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

EMPIRE'S REPLY BRIEF

Public Version

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COMES NOW The Empire District Electric Company ("Empire" or the "Company") and, as its Reply Brief, respectfully states as follows to the Missouri Public Service Commission ("Commission"):

I. <u>INTRODUCTION</u>

Initial Post-Hearing Briefs were filed by the Staff of the Commission ("Staff"), the Office of the Public Counsel ("OPC"), the Missouri Department of Economic Development ("DE"), Missouri Energy Consumers Group ("MECG"), Renew Missouri Advocates ("Renew Missouri"), the City of Joplin, Missouri ("Joplin"), and the Sierra Club.[1] The briefs filed by MECG, DE, Staff, Renew Missouri, and Sierra Club are supportive of Empire's proposed acquisition of 600 MW of wind generation (the "Wind Projects") included in the Non-Unanimous Stipulation and Agreement (the "Stipulation").

OPC and Joplin, on the other hand, go to great lengths to find every conceivable reason why the Commission should reject the Stipulation and the Customer Savings Plan to block the acquisition of new wind generation. Most of their arguments are based on hyperbole, unsupported conclusions, and unnecessarily extreme language and positions.

First, the Company would point out that OPC's claim that "the plan would unnecessarily inflict additional costs on ratepayers" and would constitute "economic waste" (OPC's Initial Brief, pp. 51-52) is incorrect. As the Company has repeatedly explained, it will actually cost customers **<u>more</u>** if Empire maintains the status quo. *See* Empire's Initial Brief, pp. 2, 22. While it is inevitable that adding new generation will come at a cost, those costs only negatively impact the revenue requirement in the first two years post-wind acquisition. Tr. 716-17. Conveniently,

[1] The fact that Empire does not respond to each and every statement contained in those briefs should not be taken as acquiescence as to the matters not addressed. Rather, Empire's decision simply reflects the fact that those matters were adequately addressed in its Initial Post-Hearing Brief.

OPC and Joplin ignore the ensuing twenty to thirty years that follow, when the Wind Projects will result in anywhere from $169 million to $295 million in **savings** for customers. Exh. 8, McMahon Affidavit, pp. 3-4.

The fact of the matter remains that based on significant evidence in the record, whether the Commission approves the Stipulation or the Customer Savings Plan, customers will save money compared to continuing Empire's current resource acquisition strategy which will cost more over the long run. A primary driver of these savings is the current availability of Production Tax Credits, which will singularly reduce the cost to acquire the Wind Projects between $4-$7 MW/hour. Tr. 468-469; Exh. 11, Mooney Dir., p. 8. As Mr. Mertens pointed out at the hearing, it simply would not be possible to otherwise achieve these levels of savings:

> …the biggest deadline is related to the protection [sic] tax credit. And that provides our customers basically a 50 percent discount….if you would equate that to turbine technology, we would have to see a 50 percent improvement in the amount of wind that –the capacity factor. So we'd have to go from a 45 percent capacity factor to a 90 percent capacity factor. I call tell you today that's just not possible unless we make turbines, you know, thousands of feet tall. So the other side of it would be we'd have to cut the capital costs in half from, you know, the roughly 15 to $1600 KW down to 750. Is that in the long-term impossible? No. Do I – of my professional opinion believe that's going to happen in the next four or five years? Absolutely not.

Tr. 322-323.

As to OPC and Joplin's arguments that the wind generation is not needed, the reality is that the Wind Projects contemplated by the Stipulation would not come online until the 2020/2021 time horizon. It is not long after that that the Elk River wind farm purchase power agreement expires (150 MW claimed capacity expires in 2026), and the Meridian Way wind farm purchase power agreement expires (105 MW claimed capacity expires in 2029). Tr. 494; Stipulation Appendix A. When those contracts expire, not only will the Company need replacement capacity, Mr. Wilson explained that Empire will need some form of renewable

generation to meet its Missouri Renewable Portfolio Standard ("RPS") requirements. Tr. 494-5. The Wind Projects can meet those requirements. *Id*. Empire's plan to acquire 600 MW of wind in conformance with the Stipulation is reasonable, because the Company can acquire wind now at a substantial discount given that it will be highly subsidized in light of current federal tax policy, and have it online by the mid 2020s when it is needed, all while saving customers money. As MECG's counsel described in his opening statement at the hearing, this is "an opportunity to truly bend the cost curve." Tr. 101.

II. <u>COMMISSION AUTHORITY</u>

a. <u>There Is No Advisory Opinion/Declaratory Judgment Sought In This Case</u>.

Joplin and OPC allege that Empire seeks an advisory opinion and that Empire's Application should, therefore, be dismissed. Joplin's Brief, p. 4; OPC's Brief, p. 17.

Joplin cites as its primary authority for this position the Commission's "Order Partially Dismissing Application for Failure to State a Claim" in *In the Matter of the Application of Middle Fork Water Company*, Case No. WO-2007-0266 (March 20, 2007). In *Middle Fork*, as is found in the section cited by Joplin on page 7 of its Initial Brief herein, Middle Fork had requested findings "regarding the <u>standards and principles that will govern its valuation</u> of certain <u>unspecified future investments</u>" and "how those <u>hypothetical future investments</u> would be characterized and treated by the Commission for <u>ratemaking purposes</u>." *Id.* (emphasis added).

First, the subject of this case, as described in the Application and modified by the Stipulation, is a specified project – up to 600 MWs of wind generation under a set of specific parameters associated with location, financing, and other matters. The fact that the project has not yet been constructed does not make it hypothetical. In fact, the projects under consideration are very real. They include projects from ten wind developers who proposed 18 different sites for

potential acquisition, in addition to bids from six developers on the two sites that Empire has under development. Exh. 20, Wilson Sur., p. 4.

Although unlike the *Middle Fork* case, the status of this case is very similar to other cases determined by the Commission. 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.

Second, there is no request associated with how this project would be treated for "ratemaking purposes." In fact, the Signatories expressly recognize and affirmatively state that the Stipulation does not preclude the Commission and the Signatories from reviewing the reasonableness of the costs of the Wind Projects and CCR rules compliance in a general rate proceeding following the date when the Wind Projects are fully operational and used for service and any CCR rules compliance costs have been incurred. Stipulation, p. 5, para. 14.e,, 19.c. Additionally, the Stipulation makes provision for "in-service" criteria to guide future decisions as to whether the Wind Projects are "fully operational and used for service" (RSMo. §393.135) before considered for any rate recovery. Stipulation, para. 17.a. How the Wind Projects and any CCR investment will be treated for "ratemaking purposes" remains squarely within the issues to be determined in future rate cases.

In support of its position, OPC also notes that the General Assembly specifically provided the Missouri Ethics Commission ("MEC") with the power to issue "advisory opinions" (Section 105.955.16(1)). OPC's Initial Brief, p. 1. Attached for comparison is just such an

advisory opinion, which, on its face, is clearly distinguishable from the Stipulation that is before the Commission. In the case of the attached advisory opinion, the MEC calls out various laws and regulations of which the applicant must be aware, effectively providing the applicant with a list of "dos and don'ts" for its proposed activity. This is a far cry from the process and considerations before this Commission, where the Signatories have requested that an economic regulator make specific, adjudicatory determinations that have been subject to extensive discovery and cross examination. Section 105.955.16(1) does not call for discovery or a hearing, such as have been available and exercised in this proceeding. There are no adversarial parties in the MEC setting, as there are in this proceeding. There is also no specific request for relief that has been made to the Ethics Commission, as Empire has requested of the Public Service Commission. Thus, there is nothing analogous about the role of the MEC in issuing its advisory opinions to the matter that is before this Commission. Empire's Application represents more than mere "hypothetical future investments." There is no "advisory opinion" sought by Empire in this case.

b. There is No Pre-Approval of a Management Decision Sought in this Case.

Joplin and OPC allege that "pre-approval" of a management decision is sought and that the Commission has no authority to provide such approval. Joplin's Initial Brief, p. 8; OPC's Initial Brief, p. 11.

Joplin begins its argument by quoting the much used, and undisputed, language that the Commission is a "creature of statute" and that questions of lawfulness are determined as to whether or not the Commission has statutory authority to act. Joplin's Initial Brief, p. 9. Joplin errs when it alleges that "the Company and Signatories to the Non-Unanimous Stipulation cannot point to any statutory authority for this Commission to grant the relief requested. . . ." *Id.* at 10.

Empire's Initial Post-Hearing Brief identified both the statutes establishing the Commission's general jurisdiction over these matters and the specific statutory authority for the Commission to grant the relief requested. Empire's Initial Brief, pp. 5-8.

The Court of Appeals has relied on the statutes providing for the Commission's general jurisdiction in reviewing the Union Electric Company' experimental alternative regulatory plans. *Union Electric Company v. Public Service Commission*, 136 S.W.3d 146 (Mo.App. 2004). In finding that the Commission had jurisdiction over the matters involved, the Court stated:

> That the Commission is charged with statutory obligations and duties regarding utility regulation is beyond question. We construe the EARP, not as an abdication of the Commission's responsibility to regulate, but as embodiment of it. It was an attempt to streamline the rate monitoring process and provided a means to resolve issues in lieu of the formal complaint process. The EARP contemplated extensive and continuous monitoring and embraced the recognition that not all items could be anticipated and addressed and that disputes could arise. The Commission's role is grounded in this recognition. That being said, we find that the Commission, in making the disputed adjustments, did not change or violate the terms of the EARP or its role thereunder. The terms of the EARP permitted the Commission's intervention into the areas of dispute between the parties.

Id. at 152.

Again, under its general supervisory authority, the Commission has jurisdiction to approve the reasonableness of the framework proposed by the Signatories that Empire acquire wind generation with a tax equity partner.

The specific statutes supporting the orders and findings requested by the Stipulation follow:

1) 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," and;

2) Section 393.240.2 provides that the Commission "may, from time to time, ascertain and determine and by order fix the proper and adequate rates of depreciation of the several classes of property of such corporation, person or public utility."

The Commission's issuance of orders pursuant to specific statutory authority does not constitute pre-approval.

A review of the "four concerns" related to "pre-approval" cited by the OPC (OPC's Initial Brief, pp. 12-13) further establishes that there is no such "pre-approval" sought in this case:

> The first problem is the potential for the shifting of technology and demand risks from the shareholders to the ratepayers. The second problem is the significant resources preapproval … would require of the Commission. The third problem, preapproval is likely to lock the utility into the plan approved by the Commission. The fourth problem is that, once approved, a utility may have less incentive to closely scrutinize its costs.

In the Matter of the Application of Kansas City Power & Light Company, 1 Mo.P.S.C.3d 359, 364 (EO-92-250) (August 26, 1992).

OPC argues that the first concern exists because Empire's customers will be "cost-liable in subsequent proceedings." Empire explained in its Initial Post-Hearing Brief (Empire's Initial Brief, pp. 28-29) that while there is a short term 11.75% rate increase projected in the first rate case after Empire acquires the wind farms, that should be viewed in the context of what is projected to happen in the absence of the Stipulation Plan. Exh. 351, Meyer Aff., p. 7.

Rates would NOT be approximately 12% lower in the absence of the Stipulation Plan. *Id.*; Tr. 693-694, Meyer. The rate increase in the absence of the Stipulation Plan is projected to be 8.42%. Tr. 522-523, Krygier; Tr. 575-576, Holmes. The difference associated with the Stipulation Plan is approximately 3.33%. *Id.*; Exh. 216. However, by 2024, there is no projected difference in rates when comparing the status quo and the Stipulation Plan, and, by 2030, the

revenue requirement from the Stipulation Plan is ***$57 million less*** than under the status quo. Exh. 351, Meyer Aff., p. 8.

This having been said, there is no agreement or request that the Commission find what will happen in Empire's future rate cases. As noted, the Stipulation expressly recognizes and affirmatively states that the Stipulation does not preclude the Commission and the Signatories from reviewing the reasonableness of the costs of the Wind Projects and CCR rules compliance in a general rate proceeding following the date when the Wind Projects are fully operational and used for service and any CCR rules compliance costs have been incurred. Stipulation, p. 5, para. 14.e,, 19.c.

In addition, as described *infra*, because the Market Price Protection mechanism focuses on revenues in relation to the Wind Projects' revenue requirement, it greatly incentivizes Empire to drive construction costs (to include transmission) as low as possible, and to maximize the contribution of the tax equity partner. Tr. 491-492, Mooney. Any failure on the part of Empire to accomplish these goals drives the Company's exposure under the mechanism higher, along with the revenue requirement. Tr. 734-735, Meyer. Risk remains with the shareholders.

The third and fourth concerns are equally inapplicable to the Stipulation. Again, because there is no rate recovery approval being requested in the Stipulation, this does not qualify as a request for "pre-approval," and, for that reason alone, Empire would not be "locked" into a plan and would continue to be incentivized to closely scrutinize its costs. Additionally, as described above, the Stipulation continues to place risk on Empire associated with the projects.

c. Empire is Required, and Will, Apply for Certificates of Convenience and Necessity ("CCN").

Joplin erroneously alleges that Empire is "purposely evading the existing and exclusive statutory process under Section 393.170, RSMo, which provides for certificates of convenience and necessity to be issued by the Commission." Joplin's Initial Brief, p. 3, *see also* pp. 9-10.

There is no such "evasion" – "purposeful" or otherwise. Empire's testimony confirmed that it would expect to separately file an application for necessary CCNs. Exh. 3, Krygier Sur., p. 10. Further, the Stipulation expressly calls for the filing of subsequent applications for CCNs. Stipulation, para. 16.a. Like many of its positions, Joplin's allegations regarding CCN applications ignore the evidence before the Commission.

Somewhat similarly, OPC makes the observation that "this is not the case in which the Commission can grant the certificate for Empire to move forward to execute the plan laid out in the Stipulation." OPC's Initial Brief, p. 23. OPC further accuses Empire of having "evaded" questions about the need for a certificate. *Id*. at 23-24. The section of the transcript cited by OPC for this allegation is a bit mysterious, as Mr. Krygier was never asked about the Company's plans in regard to a certificate allegation. (Perhaps OPC "evaded" asking the question?) However, as stated above, both testimony and the Stipulation expressly describe Empire's intent in regard to CCN applications.

d. Ownership of the Wind Projects is in the Public Interest.

Joplin suggests that the Stipulation should be rejected because there is "no present need for additional generation." Joplin's Initial Brief, p. 12. OPC similarly states that the addition of wind would inflict an "economic waste" on customers because it is "not necessary to serve" meet capacity requirements, or to meet environmental compliance. OPC's Initial Brief, p. 51. None of

these matters are a prerequisite to a finding of "public interest," nor even "necessity" within the context of a CCN case.

In *Office of Pub. Counsel v. Mo. PSC (In re KCP&L Greater Mo. Operations Co.)*, 515 S.W.3d 754 (Mo.App. 2016) ("*GMO Case*"), OPC alleged that the Commission's decision granting a CCN for a solar facility was unlawful and unreasonable because the applicant had not met its burden to prove that the solar plant was necessary or convenient for the public service in that (1) the plant was not needed to serve GMO load, (2) the plant costs were in excess of reasonable alternatives, (3) the plant was not needed to comply with environmental regulations, and (4) the plant protected the utility rather than the public. *Id*. at 760.

The Court of Appeals found that none of the issues raised by OPC were determinative of "necessity." The underlying public interest is the controlling concern and "it is within the discretion of the . . . Commission to determine when the evidence indicates the public interest would be served in the award of the certificate." *Id*. at 764.

In this case, public interest is established by the fact that the proposed Wind Projects will take advantage of real opportunities that exist today to add generation capacity to Empire's fleet at reduced cost given the availability of Production Tax Credits, which in turn will provide low cost energy for Empire's customers for years to come.

Further, the Wind Projects satisfy the stated public policy objective of conserving natural resources and pursuing renewable energy sources. Empire described the State Energy Policy in this regard in its Initial Brief. *See* p. 4. The Court of Appeals described this general public policy with regard to the Renewable Energy Standards ("RES") in the *GMO Case*:

> Moreover, Appellants fail to acknowledge that the same cases they generally rely on also emphasize "a necessity for the conservation of energy and of natural resources." *Pub. Water Supply*, 600 S.W.2d at 154 (citing *Atkinson*, 204 S.W. at 898-99) (inner quotation marks omitted). The public policy of the state to

> conserve natural resources and pursue renewable energy sources is reflected in Missouri's RES. *See Moorshead v. United Rys. Co.*, 119 Mo. App. 541, 96 S.W. 261, 271 (Mo. App. 1906) ("[T]he very highest evidence of the public policy of any state is its statutory law").

Id. at 763.

Joplin proceeds to also suggest there is not adequate explanation as to why the expiring wind generation power purchase agreements (255 MWs) could not be replaced by extensions of these PPAs, or new PPAs. Joplin's Initial Brief, p. 13. Empire provided evidence of the advantages associated with wind generation ownership, as opposed to PPAs, in both its pre-filed and live testimony.

Empire witness Mertens explained that by owning and operating the wind generation assets, Empire is in a position of control over the generation of electricity for its customers. Exh. 9, Mertens Dir., p. 9. An example as to how this is important can be found in the existing PPAs concerning Elk River and Meridian Way. Those contracts were first entered in 2005 and 2008 (Tr. 319), and the prices in those contracts are now higher than the existing market prices. Tr. 394, Mertens. If Empire were the owner of those facilities, it could retrofit those facilities to make them more efficient for customers, get more energy out of them, and have lower operation and maintenance costs. *Id*. However, the current owners of those facilities have no economic incentive to do that and would only pass on those costs to Empire, thereby driving the already out of market rates higher. *Id*.

Further, Empire is in a unique position to benefit from Algonquin Power & Utilities Corp.'s expertise in owning and managing wind farms, and its expertise developing such opportunities with tax equity partners, which will deliver substantial savings to the Empire's customers over the life of the wind generation assets. Exh. 9, Mertens Dir., p. 9. In comparison, PPAs typically have terms of approximately 20 years. *Id*. If Empire were to enter into such a

PPA, it would receive no value for its customers from the wind generation unit after the PPA had terminated. *Id*.

In this case, Empire's customers will receive the benefits of the wind generation assets over their entire lifetime, which Empire anticipates will extend well beyond 20 years. Exh. 9, Mertens Dir., p. 9; Exh. 18, Watson Dir., p. 9 (recommending a 30 year life for the Wind Projects). Further, the counterparty to a PPA would markup the costs under the PPA, making the transaction less desirable for customers compared to utility ownership of the generation asset, particularly in partnership with tax equity which maximizes customer savings. Exh. 9, Mertens Dir., p. 9.

e. <u>There is No Request for the Commission to Make Management Decisions.</u>

The OPC Brief recites the well-established principal that the Commission "does not have authority to take over the general management of any utility or to dictate the manner in which the company shall conduct its business." OPC's Initial Brief, p. 15. While this is an accurate statement, it is also unrelated to the requests being made in this case.

The Commission has not been asked, nor attempted, to direct the general management of the Company or to dictate the manner in which Empire will conduct its business. The Commission has been asked to review and provide certain orders and factual findings based upon a plan put forth by Empire. This process is the same as many matters that come before this Commission. Nothing about what the Commission has been asked to do would direct or mandate specific conduct on the part of Empire. A positive decision on the part of the Commission will certainly assist in the Company's process of constructing the referenced wind generation facilities. However, the Commission will not be attempting to manage the day-to-day affairs of Empire as it relates to the Wind Projects, such as dictating that Empire use a certain

contractor or equipment from a particular manufacturer, nor even directing that the project be completed.

In connection with this issue, OPC asserts that something is amiss because Empire's Board of Directors has not granted Empire the authority to execute contracts to acquire the Wind Projects. OPC's Initial Brief, pp. 16, 23. First, this assertion is devoid of any citation to corporate, Commission, or other law that would require such approval. That is because there is none. Second, Empire witness Mertens explained that it is Empire's longstanding practice to get Empire Board of Directors' approval prior to entering into contracts for large energy resource acquisitions. Tr. 359-360. At the time of the hearing, specific contracts were not ready for approval, thus, there would be no reason for the Board to act as of now. *Id*. Similar approval would be obtained prior to entering into tax equity agreements. Tr. 460. Thus, there is no basis for OPC's criticism.

Lastly, in regard to this issue of management discretion, OPC attempts to somehow draw a contrast between arguments made by Empire in OPC's pending appeal of the Sixth Prudence Review of Empire's Fuel Adjustment Clause ("FAC") (MoPSC Case No. EO-2017-0065). OPC's Initial Brief, p. 16. However, Empire's positions are consistent. Rather than waiting for a hindsight second-guess, as suggested by OPC in the FAC review, Empire is suggesting that the Commission provide information at the time decisions are being made. Such review does not usurp Empire's management discretion. Instead, it provides valuable information that Empire should, and will, take into account as it moves forward.

f. <u>The Proposed Findings of Fact on Tax Equity Financing are Within the Commission's Authority.</u>

OPC states that the Commission does not have authority to authorize the proposed tax equity financing structure. OPC's Initial Brief, p. 26. Empire has not asked that the entire structure be approved (nor is such approval required under Sections 393.180 or 393.200).

What Empire has requested is that in conjunction with its order, the Commission make a finding of fact (Empire's Initial Brief, pp. 32-33):

> That given the information presented in Case No. EO-2018-0092, and considering that Empire must make decisions prospectively, rather than in reliance on hindsight, the decision to acquire up to 600 MWs of Wind Projects under the terms of this Stipulation is reasonable. (Stip., p. 5, para. 14.e)

The "terms of this Stipulation" contemplate tax equity financing within specified parameters. Stipulation, pp. 10-11, para. 18.a. These parameters enable Empire to reduce the capital investment it needs to construct the Wind Projects by allowing a tax equity partner to make use of available Production Tax Credits and accelerated tax depreciation using the five-year Modified Accelerated Cost Recovery System schedule. Exh. 11, Mooney Dir., p. 8. This partnership will result in between $4 and $7 per MW hour savings for Empire's customers for any generation that is acquired. Exh. 11, Mooney Dir., p. 8.

Further, should the tax equity structure require specific Commission approval, both Empire's testimony and the Stipulation acknowledge that a separate application for such approval shall be filed. Empire witness Krygier explained in his Surrebuttal Testimony that Empire was not seeking such approval in this case and offered certain commitments in regard to future financing applications. Exh. 3, Krygier Sur., pp. 9-10. Paragraph 16 of the Stipulation further memorializes that commitment. Exh. 4P, Krygier Aff., para. 6.

g. The Commission Has Authority to Establish Depreciation Rates for Wind Projects.

In regard to Empire's request that the Commission establish a depreciation rate for the Wind Projects, OPC acknowledges that the Commission has authority to set depreciation rates where a new type of asset is placed in service. OPC's Initial Brief, p. 31. However, OPC alleges that the Commission has no jurisdiction to set a depreciation rate in this situation because "Empire will not own the assets." *Id*.

In support of this position, OPC cites a Kansas City Power & Light Company ("KCPL") case (MoPSC Case No. EO-2012-0340) concerning expenses related to a new highway overpass. There the Commission ordered the expenses "amortized" rather than "depreciated" because KCPL did not own the overpass (presumably either directly or indirectly).

Empire's situation is different. First, Empire will indirectly own the wind generation assets. Empire will have an ownership interest in Wind Hold Co., which in turn will own 100% of the Wind Project Co. Mooney Dir., pp. 8-19. Additionally, as a part of this case, Empire has requested in accordance with Section 393.140(8), 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." Stipulation, p. 5, para. 14.d. If Empire's capital investment is so recorded, it will need a depreciation rate.

h. The Record is Replete with Competent and Substantial Evidence to Support the Stipulation.

Joplin further suggests that there is "no" competent and substantial evidence to support the Stipulation. Joplin's Initial Brief, p. 13. This is a fairly extraordinary position. Joplin does not suggest merely that there is not sufficient competent and substantial evidence, but that there is

"no" such evidence in the record that would support a finding in favor of the elements of the Stipulation.

"The courts define competent evidence as relevant and admissible evidence that can establish the fact at issue." *Loven v. Greene County*, 63 S.W.3d 278, 292 (Mo.App. 2001); citing *Consolidated Sch. Dist. No. 2 v. King,* 786 S.W.2d 217, 219 (Mo.App. W.D. 1990). "Substantial evidence has been defined to mean 'competent evidence which, if believed, would have probative force on the issues'. *Midstate Oil Company, Inc. v. Missouri Commission on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984), citing *Barnes Hospital v. Missouri Commission on Human Rights*, 661 S.W.2d 534, 537 (Mo. banc 1983)." *Farnsworth v. Missouri Dep't of Corrections & Human Resources*, 747 S.W.2d 180, 188 (Mo.App. 1988).

The record in this case is full of testimony provided by Empire, Staff, MECG, and others that is both competent and substantial in regard to the issues to be decided by the Commission. An allegation that there is "no" such evidence could only indicate a lack of familiarity with the record in this case.

i. OPC's Arguments Regarding the Coal Combustion Residuals Rule, Asbury Retirement, and Undepreciated Investment are Red Herrings.

OPC makes a series of arguments concerning the proposed treatment of the Asbury generation facility most of which are superfluous to this proceeding. OPC's Initial Brief, pp. 28-31.

For example, OPC argues that "it would be unreasonable for Empire not to comply with the law; therefore, it needs to continually evaluate whether to comply with the CCR rules, either by investing to keep Asbury in compliance or by retiring Asbury." OPC's Initial Brief, p. 28. This is a statement of the obvious – that Empire must always be evaluating compliance with legal requirements. Empire's concern, and the reason the Asbury issue is included in the

Stipulation, is that there is a difference of opinion as to the factors OPC identifies in regard to retirement considerations – 1) likelihood of future net positive margins; and, 2) cost-effectiveness of Asbury in providing generating resource capacity. *Id.* Parties to this case – especially Staff and MECG – have explained in detail the value they place on Asbury's continued operation in at least the near term. Empire has provided evidence to the contrary. In the end, this is an important question for both the Company and its customers and it is important that all involved understand the implications of decisions to be made.

OPC further suggests that a Commission decision concerning the potential retirement of Asbury would be a prohibited advisory opinion. OPC's Initial Brief, p. 29. OPC accurately states that no party appears to be actively advocating for the retirement of Asbury at this time. Further, the Stipulation does not ask for approval of the decision to leave Asbury open at this time. Thus, there does not appear to be an issue.

Lastly, OPC argues that the Commission does not have authority to order "recovery" of the undepreciated investment in Asbury. OPC's Initial Brief, p. 30. Again, this is a fight with no opponent. Empire's Application asks for an accounting order allowing it to record as a regulatory asset the remaining undepreciated plant balance at the time of Asbury's retirement. Such order would have allowed the balance to remain on Empire's books at least until it could be addressed in a subsequent rate case. Empire did not seek an order granting "recovery."

OPC also makes an argument that the law would not permit recovery of any undepreciated amounts (existing investment or new CCR rule investment) under any circumstance, once Asbury is retired. While these amounts may not be continued to be recorded as plant in service once Asbury is retired, their treatment will be within the Commission's authority to decide. Section 393.140(8).

Moreover, OPC cites *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 47 S.W.2d 102 (1931) in support of its position. A provision of that case OPC did not quote was the Missouri Supreme Court's statement that: "A public utility is entitled to earn a reasonable sum for depreciation of its property, including necessary retirements, ordinary obsolescence and diminishing usefulness which cannot be arrested by repairs . . . ." *City of St. Louis*, 47 S.W.2d at 111.

A Commission failure to provide a return of undepreciated investments associated with plant suffering from ordinary obsolescence (the old St. Joseph treatment plant) was found by the Circuit Court on appeal of *In the Matter of Missouri-American Water Company*, Case No. WR-2000-281 (August 31, 2000), to be a taking or confiscation of its property in violation of the Fifth Amendment of the United States Constitution, applicable to the States under the Fourteenth Amendment, and Art. I, Sec. 26 of the Missouri Constitution. *State of Missouri ex rel. Missouri-American Water Company v. Public Service Commission*, Case No. 00CV325014 (May 25, 2001).

Provided that Asbury remains in service in the near term, this is not an issue which the Commission must resolve in this case. However, if it does arise in the future, it will likely be because of "ordinary obsolescence and diminishing usefulness," not "extraordinary supersession" as suggested by OPC.

III. MODELING AND RELATED MATTERS

a. The Model Used to Determine the Savings Associated with the CSP and the Stipulation is Sound.

Both OPC and Joplin wage wholesale attacks on the modeling performed in support of the Customer Savings Plan and the Stipulation, referring to the model inputs as "unreasonable

and unsupported by any evidence," (Joplin's Initial Brief, p. 14), the "catalog of false presumptions, errors and omissions" relied upon by Empire (OPC's Initial Brief, p. 35), and finally the claim that the model "is so unreasonable that it fails to give this Commission any confidence that Customers will not be significantly harmed by Empire's proposal…" (Joplin's Initial Brief, p. 14). The Commission should reject OPC and Joplin's positions, because they ignore substantial record evidence in support of key assumptions in the model, including market prices (from ABB, a trusted third party source), capacity factors (the results of the competitive RFP process reviewed by a third party engineering firm), and capital costs (also the result of the competitive RFP process). Simply put, OPC's and Joplin's positions are incorrect.

b. <u>The ABB Market Price Forecast is Reliable Evidence.</u>

The foundation of the modeling in this case (referred to as the Generation Fleet Savings Analysis or "GFSA") are market price forecasts provided by ABB. ABB market price forecasts have been relied upon by Empire for resource planning for over a decade (Exh. 9, Mertens Dir., p. 7) and are the source of market prices that every single investor owned electric utility in Missouri relies upon in conducting resource planning under the Commission's Electric Utility Resource Planning Rules. Tr. 778-79. It is also important to note that the ABB forecast used by Empire for the GFSA was ABB's standard forecast (Exh. 6P, McMahon Dir., pp. 25-8), not a forecast that was produced for the purpose of driving results in this case. Tr. 278-9. Further, not a single party to this proceeding produced a competing forecast.

Despite the fact that Empire relied on a long-used and widely relied upon source of market forecasts, Joplin claims that Empire's reliance on ABB's thirty year price forecast is unreasonable. Joplin's Initial Brief, p. 20. Using Joplin's reasoning, all electric utility resource planning would be unreasonable to the extent it was premised on ABB's market forecasts. This

position is not only unrealistic, but untenable because utilities have to rely on *some* form of market forecast in conducting resource planning. As Mr. Holmes indicated at the hearing, in some respects, all market forecasts are incorrect, but as he pointed out, that is exactly why utilities "run forecasts and probabilities to try to end up with the best decision-making capability you can." Tr. 595. Mr. McMahon similarly explained that "[u]ncertainty is part of any market price forecasting exercise and is the very reason that Empire has gone to extensive effort to run alternative scenarios and a stochastic model to express outcomes in both expected case, high-low, and probability based format." Exh. 7P, McMahon Sur., p. 31.

In a similar vein, OPC argues that because market prices are impossible to predict (Exh. 200, Mantle Reb. p. 14), market forecasts should not be relied upon in making generation decisions such as the one presented here. This position, which may create a convenient sound bite in this case, is not reasonable or realistic in light of the obligation of electric utilities to engage in resource planning, and in doing so, rely on market forecasts. OPC's rejection of market forecasts was made all the more curious by Ms. Mantle repeated statements in this proceeding that she herself had drafted the very rules promulgated by the Commission, which require electric utilities like Empire to rely on market forecasts to make decisions about supply-side procurement. Exh. 201, Mantle Sur., pp. 10-11; Tr. pp. 763, 778. OPC's attempt to completely disavow the legitimacy of ABB's forecasts should be given no weight in considering whether the Stipulation is in the public interest.

c. <u>The Projected Market Revenues from the Wind Projects are Amply Supported by the Record.</u>

OPC and Joplin (which relies on OPC's testimony since it presented no independent analysis or expert testimony), argue that neither the Stipulation nor the Customer Savings Plan should be approved because the projected savings from the sale of energy from the Wind

Projects will not materialize. Their argument is largely based on a concern with the frequency of negative pricing in SPP. OPC's Initial Brief, pp. 43, 59; Joplin's Initial Brief, pp. 20-21.

While it is a fact that there have been negative prices in SPP, the relevant inquiry is under what circumstances have those negative prices occurred and at what quantity? Ms. Mantle made much ado about negative prices that were experienced in the real time market, but on examination, it was clear that her focus was on prices that occurred either for a sole hour (Tr. 777) or in a limited quantity. Exh. 7P, McMahon Sur., p. 33. The Commission should place no weight on Ms. Mantle's view that short-term real-time negative prices applied to a minimal number of megawatt hours is somehow reflective of the total market in SPP or are predictive of the revenues to be generated by the Wind Projects.

Rather, the uncontroverted evidence in this case is that negative prices have been much more frequent in the real-time market than in the day-ahead market (Exh. 7P, McMahon Sur., p. 33; Tr. 289-90, 338, 592, 710-11, 727-28) and within certain physical locations within the SPP. *Id*. at 34-35. Mr. Mertens testified that the majority of Empire's sales and revenues are associated with day-ahead prices (Tr. 414), and Mr. Holmes further confirmed that negative prices should not be a concern for the Empire Wind Projects, because they will be bid into and settled in the day-ahead market, where negative pricing has not been an issue. Tr. 597-598. MECG witness Meyer further indicated that 90-95% of the SPP market is settled in the day-ahead market. Tr. 728. Thus, comparing real time prices versus the ABB forecasted day-ahead price would be an "apples to oranges comparison to some extent." Tr. 414-415. Further, as Mr. McMahon explained, there has been extremely limited negative pricing in the areas associated with the potential Wind Projects:

> Negative pricing is more likely to occur in regions with high levels of transmission congestion, where there is more wind generation than load. This is

> why negative prices have been more frequent around the Elk River node than in areas closer to Empire's load…**the RFP responses resulted in a short-list of wind projects that are all close to Empire's load, reducing the risk of negative pricing. This leads me to conclude that the risk of negative prices impacting the economic performance of these wind projects is much lower than if the projects were to be located in Kansas**, the site of the initial low-LCOE wind from the GFSA.

Exh. 7P, McMahon Sur., pp. 34-35 (emphasis added); *see also* Tr. 230-1 ("We see negative prices not typically across all of SPP. We see them in congested spots."); Tr. 290 (the amount of negative pricing impacted by specific locations node by node).

Yet, despite this explanation – that Empire will be acquiring Wind Projects that are all close to Empire's load – Joplin argues that Empire's use of the Asbury node to estimate future market prices "is unreasonable." Joplin's Initial Brief, p. 21. What could be more reasonable than using the node where the projects are expected to be located? The only apparent reason that use of the Asbury node is "unreasonable" is because it does not help Joplin tell the story that it seeks to tell. Similarly, OPC and Joplin's claim that Empire did not include any negative prices in its analysis also is disingenuous. Mr. McMahon explained that:

> Empire's price forecast uses location-specific historical data from the day-ahead market and develops an hourly discount that encompasses all of the observed historical data. Since it uses an averaging approach, the hours will not capture extremes in either direction, but they will effectively account for all of the prices present in the broad range of historical data without dismissing or disregarding any negative pricing.

Id. at 35; *see also* Tr. 289-90 ("So, I think the bigger question was, well, did you incorporate negative pricing in your modeling? And the answer is, absolutely yes. It was factored in to the nodal basis adjustments to the ABB price curve that we describe in our testimony by looking at the history of basis differentials, and those –those incorporate negative pricing."). Thus, to claim that Empire did not factor in any negative prices is plainly incorrect.

Ms. Mantle further claims that the Wind Projects will be curtailed by the SPP, and thus will not be permitted to run and therefore will not generate any revenue. Exh. 208, Mantle Aff., para. 20. Mr. Meyer pointed out the absurdity of Ms. Mantle's position: "It doesn't make – it's not a reasonable assumption, let's put it that way, that you would build the wind and that you would get no output from the generator." Tr. 691; *see also* Tr. 179. Mr. McMahon further explained that curtailment was included in the modeling scenarios that he ran involving basis differentials. Tr. 291.

To the extent OPC expressed concerns about changes in SPP's market rules that would affect dispatchability, Mr. Mertens explained that under these potential changes, the Wind Projects to be built would be considered dispatchable energy resources (Tr. 358), and that it is Empire's current wind farms (Elk River and Meridian Way) that are currently designated as non-dispatchable variable resources. *Id*. at 357. As Mr. Mertens explained, if SPP were to change the designation of these older wind farms from non-dispatchable to dispatchable, "that would actually be beneficial to our –our new wind farms because it would an impact on our old wind farms in those PPAs. But the new wind farms would be, therefore, more dispatchable because these non-dispatchable resources wouldn't be able to automatically left without dispatching requirements from SPP." *Id.* at 358-359.

OPC also argues that the model was "static" and did not account for future additions to wind generation. This is plainly incorrect. Tr. 280. Mr. McMahon testified that Empire separately modeled a case for OPC where more wind was added to the system. Specifically, this OPC case run reflected ABB's latest reference case from the Fall 2017, which itself factored in additional wind being built in SPP (Tr. 277-8), plus a probability weighting of the SPP wind queue to reflect the likelihood that some wind projects in the wind queue would be built. *Id*. at

279-80. If all of those assumptions came to fruition, Mr. McMahon explained that this would represent an approximate 50% increase in the total wind capacity in SPP. Exh. 7P, McMahon Sur., pp. 25-6. Additionally, OPC argues that Empire's modeling "assumes there will be no additional wind generation after 2020." OPC's Initial Brief, p. 41. This is incorrect. Both ABB's 2016 and 2017 reference cases include substantial wind additions. Tr. 280, McMahon.

In addition to this OPC specific analysis, the model also considered the effect of more wind additions through the stochastic analysis. This analysis examined uncertainty across three major variables – market prices, transmission congestion and carbon pricing. Empire further considered three possible market price scenarios – high market, base market, and low market prices. In the low market case (which would reflect the worst case scenario), market prices were an average of 24% lower than in the specific wind case modeled for OPC. *Id.* at 26-27. Even with those results taken into account, the model demonstrates savings for customers. Exh. 8, McMahon Affidavit, pp. 3-4; Tr. 279-81. This "stress" testing of the model should provide the Commission with assurance that the Stipulation is based on sound analysis.

d. The Capacity Factor and Capital Costs Assumptions are Based on Reliable Evidence.

Joplin and OPC's criticisms of the assumed capacity factors of the Wind Projects is similarly unfounded and reflects a reckless disregard for the evidence. Joplin claims that Empire "offered no reason or support for its use [sic] 54%+ in the original modeling and 47%+ after the RFP responses" regarding assumed capacity factors. Joplin's Initial Brief, p. 17.

Apparently, Joplin did not take the time to read the evidence in the record or chose to ignore it. The Generation Fleet Savings Analysis, which was attached to Mr. McMahon's Direct Testimony filed on October 31, 2017, includes a table on page 22 that has an entire section how the Annual Capacity Factor for the GFSA was derived. It states as follows:

> Empire developed two generic wind projects that are representative of a range of projects that could reasonably be developed to serve Empire's customers. **The annual capacity factor, or annual energy production used for these sites was based on studies performed by Empire using long-term meteorological data, manufacturer's performance data, and industry standard assumptions regarding facility performance**.

Exh. 6P, McMahon Dir., Direct Attachment JM-2, p. 22 (emphasis added). This well-articulated basis for the assumed capacity factors in the GFSA analysis can hardly be lacking in "reason or support." Further, Mr. Holmes testified that degradation was taken into account when determining the 54% capacity factor. Tr. 588. OPC's claim that "Empire's model failed to properly account for performance degradation, i.e. the reduction of generation output over time" is clearly in error. OPC's Initial Brief, p. 38.

Just as there is ample support for the initial 54% capacity factor in the GFSA analysis, the 47% capacity factor used in the updated GFSA analysis that was performed after the Company received responses to its RFP from wind developers is also supported by record evidence. Empire explicitly stated in its Surrebuttal Testimony that it revised the capacity factor assumed in its modeling based on the RFP results. Exh. 7P, McMahon Sur., p. 9. As Mr. McMahon explained, the updated RFP modeling was based on three cases, "each involving unique combinations of proposed wind projects from the **______________________________________ ____." ** Exh. 7C, McMahon Sur., p. 7. This in turn was premised on bids that were received in response to the RFP, including 6 bids on Empire's two sites. *Id*. at 7. Mr. Mooney testified at the hearing that ** "____

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____________________."** Tr. 447-448. Thus, not only is the updated capacity factor used in

the RFP modeling amply supported in the record, it is highly reliable evidence because it was derived from a competitive bidding process. Simply put, Joplin's critique is misplaced.

Joplin also argues that the 47% capacity factor is unreasonable in comparison to certain Kansas wind farms. Joplin's comparison of the capacity factor of a wind farm that would be built in 2019 or 2020 versus a wind farm like Elk River which was built in 2008 is not an apt comparison. Mr. Mertens testified that the technology of today's wind turbines is much different than those installed in the earlier years. Exh. 9, Mertens Dir., pp. 6-7. Essentially, it would be akin to comparing the efficiency of a light bulb that was manufactured ten years ago to one that was made today.

e. The Market Price Protection Mechanism Incentivizes Empire to Limit Costs of the Wind Projects and Protects Customers Against the Worst Case Market Scenario.

In an effort to provide assurance that customers will be protected against any downside risk in the early years of the Wind Projects, the Company agreed to the Market Protection Provision in the Stipulation. This provision provides a $35 million financial buffer during the first ten years of the project, and in many ways, is elegant in its design in that it aligns incentives among customers and the Company. The foundation of the Market Protection Provision is an annual calculation of the difference between the Wind Revenue Requirement (essentially, all costs of the Wind Projects, including O&M, labor, tax equity payments/credits, property taxes, return on and of, and income taxes) and SPP revenues for the Wind Projects, plus the value associated with replacing Empire's two wind Purchase Power Agreements at Elk River and Meridian Way. Based on this calculation, the Company has a significant interest in keeping any and all costs of the Wind Project as low as possible because if the cost of the Wind Project exceeds the amount of revenue it generates in SPP, Empire's shareholders are at risk for making

payments under the Customer Protection Mechanism. Tr. 492. Thus, OPC's claims that the Company "will have less incentive to closely scrutinize its [the Wind Projects] costs," (OPC's Initial Brief, p. 14), and its statement that "(u)nless Empire bears some kind of risk regarding the prospective prudency evaluation of its present action, it has little incentive to scrutinize its own cost," (*Id*. at 15), in fact, is not the case.

Further, there was extensive testimony at the hearing that the non-Company Signatories weighed the risk to customers against the adequacy of the financial protection provided to customers by the Market Protection Mechanism. Mr. Meyer testified that he reviewed the Market Protection Provision against what he considered to be the worst case scenario, which involved $22 million in losses for customers. Tr. 729-730. He verified that in that even in that worst case scenario (P95 and low prices), the Market Protection Provision provided more than adequate financial protection to customers, because the Missouri jurisdictional cap itself is $35 million, leaving $13 million in "room before you, you would max out on a Missouri jurisdictional basis." *Id*. at 730. This means that production from the Wind Projects would need to be worse than P95, or market prices would need to be below the worst market prices modeled. *Id*. In fact, Mr. Meyer confirmed that the Market Protection Provision protected against changes in the percentage of Empire's investment in the Wind Projects, if transmission costs changed, if market prices changed, and production level from the Wind Projects changed, all would be factored into the Mechanism. *Id*. at 735. Staff witness Rogers testified that the Market Protection Mechanism was designed to address the risk to customer savings during the first ten years of the wind ownership, given that little of the customer savings are expected during the first ten years of the Customer Savings Plan. Exh. 104, Staff Affidavit, pp. 5-6. One cannot ignore the fact that in the case of MECG, which represents Empire's largest customers, its members would have

substantial amounts of money at stake if the Stipulation were approved. The Commission should place significant weight on this testimony.

f. **OPC Witness Riley's Analysis Contains Material Errors and Should Not Be Relied Upon.**

In its Initial Brief, OPC argues that the Commission should rely on OPC witness Riley's analysis in JSR-1 (Exhibit 201) and JSR-1 Revised (Exhibits 218 and 511-C), who claims that Empire's customers "would be exposed to $319 million of additional costs" if the Stipulation is approved. OPC Initial Brief at 36, instead of the $169 million in savings that the Company estimates[2]. The Commission should not rely on Mr. Riley's analysis, because, as was evident at the hearing, both his initial and revised analyses are replete with material errors that render Exhibits 201, 218 and 501-C wholly unreliable.

In developing JSR-1, Mr. Riley attempts to compare the costs of the Wind Projects to the revenue that they will generate. In doing so, Mr. Riley cherry picked numbers that conveniently reach the conclusion he sought to make. First, he grossly overstates the costs of the Wind Projects in JSR-1 by relying on out-of-date information. The most glaring of these errors relates to the costs to operate, or fixed O&M costs, of the Wind Projects. The Company had estimated these costs at $245 million. Stipulation, Appendix A, p. 6 (cumulative of "Fixed O&M" line). Yet Mr. Mr. Riley used operating costs that were $80-$90 million ***higher*** than information the Company had twice provided OPC. Tr. 833. Mr. Holmes explained at the hearing that the Company derived the costs to operate the Wind Projects from bid responses from wind developers submitted in response to the Company's RFP. Tr. 570. When Mr. Riley was asked at the hearing whether he had reviewed the bid results at Empire's counsel's office, he reported that even though he went with a co-worker to review the RFP bids, he chose not to look at them. *Id.*

[2] The Company's analysis of the costs to operate the Wind Farms, and the projected revenue, is set forth in the Stipulation, as well as Exhibit 216.

at 833-834. The Company also produced the operating costs in response to OPC Data Request 8045, which Mr. Riley testified that he had never seen. Tr. 836-7. This one mistake alone accounts for an $80-90 million difference.

Mr. Riley made other errors that result in the overstatement of costs associated with the Wind Projects. For example, he overstated interest costs on JSR-1, relying on 5.33% when the Stipulation analysis was premised on 4%, the last known total cost of debt. This error has a multi-million dollar *per year* impact on JSR-1. Tr. 567. JSR-1 also double-counts certain tax equity dollars (*Id.* at 571, 890), includes a math error in the rate base calculation (*Id*. at 566), includes an overstatement of the applicable income tax rate (24.95% versus 23.90%) (*Id*. at 567), and an overstatement of the property tax (*Id*. at 568).

To further compound the errors, Mr. Riley then understated the amount of revenues that are projected to be generated by the Wind Farms. Mr. Holmes explained that Mr. Riley relied on a scenario that had 2.5% probability of actually occurring, and as a result, understated projected revenues. Tr. 569-70. In light of all these errors, Mr. Holmes explained that JSR-1 is not a realistic scenario as far as a projected "worst case" performance of the Wind Projects. Tr. 596.

After hearing Mr. Holmes' testimony critiquing JSR-1, Mr. Riley then made a last minute effort to correct his analysis, which OPC produced during the hearing (Exh. 218). Mr. Holmes was recalled to the stand, testifying that the revised JSR-1 had all the same errors as his original analysis. Tr. 890. Joplin, in a last ditch effort to rehabilitate Mr. Riley's revised JSR-1, introduced Exhibit 511-C, where Mr. Riley attempted to reflect a higher tax equity contribution than reflected in his initial analysis. *Id*. at 891. Mr. Holmes explained that not only did Exhibit 511-C contain all the same errors as Exhibits 201 and 218, it contained *additional* errors, including increasing Empire's equity in its capital structure to 60%. Tr. 891. The only plausible

explanation the Company can offer of this last error is that Mr. Riley conflated a 60% tax equity contribution with a 60% equity layer in Empire's capital structure, thereby demonstrating his fundamental lack of understanding of the role of tax equity. Regardless of the explanation, it is clear than neither Exhibit 200, nor 218 nor 511-C are competent evidence upon which the Commission should rely.

g. **The AEP Windcatcher Settlement in Oklahoma is Different and Irrelevant.**

OPC alleges that the a settlement agreement reached in a proceeding before the Oklahoma Corporation Commission concerning the AEP Windcatcher project better protects the Oklahoma customers of AEP, than does the Market Price Protection provision contained in the Stipulation in this case protects Missouri customers. OPC's Initial Brief, pp. 57-58. It does not. However, more importantly, it is not an appropriate comparison. The AEP Windcatcher project concerns a different utility (AEP); with customers spread among different states (Oklahoma, Arkansas, Louisiana, and Texas); with a different project, being addressed by a different state regulatory commission, with different parties. Tr. 885-7, Marke.

Further –

- AEP performed no RFP or competitive bidding process. Tr. 559, Krygier; 885, Marke. This is very different from the robust RFP project Empire has conducted in order to find the lowest cost projects. Tr. 559, Krygier.
- In addition to the cost of the wind generation, Windcatcher will require a $1 billion transmission line. Tr. 558-9, Krygier; 885, Marke. That is a huge difference from the projects in or near Empire's service area. Tr. 559, Krygier.
- OPC's witness Marke had not reviewed any of the modeling in that case. Tr. 885, Marke.

- AEP is not making use of tax equity financing. Tr. 625, Dietrich.
- There would be no benefits for customers under the Windcatcher settlement until at least year 11. Tr. 512-3, Krygier; Tr. 885-6, Marke. The Market Price Protection provision would provide for adjustment, as necessary, in each rate case after the wind generation is in service. Tr. 513-4, Krygier.

The Market Price Protection provision in this case does a very good job of providing customer protection during the first ten years after construction – something the other parties were specifically concerned about. It further provides additional incentive for Empire to minimize costs of construction and to operate in a way that will drive the revenue requirement associated with the projects as low as possible. The existence of a different settlement concerning a different company's project in a different state holds little significance as it relates to this case.

h. <u>OPC Repeatedly Refuses to Acknowledge that Empire Can Flow Back Savings to Customers.</u>

Unbelievably, OPC continues to argue that customers cannot receive the financial benefit of all of the savings from Empire's acquisition of wind. OPC's Initial Brief, pp. 39, 58-59. OPC is inexplicably stuck on this point, arguing that Empire's projected customer savings should be reduced by at least $103 million because of an inability to use existing tariffed mechanisms to flow market revenues back to customers. *Id*. OPC's steadfast refusal to acknowledge that a legal mechanism exists today to provide customers with revenue generated from sales into the SPP-IP is a reflection of OPC's determination to oppose this project regardless of the facts. The Commission should reject OPC's position given that it is premised on an unsupported interpretation of the law.

i. <u>A Rate Moratorium May Only be Ordered with Consent of the Public Utility.</u>

Staff suggests that in the absence of approving the terms of the Stipulation, the "Commission can, if the record supports it, condition a grant of any or some or all of the relief Empire seeks upon a reasonable rate case moratorium, for example, or upon a particular resolution of the federal income tax cut issue." Staff's Initial Brief, p. 41. While Empire agrees generally that the Commission may attach conditions to its approvals, it should not do so in regard to a rate moratorium.

The Commission has the duty to provide "just and reasonable" rates. Sections 386.390 and 393.150. A rate moratorium arguably violates this provision by establishing a period of time during which a utility may not seek a change in rates, even if existing rates are not just and reasonable. Accordingly, a rate moratorium may not be imposed on unwilling parties. *See In the Matter of the Joint Application of UtiliCorp United Inc. and St. Joseph Light & Power Company*, 9 Mo. P.S.C. 3d 454 (Case No. EM-2000-292) (December 14, 2000).

Here, the rate moratorium proposed by Empire is a part of package of conditions. It is only within the context of that package that Empire's express consent to a rate moratorium exists. The Commission should not condition its approval on a rate moratorium in the absence of approval of the other conditions found in the Stipulation.

j. <u>Dismantlement Costs Will Be Incurred In Any Scenario.</u>

The Staff's Initial Brief (pp. 30-31) suggested that by comparing the estimated cost of CCR rule compliance ($20 million) dollars to the estimated dismantlement costs ($24 million), one could view the cost of keeping Asbury in service to be $4 million dollars less than the cost of closing the facility.

First, this ignores the many expenses that are required to operate Asbury, such as operation and maintenance, labor, and fuel expense. It also ignores the many additional investments expected to be required over the next several years. Exh. 6C, McMahon Dir., Dir.Att. JM-2, pp. 23 of 44. However, more importantly, dismantlement costs represent "sunk costs." These costs will have to be paid whether Asbury runs for another 2 years, 20 years or anything in between and the costs are not material to the Generation Fleet Savings plan. Exh. 10, Mertens Sur., p. 12.

k. The Commission Should Not Direct Empire to File an Application for Generation Plant Built Outside of Missouri.

Sierra Club suggests that if the Commission does not approve the Stipulation, "it should order Empire to file an application for a CCN under [Section] 393.170, RSMo, for any wind farm it may propose to build outside Missouri." Sierra Club's Initial Brief, p. 10. At the outset, Empire would note that it proposes to acquire wind generation constructed by others.

As the Commission is well aware, it has proposed revisions to the electrical corporation CCN rule that are under consideration in File No. EX-2018-0189. The issue of Commission jurisdiction and reasonableness of requiring CCNs for out of Missouri construction would be most appropriately addressed within the rulemaking matter. Depending upon the Commission's decision, the Stipulation makes provision for the possible filing of such a CCN application.

Perhaps, most importantly, the Commission need not address this issue in this case and thus should decline Sierra Club's request that it act now.

IV. TAX REFORM

OPC argues that the Commission "cannot and should not approve the Stipulation and Agreement, as it does not comport with the requirements of SB 564 and would deprive

ratepayers of the benefit of the regulatory asset accounts from January 1, 2018, through the effective date of new rates." OPC's Initial Brief, p. 62. OPC's argument fails because SB 564, which was subsequently signed by the Governor on June 1, 2018, and became effective the same date as the result of an emergency clause, does not apply to Empire, in that Empire had a general rate case pending on the effective date of Section 393.137. The statute (as created by SB 564), states as follows:

> This section applies to electrical corporations <u>that do not have</u> a general rate proceeding pending before the commission as of the later of February 1, 2018, or the effective date of this section.

RSMo. 393.137 (emphasis added).

There are three basic ways to initiate a rate case provided statute: 1) file and suspend (Section 393.150); 2) Complaint by customer (Section 393.260 (requiring 25 customers to sign a complaint)); or, 3) by motion of the Commission (Sections 393.140(5), 393.150, and 393.270). *See also*, *State ex rel. Utility Consumers' Council of Missouri*, *Inc. v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979); and *see*, generally, *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20 (Mo. banc 1975).

On February 16, 2018, the Staff filed its *Motion to Open Rate Case and to Require Company to Show Cause* ("*Motion to Open Rate Case*"). The *Motion to Open Rate Case* was assigned File No. ER-2018-0228. Staff stated the following as authority for its request:

> The Commission may, on its own motion, open a rate proceeding to determine the reasonableness of the rates and charges of any electrical, gas, heat, water, or sewer corporation. Section 386.390.1, RSMo.; *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission,* 585 S.W.2d 41, 48 (Mo. banc 1979) (*"UCCM"*). Within a rate case, the Commission may investigate any matter necessary to enable it to ascertain facts requisite to the exercise of its powers. Section 393.270.1, RSMo., *UCCM,* at 48.

The *Motion to Open Rate Case* further specifically requested that the Commission "open a rate case on its own motion" and "make Staff, the Office of the Public Counsel, and all intervenors that were parties to Empire Electric's last rate case parties to the new rate case." On February 21, 2018, the Commission granted Staff's Motion and issued its *Order Opening Rate Case, Directing Notice, Establishing Time to Intervene, and Requiring Company to Show Cause Why Its Rates Should Not Be Adjusted.*

Thus, Empire had a "general rate proceeding" pending on June 1, 2018 (File No. ER-2018-0228), and Section 393.137, as established by SB 564, is not applicable to Empire. Empire further notes that even as to those electrical corporations to which Section 393.137 does apply, the Section 393.137.4 states in part as follows:

> Upon good cause shown by the electrical corporation, the commission may, as an alternative to requiring a one-time change and deferral under subsection 2 of this section, allow a deferral, in whole or in part, of such federal act's financial impacts to a regulatory asset starting January 1, 2018, through the effective date of new rates in such electrical corporation's next general rate proceeding.

The tax reform provisions agreed to in the Stipulation should form the basis both for the "good cause" referenced by Section 393.137.4, and for the deferral referenced by the same section. The tax reform provisions contained in the Stipulation remain advantageous for Empire's customers. At a high level, these provisions provide a <u>known date for rate reductions</u> related to the Federal Tax Cuts and Jobs Act of 2017 that eliminates any questions about legislation, process, or legal issues and provides $17.8 million of immediate benefits to customers. Stipulation, paras. 24-26. The Stipulation further calls for the establishment of a regulatory liability to account for the tax savings associated with excess Accumulated Deferred Income Taxes beginning as of January 1, 2018. *Id.*, pp. 15-16, para. 25.

The annual base rate revenue requirement reduction and the excess ADIT provision, taken together, will provide the full benefits of the Tax Cuts and Jobs Act to Empire's customers. Exh. 13, North Aff., para. 9. Also, the provision regarding the filing of revised tariff sheets to effectuate the annual revenue requirement reduction will provide certainty to Empire's customers regarding when and how they will receive the benefit of the tax reform legislation. *Id.*

V. CONCLUSION

Empire requests that the Commission approve the Non-Unanimous Stipulation and Agreement as proposed. The Stipulation put forth by Empire, Staff, MECG, Division of Energy, and Renew Missouri is in the public interest, in that it takes advantage of real opportunities that exist today to add generation capacity to Empire's fleet at significantly reduced cost given the availability of Production Tax Credits, which in turn will provide low cost energy for Empire's customers for years to come.

WHEREFORE, Empire respectfully requests the Commission consider its Initial Post-Hearing Brief and this Reply Brief and, thereafter, approve the Stipulation as proposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the above and foregoing brief was filed in EFIS on this 12th day of June, 2018, with notice of the same being sent to all counsel of record. The undersigned further certifies that a true and correct copy of the foregoing document was sent by electronic mail on said date to the following:

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