relief for the arrangements between Empire and affiliates necessary to implement the Customer Savings Plan as required by rule 4 CSR 240-2.060(4), much less the a complete justification setting out good cause for relief; therefore, the Commission cannot grant Empire the vague relief it seeks. Because Empire has presented its CSP on an all or nothing basis;⁵ for this reason alone, the Commission should give Empire no relief.
- Empire is seeking for the Commission to find that executing its plan is better for the public than not executing it; basically the same standard Missouri courts have described for granting certificates of convenience and necessity.⁶ It is uncontroverted that Empire presently owns or obtains from purchased power agreements more than sufficient energy and capacity to serve its customers.

⁴ Empire witness David Swain direct testimony p. 14, l. 8 – p. 16, l. 2; Empire witness Christopher Krygier direct testimony p. 8, ll. 18-20.

⁵ Empire witness David Swain direct testimony p. 14, l. 8 – p. 16, l. 2; Empire witness Christopher Krygier direct testimony p. 8, ll. 18-20.

⁶ "[A]n additional service would be an improvement justifying its cost." *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n*, 848 S.W.2d 593, 597-98 (Mo. App. 1993) citing *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d at 219.

Empire’s generating resources have a total capacity of 1,712 MW (1,431 MW SPP accredited), of which Asbury is 218 MW (198 MW SPP accredited), and Empire’s historical all-time peak is 1,199 MW.⁷ Empire presently also has a good mix of resources. The following table shows Empire’s current generation mix and how much it contributed to Empire’s 2016 electrical energy:⁸

Source	Total capacity	Energy contribution
Coal-fired	28%	47%
Combined cycle	34%	37%
Combustion turbine	22%	2%
Wind	15%	13%
Hydro	1%	1%

The following table shows how Empire’s plan would change that mix by 2022:⁹

Source	Total capacity	Estimated energy contribution
Coal-fired	12%	21%
Combined cycle	25%	26%
Combustion turbine	16%	2%
Wind	46%	51%
Hydro	1%	0%

⁷ OPC witness Lena Mantle rebuttal testimony p. 17, table; Empire witness Blake Mertens direct testimony p. 13, l. 13, p. 16, l. 13, p. 17, ll. 6-7; OPC witness John Robinett rebuttal testimony p. 1, ll. 13-18.

⁸ OPC witness Lena Mantle rebuttal testimony p. 16, l. 1 chart.

⁹ OPC witness Lena Mantle rebuttal testimony p. 16, l. 10 chart.

Relying this much on wind resources is problematic because, unlike coal and natural gas-fired, and hydro generation, electricity is generated from wind only when the wind blows.¹⁰ Further, this new resource mix would increase Empire's customers' exposure to volatility in natural gas prices, as Empire will no longer have Asbury as a coal-fired generating resource.¹¹ Also, while Empire's peak load is forecasted to increase less than 2% between 2016 and 2022, with Empire's proposed plan, its total nominal capacity would increase by 35% and its energy generation would increase by 37%,¹² while its SPP accredited capacity would decrease, likely by about 80 MW.¹³ As OPC witness Geoff Marke testifies in his direct testimony, before it acquired Empire, "Algonquin/Liberty had clearly identified Empire as an opportunity for significant capital investment in renewable generation, driven in large part by pending federal regulatory compliance in the form of the Clean Power Plan ("CPP")."¹⁴ Algonquin/Liberty paid a 21% premium to acquire Empire.¹⁵ Because it gets the opportunity for not only a return of, but also a return on plant investment, Empire has every incentive to increase its plant investment to increase its cash flow from its customers to increase cash distributions to its ultimate parent Algonquin.

- Empire's quantification of the savings in its plan from retiring Asbury are only \$26 million over twenty years and \$9 million over thirty years¹⁶ when it is seeking Commission pre-approval to increase its rate base by about 50% by adding \$700

¹⁰ OPC witness Lena Mantle rebuttal testimony p. 15, ll. 15-17.

¹¹ OPC witness Lena Mantle rebuttal testimony p. 18, ll. 6-16.

¹² OPC witness Lena Mantle rebuttal testimony p. 17, ll. 10-13.

¹³ 198 MW (Asbury SPP accredited) - 120 MW (15% of nominal 800 MW wind) = 78 MW.

¹⁴ OPC witness Geoff Marke rebuttal testimony p. 11, ll. 18-21.

¹⁵ OPC witness Geoff Marke rebuttal testimony p. 16, l. 11.

¹⁶ Empire March 27, 2018, response to Office of the Public Counsel data request no. 2.

million of wind and Commission approval to prematurely retire Asbury (but still recover its yet unrecovered investment in Asbury) instead of spending about \$30 million before 2019 for Asbury.¹⁷

- Empire customer benefits from the CSP hinge on a number of undetermined factors, including, but not limited to,
 - a. SPP market prices,¹⁸
 - b. how much the tax equity partner(s) invest(s),¹⁹
 - c. the costs to build the up to 800 MW of wind generation,
 - d. wind turbine performance,
 - e. transmission costs,
 - f. advances in wind technology,
 - g. wind penetration in the SPP footprint,
 - h. SPP market rules,²⁰
 - i. wind generation capacity,
 - j. wind farm siting,
 - k. revenues from SPP from wind generation by the wind farms,
 - l. the specific terms of the “hedging” agreement(s) between Empire and the entity(ies) that own(s) the wind farm(s), including the “hedge” price and tax equity partner’s share of the cash distribution during the last five years of the agreement,

¹⁷ Empire witness David Swain direct testimony p. 11, ll. 9-12; p. 13, l. 4 – p. 16, l. 2; Empire witness Blake Mertens direct testimony p. 14, ll. 12-16.

¹⁸ OPC witness Mantle rebuttal testimony p. 6, ll. 3-10.

¹⁹ OPC witness Mantle rebuttal testimony p. 3, l. 25 – p. 4, l. 1.

²⁰ OPC witness Mantle rebuttal testimony p. 9, ll. 14-19.

- m. production tax credits available,
- n. production tax credits realized,
- o. coal prices,
- p. natural gas prices, and
- q. changes in environmental regulations.

As OPC witness Lena Mantle testifies, one of the most crucial undetermined factors is future SPP market prices. Empire's customers only benefit from Empire's plan if SPP market revenues from selling wind energy from the up to 800 MW of wind generation exceeds the costs Empire's plan imposes on them.²¹ These costs include Empire continuing to recover through its customers' rates its investment in Asbury (about \$204 million²²), after retiring Asbury, and recovering its new about \$700 million investment in up to 800 MW of wind generation. Empire has modeled SPP market prices to more than double in 20 years based on information from a market that has existed only since March 2014, and historically shows declining prices.²³ Empire has not included any negative market prices in its modeling, although they have occurred, and with production tax credits, unless SPP changes its market rules, they should continue to occur.²⁴ Based on Empire's 20-year modeling, a 5% to 7% decline in its forecasted average SPP market prices reduces revenues in its plan by 14% (\$44 million).²⁵ Similarly, a 20% to 25% decline in its forecasted average SPP market prices reduces revenues in its plan by 60% (\$194 million).²⁶ Simply put, Empire's assumptions of future SPP market prices are not

²¹ OPC witness Lena Mantle rebuttal testimony p. 4, ll. 5-10.

²² Empire witness Robert Sager direct testimony, p. 3, ll. 15-19.

²³ OPC witness Lena Mantle rebuttal testimony p. 7, l. 13 – p. 8, l. 11.

²⁴ OPC witness Mantle rebuttal testimony p. 8, l. 16 – p. 9, l. 29.

²⁵ OPC Mantle rebuttal testimony p. 14, ll. 1-8; Empire witness James McMahon surrebuttal testimony p. 27, l. 18 – p. 28, l. 3.

²⁶ Empire witness James McMahon surrebuttal testimony p. 27, ll. 16-18.

sufficiently reliable to justify Empire building 800 MW of new wind generation, particularly when Empire owns more than sufficient generating capacity now to reliably and economically serve its 172,000 electric customers.²⁷

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

OPC Position: There should be no Asbury regulatory asset.

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

OPC Position: No. The Commission cannot and should not approve Empire's CSP.

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

OPC Position: Not in this case. The Commission cannot and should not approve Empire's CSP.

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

OPC Position: The Commission cannot and should not approve Empire's CSP.

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

OPC Position: No. The Commission cannot and should not approve Empire's CSP.

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

OPC Position: Not in this case. The Commission cannot and should not approve Empire's CSP.

²⁷ Empire witness Christopher Krygier direct testimony p. 5, l. 6.

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

OPC Position: The Commission should reject the proposal put forward. Moving forward, future wind projects should consider all relevant factors, and applications should identify compliance with all applicable conservation requirements to insure that wind turbine placement does not impact mortality rates of protected species. See OPC witness Geoff Marke surrebuttal testimony p. 16, ll. 6-16.

Dr. Marke will be available to respond to specific Commission questions.

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

OPC Position: No. See position to 1.d.—Empire has not complied with the Commission's rule 4 CSR 240-2.060(4); therefore, since the Commission is not in a position to grant any relief, none should be given.

Respectfully,

/s/ Nathan Williams

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 4th day of April 2018.

/s/ Nathan Williams