

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

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

**PUBLIC COUNSEL’S REPLY TO LIBERTY’S RESPONSE TO
OPC’S MOTION IN RESPONSE TO LIBERTY’S MPPM NOTICE FILING**

COMES NOW the Office of Public Counsel (Public Counsel) and for its reply to Liberty’s response to Public Counsel’s motion in response to Liberty’s first annual MPPM notice filing (Notice of MPPM Submission), states:

1. Liberty’s arguments in its response do not controvert that Liberty’s calculation methodology for the PPA replacement value balance of the market price protection mechanism (MPPM) is illogical.

2. No one disputes that the MPPM PPA replacement value is to recognize that there is value in the availability to Liberty of the renewable energy credits (RECs) that Liberty’s Neosho Ridge, Kings Point, and North Fork Ridge wind stations create for satisfying Liberty’s annual calendar year Missouri renewable energy standard (RES) requirements.¹

3. Because Liberty did not acquire them to satisfy its Missouri RES requirements, RECs from its Ozark Beach hydroelectric station, its customer-owned solar generation, Elk River purchase power agreement (PPA) (expires December 31, 2025) and its Meridian Way PPA (expires December 31, 2027) have no cost for purposes of Liberty satisfying its Missouri RES requirements. Those resources generated sufficient RECs in

¹ § 393.1030.1, RSMo.

2022 and before² for Liberty to satisfy its 2022 calendar year Missouri RES requirements. However, for calculating the MPPM PPA replacement value it reported in 2023, Liberty effectively replaced the Missouri RES compliance cost of RECs from its Ozark Beach hydroelectric station (\$0), RECs from its customer-owned solar generation (\$0), with RECs from its Neosho Ridge, Kings Point, and North Fork Ridge wind stations that it costed at an aggregate of \$8,345,69.

4. There is no rational basis for valuing RECs from Neosho Ridge, Kings Point, and North Fork Ridge as if they replace RECs from Liberty's Ozark Beach hydroelectric station and customer-owned solar generation for purposes of the MPPM PPA replacement value. Instead, the value of RECs from Neosho Ridge, Kings Point, and North Fork Ridge for Missouri RES purposes are not anticipated to be realized before Liberty's Elk River PPA expires on December 31, 2025.

5. Liberty's latest Missouri RES compliance report confirms that it had more than sufficient RECs to satisfy its Missouri 2022 calendar year RES requirement without using any RECs created by its Neosho Ridge, Kings Point, or North Fork Ridge wind stations.³

6. Further, Liberty's calculation methodology treats its obligation to comply with the Missouri RES as if it were a monthly obligation. It is not. It is a calendar year obligation. It is axiomatic that renewable generation varies over the course of each year, and that variation can be extreme.

² RECs can be used for up to three years from when they are generated for Missouri RES purposes. § 393.1030.2, RSMo.

³ Case No. EO-2023-0358, *Revised 2022 Renewable Energy Standard (RES) Compliance Report* (Public and Confidential), filed August 4, 2023, p. 7, Table 4 (EFIS item 18).

7. Moreover, also illogically, Liberty's calculation methodology treats its geographically diverse Neosho Ridge, Kings Point, and North Fork Ridge wind stations as if they are one generating resource, *i.e.*, as if the cost of obtaining the RECs from each of them are the same per REC. They are not. First, the per capacity cost of each wind station differs. Second, geographically diverse, the number of RECs each generates differ. Also, Liberty's calculation methodology ignores that, for Missouri RES compliance, RECs from Kings Point and North Fork Ridge are worth 1.25 times RECs from Neosho Ridge.⁴

8. This Commission is an administrative body, not a court. Its purpose is to benefit the public.⁵ The question Public Counsel has raised to the Commission is whether Liberty' first annual MPPM notice filing (Notice of MPPM Submission) complies with what the Commission intends the MPPM it approved to require of Liberty in its annual MPPM submissions.

⁴ § 393.1030.1, RSMo.

⁵ See [*State ex rel. Barker v. Kan. City Gas Co.*, 254 Mo. 515, 534-35; 163 S.W. 854, 857-58 \(banc 1914\)](#):

[The Public Service Commission Act] is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to-wit, that a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility-owner, must be in the name of the overlord, the State, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock or bond or note issued as surely is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust *willy nilly*.

That there had been a vast increase in such utilities in the last decade or two and that evils have grown up crying out lustily for a cure by the lawmaker, is writ large in current history. The act, then, is a highly remedial one filling a manifest want, is worthy a hopeful future, and on well-settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view and retarding the mischiefs struck at -- all *pro bono publico*. Besides all which, the lawmaker himself has prescribed it "shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." [Sec. 127.]

9. While Liberty's recitation in its response as to the history regarding the MPPM and the PPA replacement value term within it may aid the Commission in recalling its understanding, others' understandings of the PPA replacement value in the MPPM are only relevant to the extent they bear on the Commission's understanding of the MPPM at the time when it adopted the MPPM.

10. Settlement discussions between parties that were never revealed to the Commission before Liberty filed its response are irrelevant to what the Commission understood when it adopted the MPPM. The settlement related to the settlement communication Liberty has disclosed is for a *clarification*, not modification, of the MPPM. Further, by Commission rule—20 CSR 4240-2.090(7)—and for public policy reasons settlement communications rarely should be presented to the Commission. This is not such a circumstance.

11. Commission rule 20 CSR 4240-2.090(7) follows:

Facts disclosed in the course of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence.

See also [Silverleaf Resorts, Inc. v. Mo. Public Serv. Comm'n \(In re Liberty Utils. \(Mo. Water\), LLC\)](#), 592 S.W.3d 82, 93 (Mo. App. 2019). (By § 386.410.1, RSMo, Commission rules control in hearings, including rule 20 CSR 4240-2.090(7)).

12. Further, with regard to settlement communications, in its opinion [St. Louis Cty. v. River Bend Estates Homeowners' Ass'n](#), 408 S.W.3d 116, 128 (Mo. 2013), the Missouri Supreme Court stated:

While an out-of-court statement that is an admission against interest might be an exception to the hearsay rule, offers of settlement are inadmissible. Negotiations for the peaceful settlement of disputes are encouraged under the law. [Hancock v. Shook](#), 100 S.W.3d 786, 799 (Mo. banc 2003); [State ex rel. State Highway Comm'n](#)

v. Sheets, 483 S.W.2d 783, 785 (Mo. App. 1972). "If offers of settlement were admitted in evidence, they would have the natural tendency with the jury to denigrate the defense position at trial. No one would make such offers if the risk of their being before the jury were a necessary corollary of the offer." J.A. Tobin Constr. Co. v. State Highway Comm'n of Missouri, 697 S.W.2d 183, 186 (Mo. App. 1985). The policy rationale behind the rule excluding evidence of settlement negotiations requires that "statements made with a clear purpose to resolve the existing dispute . . . be protected, even though uttered outside the negotiating arena." 2 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 4:58 (3d ed. 2007).

13. Significantly, Liberty never requested Public Counsel to waive its privilege, Public Counsel has not acted to waive its privilege, and Liberty has no ground to justify breaching Public Counsel's settlement communications privilege. Liberty's election to disclose settlement discussions in its response will make future settlement discussions with Liberty much more difficult since Liberty no longer recognizes that settlement discussions with other parties are privileged.

14. Finally, Public Counsel notes that while it responded to Public Counsel, Liberty ignored Staff's statement, "Staff has reviewed Liberty's market price protection mechanism filing and supports the OPC's position to require Empire to refile its compliance filing to reflect a PPA replacement value balance of \$0.00," included in Public Counsel's motion.

Wherefore, the Office of the Public Counsel replies to Liberty's response to Public Counsel's motion as set forth above and continues its request that the Commission order Liberty to refile its MPPM compliance filing to reflect a PPA replacement value balance of \$0, not (\$8,345,691), and to provide Liberty with guidance for its future annual MPPM compliance filings as the Commission deems fit.

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 6th day of December 2023.

/s/ Nathan Williams