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	)	

APPLICATION FOR REHEARING

COMES NOW the Missouri Office of the Public Counsel ("OPC" or "Public Counsel") pursuant to § 386.500 RSMo. 2017, and 4 CSR 240-2.160(2) and for its Application for Rehearing of the Public Service Commission's ("PSC" or "Commission") July 11, 2018 Report and Order states as follows:

1. A review of evidentiary record and law applicable in the above-captioned case shows that the Commission's Report and Order is unlawful, arbitrary, capricious, unreasonable, and unsupported by competent and substantial evidence.

2. Commission decisions must be lawful and must be reasonable. *State ex rel Atmos Energy Corp. v Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003). An order is lawful if the Commission acted within its statutory authority. *City of O'Fallon v. Union Elec. Co.,* 462 S.W.3d, 442 (Mo. App. W.D. 2015). An order is reasonable if it is "supported by substantial, competent evidence on the whole record, the decision of the Commission is not arbitrary or capricious or where the [PSC] has not abused its discretion." *State* ex rel. *Praxair, Inc. v. Mo. PSC,* 344 S.W.3d 178, 184 (Mo. banc 2011). Commission decisions must not be in violation of Constitutional provisions, must be supported by competent and substantial evidence upon the whole record, must be made upon lawful procedure, and must not be arbitrary, capricious, or unreasonable.

3. This proceeding arises from an application filed by The Empire District Electric Company ("Empire" or "Company") that sought numerous actions, the majority of which were denied by the Commission, as the Company fundamentally sought an advisory opinion regarding the prudency of a prospective wind project. However, the Order did authorize four requests: (1) a waiver of the 60-day notice requirement, (2) permitting Empire to record certain costs as utility plant in service, (3) assigning a depreciation rate for prospective wind assets, and (4) permitting a variance from the Commission's affiliate transaction rules. In addition, the Order propounds findings of fact and conclusions of law regarding the reasonableness to acquire a prospectively 600 MW wind project, which constitutes an advisory opinion. This application seeks rehearing on two orders: the recording of prospective project costs as plant in service and the affiliate transactions variance. Further, the OPC requests rehearing omit non-pertinent and extraneous conclusions beyond the four issues addressed in its Order. Finally, the OPC requests rehearing of the Order based on the Commission's reliance of non-evidentiary materials in its Findings of Fact.

A. The Commission Should Rehear its Order to Book Cost

4. The Order directing Empire to record costs related to the acquisition of wind assets as utility plant in service 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 overly broad. At issue are the Commission's findings of fact:

> 10. As of the date of the evidentiary hearing, Empire had not entered into any definitive tax equity agreements with tax equity partners, although the company is in advanced discussions with potential partners.

* * * *

> 15. Empire has requested authority to record its capital investment to acquire the wind assets as utility plant in service subject to audit in Empire's next general rate case. . . . .
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> * * * *
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> 17. Empire will indirectly own the wind generation assets. The tax equity structure requires the creation of a separate wind project company to own and operate each wind project. Thus, Empire and the tax equity partner will create a new legal entity in the form of a limited liability company that will own each wind project. Each wind project company will be wholly owned by a holding company, which in turn will be wholly owned by Empire and the tax equity partner.[1]

However, in the conclusions section of its Report and Order the Commission does not provide support for why "[it] will authorize Empire to record its capital investment to acquire the wind assets as utility plant in service subject to audit in Empire's next general rate case . . ."[2] or its following ordered paragraph: "2. The Empire District Electric Company is authorized to record its capital investment to acquire wind generation assets as utility plant in service subject to audit in Empire's next general rate case."[3]

In *State ex rel. Pub. Counsel v. Mo. PSC*, 289 S.W.3d 240 (Mo. App. 2009), the Court said the following:

> Where an agency's findings are not based on competent and substantial evidence, the agency has acted unreasonably and arbitrarily. *Barry Serv. Agency Co., 891 S.W.2d at 892*. As the Commission's findings regarding subsidization and the cost to serve residential customers were not based upon competent and substantial evidence, the Commission's adoption of the SFV rate design cannot be upheld based upon those findings.[4]

[1] Report and Order, pp. 8-10.
[2] Report and Order, p. 19.
[3] Report and Order, p. 24.
[4] *Id.* at 251.

The Commission's conclusion that "[it] will authorize Empire to record its capital investment to acquire the wind assets as utility plant in service subject to audit in Empire's next general rate case . . ." is not supported by competent and substantial evidence.

5. Additionally, Empire failed to properly seek or show cause for a variance from Commission rules. Empire's request to record its investment in wind farms as plant-in-service, is really a request for relief from rule 4 CSR 240-20.030, by which, with certain exceptions, the Commission adopted the accounting requirements of the 1992 version of the FERC USOA for electrical corporations such as Empire. Neither that FERC USOA nor the exceptions contemplate treating plant owned by a subsidiary as utility plant-in-service. They contemplate that the utility has the incidents of ownership—through *direct* ownership or through qualifying capital leases. A tax equity financing partnership is neither.

6. To except from the accounting requirements of the 1992 version of the FERC USOA for electrical corporations requires the utility to apply for relief from the rule for good cause shown.[5] Empire has not shown and the Commission has not found that "good cause." The text of rule 4 CSR 240-20.030(5), follows:

> (5) The commission may waive or grant a variance from the provisions of this rule, in whole or in part, for good cause shown, upon a utility's written application.

Rule 4 CSR 240-2.060 governs the application requirements for requesting relief from rules. In addition to requirements for all applications, it provides:

> (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:

[5] Rule 4 CSR 240-20.030(5).

(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* does not comply with 4 CSR 240-2.060(4)(A) or (B), and the Commission has not complied with the rule 4 CSR 240-20.030(5) requirement of good cause shown for granting a variance.

7. As OPC argued, absent documents which show Empire will have the incidents of ownership of the wind farms, Empire cannot show the good cause rule 4 CSR 240-20.030 requires for a variance from it. Further, even if such definitive documents were in the record, the relief the Commission ordered is overbroad: "2. The Empire District Electric Company is authorized to record its capital investment to acquire wind generation assets as utility plant in service subject to audit in Empire's next general rate case." It should be no broader than to effectuate the 600 MW of tax equity financed wind projects. Such broad authority can only properly be done in a rulemaking.

8. The Commission's view of its authority "to determine Empire's accounting treatment for its investment in the proposed wind generation" does not contemplate nor extend to the bounds necessary to accomplish its Order. On page 18 of its Report and Order, the Commission states, "The Commission has the statutory authority to determine Empire's accounting treatment for its investment in the proposed wind generation[49] and establish a depreciation rate for the wind assets.[50]" Footnote 49 is to § 393.140(8), RSMo, which the Commission correctly quotes: "Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation or person, and have power, after hearing, to prescribe by order the accounts in which

particular outlays and receipts shall be entered, charged or credited." However, that subsection should be read in the context of the entirety of § 393.140, RSMo, and the Public Service Commission Act. Subsection (4) of § 393.140, RSMo, states the Commission shall:

> Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations, electrical corporations, water corporations and sewer corporations engaged in the manufacture, sale or distribution of gas and electricity for light, heat or power, or in the distribution and sale of water for any purpose whatsoever, or in the collection, carriage, treatment and disposal of sewage for municipal, domestic or other necessary beneficial purpose. It may also, in its discretion, prescribe, by order, forms of accounts, records and memoranda to be kept by such persons and corporations. Notice of alterations by the commission in the required method or form of keeping a system of accounts shall be given to such persons or corporations by the commission at least six months before the same shall take effect. Any other and additional forms of accounts, records and memoranda kept by such corporation shall be subject to examination by the commission.

When subsection eight is read in light of subsection four, it is apparent that the "power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited" is limited by the "uniform methods of keeping accounts, records and books, to be observed by . . . electrical corporations . . . engaged in the manufacture, sale or distribution of . . . electricity for light, heat or power . . ." that the Commission prescribes. The Commission has prescribed that electrical corporations such as Empire use the 1992 version of the "Uniform System of Accounts Prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act, as prescribed by the Federal Energy Regulatory Commission (FERC) and published at 18 CFR Part 101 (1992) and 1 FERC Stat. & Regs. paragraph 15,001 and following (1992), except as otherwise provided in this rule [4 CSR 240-20.030]."[6] Therefore, what § 393.140(8), RSMo, empowers the Commission to do is to determine which of these accounts

[6] 4 CSR 240-20.030(1).

any particular outlay or receipt is to be recorded, but, in doing so, the Commission cannot ignore the guidelines of the uniform method of keeping accounts it has prescribed. In other words, the guidelines the Commission has prescribed control, unless they are inapplicable. The only possible exception, based on 4 CSR 240-20.030(5), is that if a utility shows good cause, the commission may permit that utility's recordkeeping not conform in whole, or in part.

B. The Commission Should Rehear its Affiliate Transaction Rule Waiver

9. The Commission should reconsider its order, as Empire failed to submit its motion for variance of the Commission's Affiliate Transactions rules in its *Application*, the entities contemplated in the Order are hypothetical, and the grant is overly broad.

10. 4 CSR 240-20.015(10) details the manner in which electric utilities would seek a variance from the affiliate transactions rules, and require "[t]he scope of a variance will be determined based on the facts and circumstances found in support of the application." A request for variance under 20.015(10) shall be made "upon written application" in accordance with the Chapter 2 filing requirements.[7] *Id.* 4 CSR 240-2.060(4) states that "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."

[7] 20.015(10)(A)1 references that the Commission's filing procedures are "set out in 4 CSR 240-2.060(11)". This rule has not been revised since 2009. The current filing procedure for seeking waiver is identified at 4 CSR 240-2.060(4).

To properly submit a motion for variance and statement of good cause under the Commission's rules, the company *must* include the motion and its good cause statement in its application.

Empire's *Application* filed in this case on October 31, 2017, states the following:

> IV. APPLICATION FOR VARIANCE - AFFILIATE TRANSACTIONS
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> 18. Based on the corporate structure to be utilized in the Customer Savings Plan, there are a number of agreements with affiliates relating to the operation of the new wind generation. Those agreements are identified in Mr. Mertens' Direct Testimony.
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> 19. Commission Rule 4 CSR 240-20.015 contains standards for affiliate transactions. The goods and services addressed by the above affiliate contracts will be priced to the Wind Project Co. in the same manner that they are currently priced to Empire by Liberty Utilities Service Corp. Commission Rule 4 CSR 240-20.015(10) provides that variances from the standards in the affiliate transaction rule may be granted by the Commission. To the extent the above described affiliated transactions may otherwise violate those standards, Empire is requesting a variance as these transactions are a necessary part of the Customer Savings Plan.[8]

Empire's application fails to provide "a complete justification setting out the good cause for granting the variance or waiver", as required by rule. Notably absent from the paragraphs are sufficient arguments substantiating a "complete justification" of good cause. Indeed, the Commission's Report and Order cites to numerous purported benefits that are not identified in the application, but elsewhere in the record.

11. To order such a waiver that was made in violation of the Commission's rules would be an abuse of discretion. "Once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, the agency denies itself the right to violate those rules." *Fowler Land Co., Inc. v. Mo. Dep't of Nat. Res.*, 460 S.W.3d 502, 507 (Mo. App. S.D. 2015). As Empire has failed to properly submit the motion before the Commission, the Commission should reconsider its order and deny Empire's request.

[8] *Application of The Empire District Electric Company for Approval of its Customer Savings Plan and Application for Variance, and Motion for Waiver*, EFIS 2 (Oct. 31, 2017).

12. The Commission's Order regarding the waiver of its variance rules is vague, in that it fails to properly identify the legal entities the waiver applies to. First, the Commission may have difficulty properly identifying the applicable entities, as no such entities exist. As observed in its *Initial Brief*, according to Empire's response to OPC data request 13 provided on May 2, 2018, Empire does not have final or draft articles of incorporation, by-laws, corporate registrations, or any other documentation related to the organization and operation of Wind Hold Co. and Wind Project Co(s).[9]

C. The Commission's Order Constitutes an Impermissible Advisory Opinion

13. At issue in this application for rehearing is the Commission's consideration and comments on the reasonableness of a hypothetical action. Specifically, the Commission's Order states:

> Since the Commission may be presented with these requests in the future, making a legal conclusion on reasonableness now could constitute an improper advisory opinion.
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> ***
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> While the Commission cannot make the legal conclusion that Empire requests, the Commission finds that the millions of dollars in customer savings and the addition of renewable wind energy resulting from the CSP and the Joint Position could be of considerable benefit to Empire's customers and the entire state.[10]

Here, the Commission attempts to avoid propounding an unlawful advisory opinion by asserting a distinction between a "legal conclusion" and a "finding."

[9] Ex. No. 208, OPC witness Lena Mantle's Affidavit, Attachment LMM-1 Pg. 86.
[10] Report and Order, pgs. 21-22.

14. The prohibition on advisory opinions are not limited to legal conclusions, indeed factual findings must not be hypothetical. "The facts on which the decision is demanded must have accrued so that the judgment declares the existing law on an existing state of facts." *Jackson v. Heritage Sav. & Loan Asso.*, 639 S.W.2d 142 (Mo. App. E.D. 1982). Regardless of how the Commission phrases its pronouncement, it has no more authority to issue advisory factual findings than advisory legal opinions. It is a distinction without a difference.

15. Second, the Commission's Order on the issue of the reasonableness to acquire additional wind assets considers a hypothetical question and has no legal effect. "Such actions are merely advisory when the judgement would not settle actual rights. If actual rights cannot be settled the decree would be a pronouncement of only academic interest." *Jackson v. Heritage Sav. & Loan Asso.*, 639 S.W.2d 142 (Mo. App. E.D. 1982) (citations omitted). By its nature, it is self-evident that the Order fails to resolve any issue regarding the wind farm, proving that it is "a pronouncement of only academic interest" and therefore an advisory opinion.

16. The proper recourse in this proceeding is for the Commission to dismiss the points of the application for which it has determined it has insufficient jurisdiction to issue a legal conclusion. Where an adjudicative body has been presented with facts that are not ripe for determination, the body should exercise its discretion and dismiss the cause "by reason of its failure to present issues which the court could intelligently and conclusively adjudicate." *Joplin v. Jasper County*, 161 S.W.2d 411, 414 (Mo. 1942). As the Commission acknowledges, the remedy sought by Empire is preapproval regarding matters of prospective applications, which would constitute

an improper advisory opinion.[11] Likewise, the appropriate remedy in such a circumstance should be dismissal of the offending action, not the proclamation that such would be deemed reasonable. To address these concerns, the Commission should rehear the issue, and issue an amended order that deletes paragraphs 20, 21, 26, 27, 28, 29, 30, 32, 33 and 34 from its findings of fact, as they relate to issues for which the Commission has determined it has no authority to adjudicate at this time.[12] Further, the Commission should delete from its conclusions of law the section titled" "Asbury wind farm on pages 21 and 22. Those sections can be lawfully addressed by an order dismissing those sections of Empire's application.

17. The request to reconsider and remove the extraneous remarks is necessary and appropriate to preserve the OPC's due process rights, as Empire may assert the Commission's previous finding of "reasonableness" as a fact in subsequent applications, or in the evaluation of prudence issues. The circumstances of future proceedings must be determined by the contiguous facts and circumstances of those future proceedings. The OPC and other parties, including Staff, should investigate and be free to scrutinize the sufficiency of every element of an application. The finding by the Commission in the section may frustrate that purpose.

D. The Commission's Order Relies on Non-Evidentiary Materials

18. Throughout its Order, in its Findings of Fact, the Commission relies on citations to Joint Position statements to substantiate its findings. "Except where facts asserted in a party's brief are conceded to be true by his or her adversary, statements in briefs are not evidence and are

[11] *Report and Order*, Pg. 21.
[12] *Id.* at Pgs. 12-18.

insufficient to supply essential matters for review." 898 S.W.2d 112, 117 (Mo. App. 1995) (internal citations omitted).[13] Position statements, like briefs, cannot be given evidentiary weight to determine a fact. As such, the Joint Position Statement is not evidence, and therefore cannot be relied on in its findings. The Commission inappropriately relies on the Joint Position Statement in two separate ways: the first where the Commission cites directly to the Joint Position statement as authoritative evidence, and the second quotes the Joint Position statement as the authority of the fact while citing to an affidavit filed in support of the agreement that the Commission asserts is a position of a signatory.

19. In Paragraph 20, the Commission only cites the Joint Position Statement in support of a grant variances to Commission Rule 4 CSR 240-20.015(10) and 20.015(2)(A), and (3). This is the only reference in the factual findings wherein parties are identified as supporting the variance. In fact, the Commission cites to Paragraph 20 in its Conclusion of Law on the issue.[14] Since the Joint Position Statements are not evidence, and the Commission failed to identify a cause on which to grant waiver, the determination is not supported by record evidence, and therefore arbitrary and capacious.

20. In Paragraphs 23, 24, 29, 30, 32, 33, and 34, the Commission mentions the Joint Position Statement as the authority regarding signatories' recommendations and then cites to

[13] The OPC and the City of Joplin timely filed objections to the Non-Unanimous Stipulation and Agreement, and the OPC filed argued against the terms of the Joint Position Statement in its initial and reply briefs. No matter identified in the Joint Position Statement can be deemed conceded.
[14] *Id.* Pg. 19.

affidavits filed in support of the agreement. However, the characterization of these positions omits Paragraph 2 of the agreement:

> If the Commission does not approve this Stipulation unconditionally and without modification, or if the Commission approves the Stipulation with modifications or conditions to which a Signatory objects, then this Stipulation shall be void and none of the Signatories shall be bound by any of the agreements or provisions hereof.[15]

To portray the signatories' positions as a finding of fact when the Commission denied the Stipulation and Agreement likely overstates the parties' positions in the case. The affidavits filed in support of the agreement were filed in support of the *whole* agreement, and whether any signatory would continue to recommend specific aspects of the agreement were the Commission to deny the Stipulation is speculative. Such affidavits filed in support of a Stipulation rejected by the Commission is a questionable basis to determine a fact, and the Commission should rehear this proceeding to address this concern and omit the aforementioned paragraphs.

E. Commission Should Rehear Given Its Denial for OPC's Extension

21. The signatories to the Stipulation and Agreement in this case violated the Commission's procedural order which required the presentation of workpapers two days after the filing of testimony. The Commission's order required that "Parties shall provide all workpapers, in electronic format, whenever feasible, within two business days following the date on which the related testimony is filed."[16] On April 20, the Commission amended its procedural schedule, directing parties to file a stipulation and agreement and file affidavits in support no later than April 24.[17] The Order also limits discovery on the Stipulation and Agreement to April 27.[18]

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[15] *Joint Position*, p. 1-2.
[16] *Order Setting Procedural Schedule and Other Procedural Requirements*, EFIS 37, p. 2 (Dec. 13, 2017).
[17] *Order Amending Procedural Schedule*, EFIS 100, p. 1 (Apr. 20, 2018).
[18] *Id*.

As a term of the Stipulation and Agreement, the signatories colluded to withhold work papers and documentation pertaining to the Stipulation and Agreement in Paragraph 7 of the document, stating:

> 7. The Signatories agree that any and all discussions, suggestions, or memoranda reviewed or discussed, related to this Stipulation shall be privileged and shall not be subject to discovery, admissible in evidence, or in any way used, described or discussed.

As detailed in Lena Mantle's affidavit, the signatories did withhold spreadsheets that provided supporting information to the Stipulation and Agreement. The existence of these sheets were not known to OPC until May 1, when they were provided as a response to a data request. Ms. Mantle states:

> This spreadsheet, which is not attached to this affidavit due to its voluminous nature, contains more details regarding the results of the modeling of the S&A by Empire. This spreadsheet includes the information regarding the S&A plan which was not provided in the workpapers supporting the S&A provided with the filing of the S&A. The spreadsheet attached to the data request response includes, among other analysis, a rate impact calculation, a treatment of the replacement of the current wind PPA and Empire's outputs from the modelling of the S&A, including unit information, income statements, and capital expenditures for scenarios with high and low gas prices with the 2017 ABB Fall market price forecasts.[19]

The signatories of the Stipulation and Agreement withheld workpapers pertinent to this proceeding in contravention to the Commission's order. This concern proved material, given the Commission's Footnote 34 wherein it dismisses the testimony of an OPC witness for discrepancies in his initial analysis,[20] despite only having three days with the information and the inability to conduct discovery after April 27.

[19] Ex. 208, p. 6.
[20] *Report and Order*, Pg. 14

22. The OPC raised several objections regarding the other parties' failure to comply with discovery,[21] or failure to produce a finalized Stipulation and Agreement by the April 24 deadline.[22] The Commission denied both motions to seek brief accommodation to perform discovery necessary for the provision of its case, and permitted the parties to violate the ordered procedural schedule. The Commission should rehear the issues and provide all parties an equal opportunity to conduct discovery and present its case.

Wherefore, the Commission's Report and Order includes extraneous factual findings, some of which without an evidentiary basis, so as to propound an advisory opinion or answer a hypothetical question, the Commission should strike the paragraphs of the order unrelated to its determination of the account to record Empire's depreciable wind assets, as detailed above.

Respectfully submitted,

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[21] *The Office of the Public Counsel's Second Motion to Suspend Procedural Schedule*, EFIS 115 (May 3, 2018).
[22] *The Office of the Public Counsel's Motion to Suspend Procedural Schedule*, EFIS 111 (May 2, 2018).

CERTIFICATE OF SERVICE

On this 9th day of August 2018, I hereby certify that a true and correct copy of the foregoing motion was submitted to all relevant parties by depositing this motion into the Commission's Electronic Filing Information System ("EFIS").

/s/Hampton Williams