

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

In the Matter of the Petition of The Empire)
District Electric Company d/b/a Liberty to)
Obtain a Financing Order that Authorizes) Case No. EO-2022-0040
the Issuance of Securitized Utility Tariff)
Bonds for Qualified Extraordinary Costs)

In the Matter of the Petition of The Empire)
District Electric Company d/b/a Liberty to)
Obtain a Financing Order that Authorizes) Case No. EO-2022-0193
the Issuance of Securitized Utility Tariff)
Bonds for Energy Transition Costs Related)
to the Asbury Plant)

The Office of the Public Counsel's Reply Brief

Respectfully submitted,

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COMES NOW the Office of the Public Counsel (“OPC”) and for its Reply Brief states:

Introduction

In their initial briefs both The Empire District Electric Company d/b/a Liberty and Renew Missouri misrepresent Office of Public Counsel (“OPC”) arguments, and Liberty misrepresents OPC’s position regarding Riverton 11 and on other issues. Staff argues Liberty was imprudent for not “tuning” Riverton 11 to operate on fuel oil at the low temperatures during Storm Uri, where OPC’s position is based on Liberty’s inability to run Riverton 11 on fuel oil at all during Storm Uri. That OPC does not address an issue raised by or argument of another party in this case is not OPC’s concession to that issue or argument.

Argument

Resource Portfolio Management Imprudence

Renew Missouri asserts,

The facts on record demonstrate Liberty acted prudently in making the determination to retire Asbury early.

* * * *

The primary opponent to the Company’s request is the Office of Public Counsel (“OPC”). The entirety of OPC’s objection, as laid out in the record, involves its desire to have the Commission reconsider previous decisions already made and affirmed involving the adequacy of the Company’s resource planning and the Company’s investment in renewable energy. Further, OPC conflates the decision to retire Asbury and Liberty’s investment in wind as legally connected events.¹

Liberty insists that it “prudently examined operational concerns and market conditions, conducted an analysis of the economics of the unit under those conditions, and then made decisions

¹ Renew Missouri Initial Brief pp. 1-2.

based on that data.”² However, it does not assert that it evaluated its abilities to reliably provide electricity to its customers at a reasonable cost during relatively rare but highly impactful events such as Storm Uri.³

As explained in its initial brief, OPC’s position is that Liberty imprudently failed to consider its need for reliably dispatchable generation when it retired Asbury and, had it done so, it would not have retired Asbury when it did. Despite Renew Missouri’s assertion to the contrary, OPC is not asking the Commission to “reconsider previous decisions already made and affirmed involving the adequacy of the Company’s resource planning and the Company’s investment in renewable energy.” OPC is not requesting the Commission to revisit its findings that Liberty complied with the Commission’s resource planning rules or that it should invest in wind resources. However, those determinations do not require the Commission to allow Liberty to recover the cost of its investments in this case. For example, when Kansas City Power & Light Company filed a general rate case on August 3, 1979, in which it sought to include in its rate base Iatan 1, which it declared commercial on May 5, 1980, the Commission declined to do so, even though the Commission had granted Kansas City Power & Light Company a certificate of convenience and necessity for Iatan 1 on November 14, 1973.⁴ Further, the issue of Liberty recovering for its investment in its wind projects through general rates was a subject of Case No. ER-2021-0312, where it was resolved by a Commission-adopted settlement.⁵

² Liberty Initial Brief p. 31.

³ Liberty Initial Brief pp. 26-33.

⁴ 1980 Mo. PSC LEXIS 34, 23 Mo. P.S.C. (N.S.) 474, 38 P.U.R.4th 1 (Mo. P.S.C. June 19, 1980).

⁵ *In the Matter of the Request of The Empire District Electric Company d/b/a Liberty for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in its Missouri Service Area*, Case No. ER-2021-0312, *Order Approving Stipulations and Agreements*, dated March 9, 2022.

OPC's position is like the July 15, 2022, at 5:00 AM, Pacific Time, Los Angeles Times article authored by Staff writer Ian James titled, *They sounded alarms about a coming Colorado River crisis. But warnings went unheeded.* At least as early as when Liberty filed its request for the Commission to approve its "Customer Savings Plan" in Case No. EO-2018-0092, OPC sounded the alarms about the impacts of Liberty abandoning the reliably dispatchable Asbury as a source of electricity and leaving Liberty without sufficient reliably dispatchable supply-side resources to assure that it could supply adequate electricity to its customers' demand at just and reasonable rates.⁶ Although OPC did not expressly raise the spectre of an event like Storm Uri, that storm demonstrated the impacts of Liberty's imprudent resource management.

Recent articles in the news about the unreliability of the electricity supply in ERCOT in Texas echo the concerns OPC raised about the unreliability of Liberty's supply-side resources after it shut Asbury down⁷: In particular, in a July 13, 2022 8:00 PM CDT commentary by John Kemp which Reuters published, he said the following,

State officials [in Texas] tend to blame the problem [of inadequate electricity available to satisfy the demand for electricity] on extreme weather but the fragile condition of the electricity network has been caused by a failure to connect enough reliable generation to cope with booming demand growth.

* * * *

Repeated power crises and calls for conservation show how growth in dependable generation has failed to keep pace with growth in load leading to an erosion of generation margins.

⁶ Ex. 204C, OPC witness Marke rebuttal, pp. 41-42.

⁷ *Column: Don't blame the weather for Texas power shortages*, by John Kemp, published by Reuters July 13, 2022, 8:00 PM CDT ([Column: Don't blame the weather for Texas power shortages | Reuters](#)); and *Texas power grid faces limited solar energy supply*, by Kyla Guilfoil, published by ABC News, July 13, 2022, 6:25 PM ([Texas power grid faces limited solar energy supply - ABC News \(go.com\)](#)).

* * * *

The inadequate generation margin is masked when weather conditions are mild and close to long-term averages (in the same way a poorly capitalised bank's problems are hidden when the economy is booming).

But when temperatures become unusually cold or hot for the time of year, the extra pressure pushes the system to the brink of failure (in the same way thinly capitalised banks fail when the business cycle turns down).

In winter, the problem centres on the inadequate weatherisation of generating units and the fuel supply system, which can cause supposedly reliable generation to fail to start when it is most needed.

In summer, there is insufficient surge generation capacity and insufficient flexibility in demand to ensure the system can be safely balanced whenever temperatures spike.

The problem is not the weather but the system design itself, insufficient capacity to match load growth, and failure to operate the network within conservative limits.

The criticisms he levels at Texas apply directly to Liberty's supply-side resource mix for reliably serving its customers. As Storm Uri demonstrated that mix is not sufficiently reliable, and became less so when Liberty shut Asbury down eliminating 200 MW of reliably dispatchable electricity.

To further aid the Commission in its deliberations, attached to this brief is a copy of the July 2021 NARUC *Resource Adequacy Primer for State Regulators*. The first sentence of the Introduction is "This primer provides an overview of resource adequacy and why it is foundational to reliable electric service." The December 2021 NERC 2021 Long-Term Reliability Assessment that is Schedule LMM-S-1 to OPC witness Mantle's surrebuttal testimony (Ex. 201) may aid the Commission as well.

Qualified extraordinary costs and Energy transition costs

While the Missouri Legislature’s intent with securitization is known only by the statutory language of 2021 H.B. 734 found at §§393.1700 to 393.1715, RSMo, Liberty asserts the Legislature intended for it to “lower rates” and “avoid ‘rate shock.’”⁸ While securitization should not be employed unless it lessens electric utility customers’ bills over the life of the bonds from what they would be absent securitization, it neither “lowers rates” nor “avoids rate shock.” What it allows is the imposition of nonbypassable charges in lieu of increased rates, where the overall bill impacts of the charges over the life of the bonds are less than the bill impacts of what the rate impacts would be if they were in rates. Without securitization the Commission has ample tools to avoid “rate shock,” including, but not limited to disallowances and phasing-in rates.⁹

This Commission should not be persuaded by Renew Missouri’s and Liberty’s assertions that if the Commission does not allow Liberty to recover all that it asks it will chill others from availing themselves of the securitization statutes.¹⁰ Utilities will be motivated by the opportunity to recoup quickly their costs and investments in a lump sum that they can invest for a better return elsewhere, and both Staff and OPC interpret the securitization statutes to allow utilities to recoup what they would through rates absent the statutes. Further, according to Liberty it is entitled to recoup costs through securitization that it cannot recoup through rates because of §393.135, RSMo—abandoned work-in-progress.¹¹

⁸ Liberty Initial Brief p. 1.

⁹ §393.155, RSMo.

¹⁰ Liberty Initial Brief pp. 2-3.

¹¹ See OPC Initial Brief pp. 28-29.

Liberty asserts it could not recover its Storm Uri costs through its fuel adjustment clause because of the extreme rate shock it would have caused and, therefore, it proposed to defer them.¹² Contrary to Liberty’s claim of choice, both its fuel adjustment clause and the Commission’s fuel adjustment clause rules are highly prescriptive, and Liberty could not recoup those costs through its fuel adjustment clause, not because it chose not to do so, but because of Commission rule 20 CSR 4240-20.090(8)2.A.(XI) the Commission excluded them: “Extraordinary costs not to be passed through, if any, due to such costs being an insured loss, or subject to reduction due to litigation or for any other reason.”

Storm Uri Carrying Costs and Asbury Carrying Costs

Liberty insists that it is entitled to carrying costs based on its weighted average cost of capital, but it is not. Liberty’s reliance on “the ‘fair return standard’ established by the United States Supreme Court . . . in the *Hope* and *Bluefield* cases” is misplaced.¹³ That standard applies to investment in hard assets (plant and property) that are used and useful for providing utility service, not to operating costs or assets no longer used or useful.¹⁴ Liberty’s costs for Storm Uri are not for plant or property—they are for electricity, fuel, and litigation costs. Liberty has retired Asbury; therefore, it is neither used nor useful.

Staff argues that Liberty’s long-term cost of debt of 4.65% is what the Commission should use for Storm Uri carrying costs.¹⁵ Staff claims this is Liberty’s most current (as of February

¹² Liberty Initial Brief p. 6.

¹³ Liberty Initial Brief pp. 52-53.

¹⁴ *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923); *Fed. Power Com. v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944)

¹⁵ Staff Initial Brief p. 32.

2022) cost of long-term debt.¹⁶ It is not. The 4.65% cost of debt was Liberty's embedded cost of debt underlying the Commission's authorized ROR in Case No. ER-2019-0374.¹⁷ Both the Company and Staff's recommended use of historical capital cost rates that are not current are by definition inappropriate. Liberty did not finance Storm Uri until February 2021, which occurred a year after the true-up date of January 31, 2020 in Case No. ER-2019-0374.¹⁸

The Commission, in its discretion, should award Liberty carrying costs based on its affiliate Liberty Utility Company's short-term debt rate, since that affiliate provides Liberty's capital, and the term is short.¹⁹ Because, as OPC argued on pages 15-17 (Storm Uri) and 31-32 (Asbury) of its Initial Brief Liberty's Storm Uri costs are for consumables and services, and its Asbury costs are investment and costs for a generating resource that is unused and useless, carrying costs should be based on Liberty Utilities Company's average short-term debt rate for each month through the date Liberty recovers its costs and investment from the secured bond proceeds

Riverton 11 Imprudence

While Liberty attempts to characterize OPC's position on its failure to have Riverton 11 available to generate electricity by burning fuel oil as being based on Liberty not legally being able to "tune" that generating unit to operate in winter temperatures.²⁰ OPC's position is not premised on "tuning" the unit, it is based on Liberty not preparing and having the unit available to run on fuel oil during Storm Uri, despite the fact that, as OPC explains at pages eleven to thirteen of its

¹⁶ Staff Initial Brief p. 33.

¹⁷ *In the Matter of The Empire District Electric Company's Request for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in its Missouri Service Area*, Case No. ER-2019-0374, *Amended Report and Order* dated July 23, 2020, p. 39.

¹⁸ *Id.* at p. 6.

¹⁹ OPC's Initial Brief pp. 15-17.

²⁰ Liberty Initial Brief pp. 13-15.

Initial Brief, Liberty fired and ran its dual fuel capable units at its other generating stations. While no one defined “tuning,” OPC understands it to mean optimizing the efficiency of converting fuel to electricity for particular ambient conditions.

Asbury Basemat Coal and Fuel Inventory

Both Liberty and Staff compare what they describe as actual monthly balances and a baseline balance for coal inventory to arrive at their Asbury fuel inventory balances.²¹ Since there was no coal inventory at Asbury for which its customers had not paid,²² the Commission should return to Liberty’s customers both the return on the 60 days’ burn of coal inventory that the Commission included in the rates they paid until June 1, 2022, and the return of that inventory for which they paid.

Accumulated Deferred Income Taxes and Excess Accumulated Deferred Income Taxes

OPC and Liberty agree on what accumulated deferred income taxes and excess accumulated deferred income taxes are, but not how they are to be addressed. As Liberty accurately describes, accumulated deferred income taxes are the result of the timing in the taxes Liberty incurs with the taxing authority and when it is treated as incurring them for ratemaking purposes.²³ That tax timing difference arises from different depreciation rates.²⁴ The impacts of accumulated deferred income taxes and excess accumulated deferred income taxes specific to

²¹ Liberty Initial Brief, p. 34-35.

²² OPC Initial Brief p. 30.

²³ Liberty Initial Brief pp. 35-37.

²⁴ See *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of Union Electric Company d/b/a Ameren Missouri*, Case No. ER-2018-0362, *Order Approving Stipulation and Agreement* dated July 5, 2018; *In the Matter of a Proceeding Under Section 393.137 (SB 564) to Adjust the Electric Rates of The Empire District Electric Company*, Case No. ER-2018-0366, *Report and Order* dated August 15, 2018.

Asbury should be addressed as of when Liberty retired Asbury and, therefore, dealt with now, not in some future proceeding(s). Asbury now is unused and useless.

Contrary to Liberty's assertion that "OPC witness Riley's calculation fails the very first requirement by his entire failure to calculate the NPV for the ADIT amount," and, therefore, "[t]he OPC calculation should be dismissed as clearly contrary to the Securitization Statute for its failure to even purport to determine the NPV amount," is incorrect.²⁵ As OPC witness Riley testified, determining the appropriate accumulated deferred income tax and excess accumulated deferred income tax amounts associated with Asbury, and all the impacts of Liberty retiring Asbury are precursors to determining net present values.²⁶

Storm Uri Income Tax Deduction

This Commission should not be fooled by Liberty's assertion that "[a]s of its 2021 tax return, Liberty has not received any cash benefit from this deduction [for its \$204 million dollars Storm Uri loss]."²⁷ Nor is Liberty correct that there are accumulated deferred income taxes associated with its Storm Uri loss.²⁸ There are not. Liberty is entitled to a 2021 federal income tax loss deduction that it would be imprudent not to take.²⁹ Like its extraordinary Storm Uri costs, Liberty's 2021 federal income tax Storm Uri loss deduction is extraordinary. Absent securitization the loss deduction would be a relevant factor in a general rate case, and likely would be the subject

²⁵ Liberty Initial Brief p. 39.

²⁶ Ex. 208C, OPC witness Riley rebuttal, pp. 12-14.

²⁷ Liberty Initial Brief p. 17.

²⁸ *Id.*

²⁹ See Ex. 208C, OPC witness Riley rebuttal Sch. JSR-R-08.

of an accounting authority order to preserve the loss deduction on Liberty's books for purposes of a subsequent rate case.

Regardless of whether Liberty has not received any cash benefit from its Storm Uri income tax loss deduction as of its 2021 tax return as it asserts,³⁰ it has realized that income tax benefit for the consolidated group of which it is a member and whose 2021 taxes were due and payable as of April 18, 2022, regardless of any six-month extensions that group may have gotten to file their returns. As OPC argued in its Initial Brief, there is no reason for the Commission not to recognize now Liberty's 2021 income tax benefit of its Storm Uri loss.³¹ Liberty should not retain the advantages of it being part of an enterprise of legal entities to retain the benefits and disadvantage its customers as it attempted to do with the interest rate on its first mortgage bonds.³²

Staff's argument on page 30 of its Initial Brief that OPC has ignored that Liberty will be liable for income tax on the securitized bond charge revenues is misplaced. The taxability of the bond charge revenues is separate and distinct from Liberty's Storm Uri 2021 income tax loss deduction. Liberty will collect for its income tax liability on the bond charges when it collects those charges.³³

Asbury Income Tax Deduction

As it does with OPC's Storm Uri income tax deduction, Liberty argues the Commission should ignore its 2019 and 2020 Asbury abandonment income tax deductions characterizing it as

³⁰ *Id.*

³¹ OPC Initial Brief p. 15.

³² See *In the Matter of The Empire District Electric Company's Request for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in its Missouri Service Area*, Case No. ER-2019-0374, *Amended Report and Order* dated July 23, 2020, pp. 86-92.

³³ Ex. 208C, OPC witness Riley rebuttal, p. 22.

a “deferred tax item.”³⁴ For the same reasons Liberty’s 2021 Storm Uri income tax loss deduction is not a deferred tax item as explained in the **Storm Uri Income Tax Deduction** section of this reply brief above, neither are its 2019 and 2020 Asbury abandonment income tax deductions. Likewise, as OPC argued in its Initial Brief, there is no reason for the Commission not to recognize now Liberty’s 2019 and 2020 income tax benefits from abandoning Asbury.³⁵ Liberty should not retain the advantages of it being part of an enterprise of legal entities to retain the benefits and disadvantage its customers as it attempted to do with the interest rate on its first mortgage bonds.³⁶

Asbury Depreciation Expense

Liberty disputes OPC witness Riley’s calculation of Asbury depreciation expense because it believes that he used depreciation rates from Case Nos. ER-2019-0374 and ER-2021-0312, and calculated depreciation expense for 30 rather than 20 months.³⁷ Liberty is wrong. OPC witness Riley used depreciation rates from only Case No. ER-2019-0374, and relied on Staff’s separation of retired and unretired Asbury plant in Case No. ER-2021-0312.³⁸ While OPC witness Riley calculated depreciation expense for his rebuttal testimony, prefiled before the effective date of Liberty’s rates in Case No. ER-2021-0374, he updated his calculations based on 29 months in his later prefiled surrebuttal testimony.³⁹

³⁴ Liberty Initial Brief p. 47.

³⁵ OPC Initial Brief p. 12.

³⁶ See *In the Matter of The Empire District Electric Company’s Request for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in its Missouri Service Area*, Case No. ER-2019-0374, *Amended Report and Order* dated July 23, 2020, pp. 86-92.

³⁷ Liberty Initial Brief p. 51.

³⁸ Ex. 208C, OPC witness Riley rebuttal, pp. 17-18.

³⁹ Ex. 209, OPC witness Riley surrebuttal, Sch. JSR-S-01.

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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 20th day of July 2022.

/s/ Nathan Williams