

**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)

RESPONSE TO APPLICATION FOR REHEARING

COMES NOW The Empire District Electric Company (“Empire”), by and through counsel, and, in response to the Application for Rehearing (“Application”) filed on August 9, 2018, by the Office of the Public Counsel (“OPC”), respectfully states as follows to the Missouri Public Service Commission (“Commission”):

1. OPC’s Application alleges that the Commission Report and Order in this matter is unlawful and unreasonable as to the following issues:

- A. The authorization to record costs related to the acquisition of wind assets as utility plant in service;
- B. The waiver granted from the Affiliate Transaction rules;
- C. Findings of Fact as to reasonableness;
- D. Reliance on Non-evidentiary Materials; and,
- E. Denial of OPC’s Request for Extension.

2. None of the subjects raised by OPC provide “sufficient reason” for the Commission to rehear the matter. (Section 386.500.1, RSMo)

A. AUTHORIZATION TO RECORD COSTS RELATED TO THE ACQUISITION OF WIND ASSETS AS UTILITY PLANT IN SERVICE

3. OPC alleges that the Commission’s authorization related to the recording of acquisition costs as utility plant in service is not lawful because it “is not supported by competent

evidence, Empire failed to properly seek a variance or show cause from the FERC USOA and Rule 4 CSR 240-20.030, and is over broad.” (App., p. 2)

Competent Evidence

4. There is little explanation of OPC’s allegation that the Report and Order’s authorization related to the booking of costs is not supported by competent evidence or that the Report and Order is “overly broad.” The argument seems to merely be that “in the conclusion section of the Report and Order the Commission does not provide support” for the authorization. (App., p. 3)

5. This is a little different than there not being competent evidence, or even findings of fact, that support the authorization. When one looks to the Findings of Fact, there are several that support the authorization, to include: (A) Descriptions of the tax equity financing structure and advantages for customers (6-9); (B) The necessity that in using the tax equity structure Empire “indirectly own the wind generation assets” (17); (C) Savings to customers (25); and, (D) Reduction of customer risk (26). The Report and Order recites findings of fact, based on competent evidence in the record, to support the referenced authorization. There is no deficiency in this regard.

Commission Authority

6. OPC acknowledges the language of Section 393.140(8), RSMo, relied on by the Commission for its authorization. However, OPC then argues that this authority is somehow limited by Section 393.140(4), RSMo, and the Commission’s own Rule 4 CSR 240-20.030. OPC’s argument ignores legal precedent on Section 393.140(8).

7. Section 393.140(8) provides that the Commission shall have the power “after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered,

charged or credited.” The Commission has previously held that “effective regulation requires commission control of accounting procedures.” *In re Missouri-American Water Company*, Case No. WO-2002-273; 2004 Mo. PSC Lexis 1637, *25.

To this end, the legislature has granted the Commission broad authority over the accounting practices of regulated utilities. . . . Taken together, these statutory provisions authorize the Commission both to prescribe the basic organization of a utility's accounting records and to determine the accounting treatment of any particular transaction. These powers amount to comprehensive control over public utility accounting.

Id. at 25-27. The Commission then pointed to a holding of the Missouri Supreme Court regarding the Commission’s authority over accounting procedures.

(T)he commission's express statutory power to determine and prescribe just and reasonable rates and to determine what rates will permit a fair return, includes the power to determine what items should be included in a utility's operating expense and what items should be excluded, and how excluded items, if any, should be handled and treated, in order that the commission may arrive at a reasoned determination of the issue of "just and reasonable" rates.

Id., citing *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 79-80 (Mo. 1960).

8. Further, given that Section 393.140(8) does not contain any express standard for the exercise of this authority, the exercise of this authority is discretionary in nature. *In the Matter of the Application of The Empire District Electric Company for the Issuance of an Accounting Authority Order*, File EU-2011-0387, 2011 Mo. PSC Lexis 1320 (November 30, 2011), citing *Missouri Gas Energy v. Public Service Comm'n*, 978 S.W.2d 434, 437 (Mo. App. 1998); *State ex rel. Office of Public Counsel v. Public Service Comm'n*, 858 S.W.2d 806, 811 (Mo. App. 1993).

9. Simply put, there is no support for OPC’s alleged limitation on the Commission’s authority under Section 393.140(8), RSMo.

B. AFFILIATE TRANSACTION RULE WAIVER

10. OPC alleges that Empire failed to submit its motion for variance of the Commission's Affiliate Transaction rules in its Application, the entities contemplated in the variance are hypothetical, and the grant is overly broad. (App., p. 7)

11. OPC suggest that Empire did not appropriately seek a variance form the Affiliate Transaction rules. A review of the Empire application shows a cite to the affiliate transaction rule; a description of the variance sought; the specific provision of the rule for which the provision is sought; and, the reasons/good cause for the variance. These items are found in the "Comes Now" paragraph of the application and paragraphs 18-19 of the Application (which incorporate by reference the detail provided in the Direct Testimony of Blake Mertens).

12. Additionally, OPC alleges that the variance is vague, in that the legal entities to which is applies are not yet in existence. (App., p. 9) OPC's argument misses the true nature of the variance. The only entity that must comply with the affiliate transaction rules, and therefor needs the variance, is Empire. Empire is very much in existence and not hypothetical. *See In the Matter of the Application of The Empire District Electric Company*, Case No. EE-2002-120, 2002 Mo. PSC Lexis 50 (rule variance regarding transfer of an asset to an unregulated subsidiary affiliated company which had yet to be formed).

C. NOT AN ADVISORY OPINION

13. OPC's primary allegation appears to be that "factual findings must not be hypothetical." (App., p. 10) Further, OPC alleges that the finding of reasonableness has no legal effect. The factual findings by the Commissions are neither hypothetical, nor without effect.

14. The Commission was asked to issue certain orders (accounting, depreciation, waiver/variance) within its jurisdiction – in other words, to apply existing law to resolve the issues

before it. The Commission was not asked to declare or enforce any principle of law or equity in a manner that would constitute a prohibited advisory opinion.

15. Public utilities commonly come to the Commission with *proposed* projects and transactions seeking rulings by the Commission. Depending upon the Commission's ruling, these projects and transactions may never be pursued or completed. These include proposed financing agreements, proposals to encumber utility assets, requests for CCNs, requests for approval of the acquisition of utility assets, requests to merge utilities, and others. This case is no different.

16. In regard to the proposed findings of reasonableness, the Commission must support any decision it makes in regard to the issue before it with separately stated findings of fact in regard to the decision. Section 536.090, RSMo. Findings of fact resolve disputes of material fact – the facts that guide the Commission's conclusions of law. *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 246 (Mo. App. W.D. 2000). Thus, the Commission's finding that the proposed decision to acquire up to 600 MWs of Wind Projects is reasonable under the terms of this Stipulation is a finding based on record evidence. This finding in turn supports the grant of Empire's request for authority "to record its capital investment to acquire the Wind Projects as utility plant in service subject to audit in Empire's next general rate case."

D. EVIDENTIARY MATERIALS

17. OPC alleges error in regard to citations to the Joint Position statement (Stipulation and Agreement) found in the Report and Order. (App., p. 11) OPC suggests that the Commission relies on the Joint Position statement as "authoritative evidence," and suggests that citing to an affidavit filed in support of the Joint Position statement would also be improper. (App. , p. 12)

18. OPC specifically suggests that the variance granted by the Report and Order was dependent on the Joint Position. In doing so, OPC ignores findings of fact 21 and 22 on the subject, which cite to record evidence:

21. Granting the variance would permit the Service Corp. to provide goods and services to the new wind project company in the same manner that Service Corp. now provides such goods and services to Empire.

22. The hedging agreement is a necessary component of the tax equity financing structure and the benefits that flow from using that structure.

(Rep. Ord., p. 12)

19. OPC also ignores the Commission's statement as follows in support of the variance:

Empire implements the CSP and acquires new wind assets with a tax equity partner, Liberty Utilities Service Corp will begin providing goods and services to the wind project company, which may constitute an "affiliate transaction" under the rule. As a result, the asymmetric pricing standards in 4 CSR 24-20.015(2), which prohibit a regulated electrical corporation from providing a financial advantage to an affiliated entity, may apply unless a variance is granted by the Commission. Without that variance, the CSP could not be implemented, and Empire could not achieve the millions of dollars in customer savings that will ultimately benefit its customers. The Commission finds that Empire has demonstrated good cause to grant the variance. The Commission will grant the variance as described above and in the Joint Position.

(Rep. Ord., p. 20) The Commission's variance decision was not dependent upon the Joint Position.

20. OPC further alleges that citations to the affidavits filed in support of the agreement are improper and should not be portrayed as findings of fact. (App., p. 12-13) The factual statements found in the affidavits, filed in support of the Joint Position, or not, constitute competent and substantial evidence. They were sworn statements, offered and admitted into the record, and on which the affiants stood cross-examination. This is no different than any other pre-filed testimony the Commission considers on a regular basis. There is no error associated with reliance on those sworn statements.

E. DENIAL OF OPC'S REQUEST FOR EXTENSION

21. OPC lastly alleges that the signatories to the Stipulation and Agreement “violated the Commission’s procedural order which required the presentation of workpapers two days after the filing of testimony.” (App., p. 13) Based largely on this allegation, OPC alleges that the Commission committed error by not granting its Motions to suspend procedural schedule. (App., p. 15)

22. OPC first alleges that the signatories “colluded to withhold work papers” based on a standard provision in the Stipulation and Agreement meant to protect settlement discussions. (App., p. 14) Such settlement discussions have been recognized as privileged by the Commission – most recently in an *Order Granting Staff’s Motion to Strike and Extending the Date for Filing Testimony*, File No. WR-2018-0170, p. 2 (Issued August 2, 2018):

Public policy encourages settlement by making settlement offers privileged. A public policy which is not simple to follow is useless as a guideline for the parties. It would make little sense for public policy to require a ruling on a per document basis regarding whether privilege applied to that particular document. Commission rule 4 CSR 240-2.090(7) contemplates this when it states, “*Facts disclosed in the course of ...settlement offers are privileged...*” (emphasis added). Both the settlement offer and the work product produced in preparation of the settlement offer are privileged.

Protecting a privilege does not constitute “collusion,” as alleged.¹

23. OPC then alleges that the signatories “did withhold spreadsheets that provided supporting information to the Stipulation and Agreement.” (App., p. 14) First, it needs to be pointed out that what OPC references to was a single spreadsheet file (as can be seen from the portion of OPC witness Mantle’s affidavit cited by OPC). Second, as also stated by OPC, the spreadsheet was provided to the OPC by one of the signatories in response to an OPC data

¹ Whether the spreadsheet even represents a “work paper,” as that phrase is commonly used, would be open to debate. However, such determination is not critical to this matter.

request. Thus, it was not “withheld.” Lastly, the relevance of the spreadsheet was to the Stipulation and Agreement that WAS NOT adopted by the Commission. Accordingly, the document issue raised by OPC is irrelevant to the matter at hand.

WHEREFORE, Empire respectfully requests the Commission consider this Response to Application for Rehearing and, thereafter, deny the Application.

Respectfully submitted,

//S// Dean L. Cooper

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail or by U.S. Mail, postage prepaid, on August 20, 2018, to the following:

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