PUBLIC

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 Its Customer Savings Plan	))	Case No. EO-2018-0092

INITIAL BRIEF OF THE MISSOURI DIVISION OF ENERGY

The primary question before the Missouri Public Service Commission ("Commission") is whether it is reasonable for The Empire District Electric Company ("Empire" or "Company") to add 600 megawatts (MW) of renewable wind generation. The test for reasonableness of a plan or project considered by the Commission is whether it would reasonably promote the welfare of the public. The decision to build new wind generation impacts the public welfare in a number of beneficial ways, with the most noted impacts being diversity and security of supply, economic impacts, and environmental impacts.

Economic impacts of developing new wind generation include: 1) impacts on the long-term energy needs and bills of every home and business in Empire's service territory; 2) impacts on economic development opportunities for businesses seeking to locate in areas with renewable energy options; 3) impacts on the local economies where wind generation is sited; 4) impacts on the diversity of Empire's energy portfolio; and 5) impacts on Empire's ability to achieve a higher level of energy independence by harnessing locally-sourced energy. Wind energy impacts the public welfare environmentally by tapping into an abundant energy resource that is clean and renewable. These are the considerations the Missouri Division of Energy ("DE") encourages the Commission to weigh in determining whether the plan is reasonable and in the public interest.

DE offers this brief in support of the Non-Unanimous Stipulation and Agreement ("Agreement")[1] and urges the Commission to find the terms of the Agreement and Empire's plan to add 600 MW of renewable wind generation to be reasonable. DE provides the perspective of an agency with a statutory duty to analyze energy supply issues to help plan for Missouri's future energy needs, and to make recommendations for the expanded use of alternative energy sources and technologies.[2] The plan set forth in the Agreement would accomplish both of these important policy goals by providing 600 MW of generation from an alternative energy source for the next twenty (20) to thirty (30) years. It is anticipated the plan will help Missouri economically by providing Empire's residential and businesses customers with a long-term, low-cost solution for their energy needs, by providing a renewable energy source that attracts businesses and jobs to Missouri, and by ** _____

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Empire's request for a finding of reasonableness before initiating construction is sensible because the proposal represents a large investment and a substantial change in future energy plans. The Commission's finding on whether the plan is reasonable could determine whether Empire goes forward with the wind projects. A finding of reasonableness in this case will in no way preclude any party from challenging the prudence of project expenditures, nor will it act to prohibit any party that did not sign the Agreement from arguing in a future rate case that the decision to proceed with the project was imprudent.

[1] Case No. EO-2018-0092, *Non-Unanimous Stipulation and Agreement*, EFIS No. 101, filed April 25, 2018, and *Addendum to Non-Unanimous Stipulation and Agreement*, EFIS No. 128, filed May 7, 2018 (collectively, "Agreement").

[2] Section 640.150(3) and (4) RSMo. Supp. 2017.

1. Does the Commission Have the Authority to Approve the Agreement?

The first issue asks whether the Commission has the authority to grant Empire's requests.[3] The requested relief that appears to be the most controversial is the request that the Commission, "*… find ... the decision to acquire up to 600 MWs of Wind Projects under the terms of this Stipulation is reasonable*."[4]

Sections 393.130, 393.140, and 393.170 RSMo provide the Commission with the authority to issue an order finding Empire's 600 MW plan to be reasonable based upon Empire's representations. Section 393.140 RSMo provides the Commission with authority over the "general supervision" of all electric corporations and all electric plant owned or leased by electric corporations, including the power to order "reasonable improvements as will best promote the public interest." Section 393.140(5) RSMo provides the Commission with the authority to determine what utility acts are just and reasonable, and the authority to "prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public." In addition, Section 393.130.1 RSMo grants the Commission the authority and duty to ensure a public utility's facilities are reasonable.

The Commission's authority to find Empire's plan to be reasonable is also consistent with the Commission's authority under Section 393.170.1 RSMo, which states, "No…electrical corporation…shall begin construction of…electric plant…without first having obtained the permission and approval of the commission." While Empire is not seeking permission for, or approval of, the construction of any particular wind project, the questions before the Commission in this case are similar in nature to a certificate application and fall within the Commission's implied authority to assist the public and the public utility in resolving energy-related issues involving plant

[3] EFIS No. 126.

[4] Agreement, p. 5.

additions. This is consistent with the Missouri Court of Appeals' conclusion that the "*Commission's powers to regulate in the public interest are broad and comprehensive*."[5]

During the opening statements on the first day of the evidentiary hearing, the Commission heard arguments from opponents to the Agreement claiming what Empire seeks is an improper "pre-approval" by the Commission of projects that rely upon the Company's modeling.[6] While DE disagrees the Agreement seeks a decision regarding prudence, DE agrees that what is being offered is the Company's modeling. The basis of any finding of reasonableness by the Commission would be based upon the Company's modeling presented to the parties and the Commission in this case. Paragraphs 3 and 4 of the Agreement recognize the Signatories' reliance upon the Company's modeling, which state:

> 3. This Stipulation is based on the unique circumstances presented by Empire to the Signatories. Except to the extent necessary to implement the terms of this Stipulation, this agreement shall not be construed to have precedential impact in any other Commission proceeding.
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> 4. The non-utility Signatory Parties enter into this Stipulation in reliance upon information provided to them by Empire, and this Stipulation is explicitly predicated upon the representations made by Empire.

These key provisions ensure that approval of the Agreement is not pre-approval of the projects, as they will have no precedential value in any subsequent proceeding. Moreover, the entire Agreement, and any Commission order finding the Agreement to be reasonable, is based upon Empire's representations and modeling presented to the Signatories and the Commission. Empire's representations and modeling, and any future modeling and assumptions Empire relies

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[5] *In the Matter of the Application of Kansas City Power & Light Co. v. Public Service Commission,* 515 S.W.3d 754 (Mo. App. 2016).

[6] Transcript ("Tr"), Volume 3, p. 137.

upon as it continues to develop these projects, will be subject to further scrutiny and potential challenge in any future certificate application or rate case. Approving the Agreement in no way binds the Commission to find the decision to proceed with the projects was prudent, nor will it bind the Office of the Public Counsel ("OPC") or the City of Joplin from challenging the prudence of the decision, the modeling, the assumptions, and the prudence of any other relevant data that Empire relied upon. In the end, many Commission decisions (including those granting Certificates of Convenience and Necessity and rate increases) rely on modeling by interveners, including utilities; while a model's validity may be challenged, the fact that a model is presented for purposes of decision-making is not an inherently problematic issue.

2. Is the Agreement in the Public Interest?

During the evidentiary hearing, Judge Bushman asked that the parties address in their briefs the appropriate standard to be applied in this case.[7] The appropriate standard in determining whether the Agreement and Empire's plan are reasonable is to determine whether they are in the public interest, which is the guiding standard to be applied in Commission decisions.[8] This standard recognizes that the public interest includes the interests of customers served by the company in question, and the interests of the public at large.[9]

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[7] Tr., Vol. 3, p. 65.

[8] *State ex rel. Chicago, R. I. & P. R. Co. v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. 1958), states, "*The public service commission is essentially an agency of the Legislature and its powers are referable to the police power of the state. It is a fact-finding body, exclusively entrusted and charged by the Legislature to deal with and determine the specialized problems arising out of the operation of public utilities… Its supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest.*" See also, *State ex rel Gulf Transport Co. v. Public Service Commission*, 658 S.W.2d 448 (Mo. App. W.D. 1983); *Grain Belt Express Clean Line LLC v. Public Service Commission*, 2018 WL 1055858, (Mo. App. E.D. February 27, 2018).

[9] *In the Matter of the Application of Kansas City Power & Light Co. v. Public Service Commission,* 515 S.W.3d 754 (Mo. App. 2016), "The Commission must balance the interests of the general public as well

a. Promoting Renewable Energy is in the Public Interest

A consideration of whether Empire's plan is in the public interest begins with considering whether renewable energy is in the public interest. Missouri's citizens made it clear that renewable energy is in the public interest when they demanded a statewide policy for Missouri that encourages public utilities to develop renewable energy. In 2008, Missouri voters approved Proposition C, the Renewable Energy Standard ("RES"), that mandates an increasing percentage of energy is to be generated using renewable energy technology.[10] Under the RES, electric utilities are required to generate or purchase electricity generated from renewable energy resources, and are required over time to increase the percentage of renewable generation.[11] The percentages are *minimums* required of every investor-owned electric utility, and are not to be considered caps.[12] This signals a policy goal premised on the understanding that the public interest is served by transitioning Missouri towards a more diverse energy future that includes a greater reliance upon renewable energy.

Past Commission and Missouri Court of Appeals decisions have confirmed that Missouri has a public policy goal of encouraging renewable energy.[13] The Missouri Court of Appeals explained, "The public policy of the state to conserve natural resources and pursue renewable

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as the interests of customers and investors of a regulated utility on a statewide basis and not consider the utility's operating area in isolation", *citing State ex rel. Cass County v. Public Service Commission*, 259 S.W.3d 544, 549 (Mo. App. 2008).

[10] Sections 393.1020 to 393.1035 RSMo.

[11] *Id.* At the time Proposition C was approved by voters, there already existed a *voluntary* renewable energy standard as a result of Senate Bill 54 (2007), but voters changed that law to make the renewable energy minimums *mandatory.*

[12] *Id.*

[13] *Ameren Missouri's Voluntary Green Program and Pure Power Program Tariff Filing*, Report & Order, Case No. EO-2013-0307, April 24, 2013; *In the Matter of Transource Missouri, LLC for a Certificate of Convenience & Necessity*, Case No. EA-2016-0188, April 6, 2015; *Ameren Transmission Co. of Illinois Certificate of Convenience & Necessity*, Report & Order, Case No. EA-2017-0146, April 27, 2016 (Vacated by the Court of Appeals for reasons that did not involve the Commission's finding that

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")."[14] Recently the Commission concluded:

> …the general public [has] a strong interest in the development of economical renewable energy sources to provide safe, reliable, and affordable service while improving the environment and reducing the amount of carbon dioxide released into the atmosphere.[15]

Additionally, last year the Commission issued an order establishing special contemporary resource planning issues for Empire, and ordered Empire to "analyze and document the following special contemporary issues in its 2018 annual IRP update report", which included a directive to:

> Describe and document Empire's efforts to address the corporate social responsibility and renewable energy purchasing goals of commercial, industrial, institutional, and public-sector customers for increased access to renewable energy and distributed generation resources.[16]

The Commission's concern with encouraging renewable energy and Missouri's policy goal of encouraging renewable energy are clear, and the Agreement before the Commission seeks to further these important public policy goals. "Any improvement which is highly important to the public

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promoting renewable energy is in the public interest); *In the Matter of the Application of Kansas City Power & Light Company v. Public Service Commission,* 515 S.W.3d 754, 759 (Mo. App. 2016).

[14] *In the Matter of the Application of Kansas City Power & Light Co. v. Public Service Commission,* 515 S.W.3d 754, 763 (Mo. App. 2016).

[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,* Report & Order, Case No. EA-2015-0256, March 2, 2016.

[16] *In The Matter of a Determination of Special Contemporary Resource Planning Issues to be Addressed by The Empire District Electric Company in Its Next Triennial Compliance Filing or Next Annual Update*

convenience and desirable for the public welfare may be regarded as necessary. If it is of sufficient importance to warrant the expense of making it, it is a public necessity."[17]

Opponents of the Agreement argue Empire does not need additional wind generation to comply with Missouri's RES requirements. However, the Commission's RES rules envision that electric utilities may expand their renewable generation *beyond* the minimums prescribed by statute or rule. During the Commission's RES rulemaking, "KCPL recommended that the rule be considered as a baseline for renewable energy investment and should not prohibit additional, prudent investment in renewable energy generation."[18] Other entities agreed with KCPL's comments, including OPC. "Public counsel testified that the concept was a good one."[19] The Commission agreed with KCPL and OPC, and concluded, "The commission agrees that the rule should not limit the prudent implementation of renewable energy generation in excess of the RES. Thus, the commission will add language for clarity."[20] The language added for clarity states, "*The requirements set forth in this rule shall not preclude an electric utility from recovering all of its prudently incurred investment and costs incurred for renewable energy resources that exceed the requirements or limits of this rule but are consistent with the prudent implementation of any resource strategy the electric utility developed in compliance with 4 CSR 240-22*."[21]

Missouri Courts have also held that planning for future renewable energy needs is inherently in the public interest. In a 2015 case, opponents of Kansas City Power & Light – Greater Missouri

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Report, Case No. EO-2018-0048, Order Establishing Special Contemporary Resource Planning Issues, November 1, 2017.

[17] *In the Matter of the Application of Kansas City Power & Light Company v. Public Service Commission,* 515 S.W.3d 754, 759 (Mo. App. 2016), *citing State ex rel Missouri Coach Lines v. Public Service Commission,* 179 S.W.2d 132 (Mo. 1944).

[18] Order of Rulemaking, *Missouri Register,* Volume 35, Number 16, pp. 1184-1185, August 16, 2010.

[19] *Id.*

[20] *Id.*

Operations Company's ("GMO") request to construct a 3 MW solar facility appealed the Commission's order granting GMO a certificate of service authority for the facility.[22] The appellants argued the order was unreasonable because it was "based on unsupported public opinion, political, and public policy speculation rather than a demonstrated public need."[23] The Court disagreed with the appellants, and found future planning is a reasonable consideration when applying a public interest standard. The Court held that while GMO's present load needs did not require the new facility, the Court found it "not unreasonable to conclude that GMO's facilities as they currently exist are not adequate to meet the increase in customer solar-based demand reasonably anticipated to result from the decreasing costs of solar energy in the next few years."[24] "Consideration of the future should be "part of a *comprehensive* evaluation of whether the public convenience and necessity would be served." *Gulf Transport*, 658 S.W.2d at 458 (emphasis added)."[25] In the present case, there is evidence of an increasing demand for renewable wind generation and a trend of decreasing costs to construct and operate wind generation.[26] This is especially true and reasonable under the present proposal where Empire seeks to take advantage of production tax credits and a tax equity financing structure that will allow Empire to generate low-cost wind for many years to come.

b. Empire's 600 MW Plan is in the Public Interest

Regarding Empire's original 800 MW proposal, DE's witness Mr. Martin Hyman testified, "Empire's proposal can reduce costs to customers, reduce reliance on out-of-state coal use, provide

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[21] 4 CSR 240-22.100(2).

[22] *In the Matter of the Application of Kansas City Power & Light Company v. Public Service Commission*, 515 S.W.3d 754, 759 (Mo. App. 2016).

[23] *Id.*

[24] *Id.*

[25] *Id.*, 515 S.W.3d at 760.

environmental benefits, and, under the right circumstances, support state and local economic development."[27] The Agreement is a modification of the 800 MW plan, but is also in the public interest for the same reasons identified by Mr. Hyman for the original plan. If approved, the Agreement will help provide 600 MW of low-cost, clean, and renewable wind generation, including ** _____ **, with important customer protections that minimize the customer's risk from unfavorable market and wind production conditions.[28]

Empire, the Commission's Staff, and the Missouri Energy Consumers Group ("MECG") each filed one or more affidavits in support of the Agreement. The analysis most relied upon by the Signatory parties is that of Mr. James McMahon, Vice President of Charles River Associates, retained by Empire to conduct a Generation Fleet Savings Analysis and additional subsequent analyses.[29] Mr. McMahon's modified analysis compared the proposed 600 MW Plan with Empire's 2016 Integrated Resource Plan ("IRP"), which provides a modeling comparison between adopting the 600 MW proposal and maintaining the status quo without adding wind projects. Mr. McMahon's analysis can be summarized by his statement that, "Adding up to 600 MW of wind to Empire's portfolio is expected to generate customer savings because the levelized cost of the wind is significantly lower than the forecast price paid for energy in the Southwest Power Pool."[30] Mr. McMahon's modeling estimates show customers save much more under the 600 MW plan than under the 2016 IRP Plan; in the first twenty (20) years, Mr. McMahon estimates customers will save

[26] Hyman Rebuttal Testimony, Ex. 300, p. 6; McMahon Affidavit, Ex. 8, p. 3.

[27] Hyman Rebuttal Testimony, Ex. 300, p. 6.

[28] McMahon Surrebuttal Testimony, Ex. 7, p. 4.

[29] McMahon Direct Testimony, Ex. 6.

[30] McMahon Affidavit, Ex. 8, p.3.

$169 million under the 600 MW Plan, and in the first thirty (30) years, Mr. McMahon anticipates those savings will increase to $295 million.[31]

Mr. McMahon's analysis tested three scenarios of low to high market prices and three scenarios of low to high wind production. Even under the worst-case scenario where market prices and production are both low, Empire's 600 MW Plan would provide cost savings to customers when compared to the 2016 IRP Plan.[32]

An affidavit filed by the Commission's Staff concurs with Mr. McMahon's analysis and also supports the 600 MW Plan.[33] Staff makes the additional point that the most recent scenarios modeled by Empire take into account the bids received during the RFP process for the wind generation, which means the most recent modeling is updated to provide more accurate estimates of the costs of the wind projects.[34]

Mr. Greg Meyer also submitted an affidavit supporting the Agreement on behalf of MECG.[35] Mr. Meyer explained why MECG changed is position from initially opposing Empire's request to now supporting the 600 MW Plan and the Agreement. MECG's largest concern with the initial proposal had to do with wholesale market prices and production assumptions for wind capacity. MECG was concerned with a scenario where low wholesale market prices meet low wind production. Nevertheless, MECG dropped its opposition when Empire agreed to a Market Price Protection Mechanism designed to protect customers from this scenario. Under the market price protection mechanism, customers will be protected from up to $35 million in revenue deficiencies should such deficiencies arise due to the 600 MW Plan. This provision allowed MECG to not only

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[31] *Id.*

[32] *Id,* p. 5, Figure 2; Tr. Vol. 3, p. 235.

[33] Staff Affidavit, Ex. 103.

[34] *Id.*

withdraw its opposition, but resulted in MECG becoming a strong advocate for the new plan. Mr. Meyer's affidavit includes a table that compares the 600 MW Plan with the 2016 IRP Plan without the wind projects, which shows the 600 MW Plan will be more costly for the first three (3) years, with the two plans having equal costs for years four (4) and five (5), followed by significant customer savings after year five (5).[36] By 2030, the modeling indicates Empire's annual revenue requirement under the 600 MW Plan will be $57 million less than the annual revenue requirement under the 2016 IRP Plan.[37]

c. **_____

[35] Meyer Affidavit, Ex. 351.

[36] *Id.*, Ex. 351, p. 8.

[37] *Id.*, pp. 8, 12.

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d. Corporate Demand for Renewable Energy

There is also an increasing demand for renewable energy options for corporations, and providing those options within Empire's service territory will help attract businesses to Missouri and will help retain the existing companies that seek to power their businesses from renewable energy. Corporations that have specifically indicated a desire for renewable energy include Wal-Mart, Target, Bloomberg, General Motors, IKEA, Proctor & Gamble, Intel, Sprint, General Mills, Kellogg's, Nestle, Unilever, General Electric, and Owens Corning – an increasing list of corporations that see value in renewable energy.[38] Allowing Empire to increase the portion of wind in its energy portfolio will help Missouri retain or attract these and other like-minded companies, which can help boost Missouri's economy generally, and help boost local economies within

[38] Hyman Rebuttal Testimony, Ex. 300, p. 8.

Empire's service territory. Adding large energy users to Empire's system has the added benefit of spreading system costs over a larger customer base, which should lower rates for all customers.

3. Chairman's Four-Point Scenario

Near the conclusion of the evidentiary hearing, Chairman Hall requested feedback regarding a scenario where the Commission issues an order that: (1) finds the plan to build 600 MW of wind generation to be reasonable; (2) finds the proposed financing to be reasonable; (3) authorizes the Company to book plant in service for the wind assets at 3.33% depreciation; and (4) grants the requested variances from the affiliate transaction rules. While DE would also support the Chairman's scenario, DE encourages the Commission to issue findings and conclusions consistent with the Agreement between Empire, DE, the Commission's Staff, the Missouri Energy Consumer's Group ("MECG"), and Renew Missouri, or risk losing the customer protections included in the Agreement. The Agreement presents the Commission with a carefully-balanced compromise between utility company interests, regulator interests, consumer interests, economic interests, and environmental interests.

4. Conclusion

The Division of Energy recommends the Commission approve the Agreement and order its terms be followed. A finding that Empire's plan to build 600 MW of wind generation is reasonable will assist Empire in moving forward with the projects, while not jeopardizing the Commission's authority to review the plan for prudence in the Company's subsequent rate case(s).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served electronically on all counsel of record this 31st day of May 2018.

Marc Poston
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