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	)))	File No. EO-2018-0092

REPLY BRIEF OF SIERRA CLUB

The objectors, OPC and the City of Joplin, pursue two main strategies: (1) holding this case to the standards for a CCN, rate case, debt issuance, etc., (or on the other hand insisting that an advisory opinion is called for) when a different approval, of reasonableness to proceed, is what is actually being sought; and (2) insisting on certainty in the inherently uncertain process of modelling the future, a position that would paralyze decision making by both utilities and the Commission.

Staff and Sierra Club both argued in their opening briefs that the Customer Savings Plan should be regarded as an experimental regulatory plan.[1] Empire does not seek preapproval of a CCN or of costs, and the signatories to the S&A have scrupulously avoided requesting forbidden findings. As the contested status of this case shows, it would have been imprudent in the common sense of the word for Empire to proceed without floating this plan before the Commission and stakeholders.

OPC has made some concessions that are worth noting at the outset. They concede that Empire does not need authorization to proceed with tax equity financing,[2] though obviously it will need a prudence determination for the outcome. They concede that the Commission has no authority over compliance with EPA's coal combustion residuals rule,[3] though again it will need

[1] Staff brief at 11–25; Sierra Club brief at 3–4.
[2] OPC Brief at 27.
[3] *Id.* at 28.

to determine the prudence of actual compliance costs. OPC drops its demand for wildlife protections (Issue 9).[4]

OPC also notes that the application (or the S&A?) won't automatically result in a "green tariff" for nonresidential customers.[5] This is true and further shows that the S&A is not binding on the Commission. It is binding on the signatories, however, and OPC can hardly object to an agreement between them committing Empire to apply for such a tariff.

1. Does the Commission have authority to grant Empire's requests?

Joplin attempts to argue that there is no difference between reasonableness and prudency based on the use of "reasonableness" in *In re Missouri American Water,* No. WA-97-46, and the subsequent rate case, WR-2000-281.[6] OPC makes the stretch of trying to equate reasonableness with public convenience and necessity,[7] but "reasonableness" alone cannot possibly serve as a finding of either convenience and necessity or prudence because it is not a specific finding of the criteria for either determination.

OPC cites as a "predetermination" case *Capital City Water Co. v. PSC*, 850 S.W.2d 903 (Mo.App. W.D. 1993).[8] The court said that the Commission cannot bind itself to a position that would prevent it from making adjustments to protect ratepayers as circumstances change, and also that a utility may not enter into contracts that limit the ratemaking authority of the Commission. 850 S.W.2d at 911. In this case the S&A (¶ 9) makes clear that the Commission is not bound by it, nor are the parties attempting to impose ratemaking conditions (¶ 1).

[4] *Id.* at 63–4.
[5] OPC brief at 57.
[6] Joplin brief at 10–12.
[7] OPC brief at 20.
[8] *Id.* at 10.

OPC cites §§ 393.180 and 393.200, RSMo, and *In re Laclede Gas Company's Verified Application*, 526 S.W.3d 245 (Mo. App. 2017), concerning the issuance of debt.[9] Of course such issuance and the determination that it is necessary and reasonably required will have to be made pursuant to § 393.200.1 when the time comes. OPC and Joplin consistently argue that the plan is unauthorized because it will entail additional proceedings down the road in the course of its implementation. These arguments simply do not address the Commission's authority to approve the S&A that is before it now.

OPC argues that Empire is abdicating its Board of Directors' authority and asking the Commission to make management decisions.[10] Case law says the Commission cannot take over general management of the company, *Laclede Gas v. PSC,* 600 S.W.2d 222, 228 (Mo.App. W.D. 1980); or dictate the manner in which the company conducts its business. *Kansas City Transit v. PSC,* 406 S.W.2d 5, 11 (Mo. banc 1966). These cases always recognize the general supervisory power of the Commission and the specific powers granted it by the legislature. Empire is seeking approval to make the board decisions OPC demands.

2. Which of Empire's requests, if any, should the Commission grant?

(a)(1) Authorization to record its investment in, and the costs to operate, the Wind Projects as described in Empire Witness Mooney's Direct Testimony, (2) including a finding that Empire's investment related to the Customer Savings Plan ("CSP") should not be excluded from Empire's rate base on the ground that the decision to proceed with the Plan was not prudent.

OPC argues that the wind investment would be "economic waste."[11] The cited cases trace back to the fundamental principle of utility regulation that monopoly is necessary to prevent destructive competition and duplication of services by utilities seeking to serve the same territory. *City of Sikeston v. PSC,* 336 Mo. 985, 82 S.W.2d 105, 109–10 (1935); although this

[9] *Id.* at 21.
[10] OPC brief at 15–6, 22.
[11] *Id.* at 51.

principle may yield to the overriding value of the public convenience and necessity, *Gulf Transport Co. v. PSC,* 658 S.W.2d 448, 456 (Mo.App. W.D. 1983). No such waste is apparent in this case. Empire seeks to serve its customers and its territory under the 21st century conditions of the SPP Integrated Marketplace.

c. Approval of depreciation rates as described in Empire Witness Watson's testimony, so that depreciation can begin as soon as the assets are placed in service.

OPC argues that the Commission cannot set a depreciation rate for wind assets that will not be owned by Empire but by affiliate wind project and wind holding companies, which are not contemplated to be regulated utilities.[12]

It is incorrect to say that Empire will not own the wind assets. It will co-own them with its tax equity partner(s) in a Wind Hold Co. that will in turn own the Wind Project Co. After 10 years ownership will "flip" so that Empire, having owned 5%, will own 95% of the wind asset with an option to buy the remaining 5%.[13]

Under § 393.240.1, RSMo, "The commission shall have power, after hearing [which has been held in this case], to require any or all gas corporations, electrical corporations, water corporations and sewer corporations to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the commission may prescribe." The 3.3% depreciation rate for a 30-year lifetime of the wind assets is supported by the record.[14]

Co-ownership by an unregulated entity poses no threat to Commission oversight. In *Associated Natural Gas Co. v. PSC,* 706 S.W.2d 870 (Mo.App. W.D 1985), the court allowed the PSC to consider for ratemaking purposes the financial structure of the corporate parent

[12] OPC brief at 31–2.
[13] Exh. 11, Mooney Direct, pp. 11–12, 15–6.
[14] Exh. 8, Watson Direct, pp. 5–9.

company. The corporate "hierarchy as exists here should not and cannot shield pertinent financial data from the Commission's scrutiny just because the ultimate owner does not provide the same service as the applicant and is not regulated." 706 S.W.2d at 881.

3. What requirements should be applied to the Asbury regulatory asset?

This should not be an issue in the present posture of the case since the retirement date for Asbury cannot be decided now, but OPC makes an argument that needs to be squelched — that if Asbury is retired before it is fully depreciated, Empire will not be entitled to rate base treatment because it will be "abandoned."[15]

OPC cites *State ex rel. City of St. Louis v. PSC,* 329 Mo. 918, 941, 47 S.W.2d 102, 111 (1931). The kind of abandoned property the court refers to is that which has been rendered "obsolete by reason of scientific discoveries and inventions," *i.e.* technological obsolescence. A utility is still "entitled to earn a reasonable sum for depreciation of its property, including necessary retirements, ordinary obsolescence and diminishing usefulness that cannot be arrested by repairs…" 47 S.W.2d at 111. Sierra Club is the only party that would like to see coal generation in general relegated to the category of "extraordinary obsolescence." Most other parties, not least OPC, view Asbury as a viable and valuable asset, contrary to the evidence that it is no longer economical to run. Exactly what cost recovery Empire will be entitled to will be determined when the time arrives.

9. Should there be any requirements associated with potential impacts of the Wind Projects on wildlife? If so, what requirements?

OPC has dropped this objection, and Joplin never argued for it.[16] It is now moot.

[15] OPC brief at 30–1.
[16] OPC brief at 63–4.

Other Objections

PPA vs. ownership. Joplin insists that Empire should negotiate power purchase agreements rather than own wind assets.[17] Empire testimony supports the advantages of ownership. They would have the ability to upgrade their own turbines to get more energy out of them.[18] Ownership for the 30-year lifetime of a turbine would extend the benefits beyond the 15–20 year term of a PPA.[19] New PPAs would price for risk, an added cost to customers.[20]

Negative pricing and Elk River assumptions. OPC and Joplin ignore the evidence on negative pricing. Joplin continues to rely on the 2005 Elk River wind farm for its outdated capacity factor.[21] Elk River is a non-dispatchable resource subject to old SPP rules that forbade curtailment of wind. The new wind farms will be dispatchable.[22] Elk River is located in an area of transmission congestion where negative prices are more likely than near Empire's load.[23] Joplin tries to turn this to its advantage by arguing that "Using the Asbury node to estimate future market prices is unreasonable as Asbury has not had negative pricing, [!] and Asbury has had higher annual prices than Empire's wind generating node Elk River."[24] Empire's point is that energy prices will be more favorable because it will build closer to the Asbury node.

Negative prices are more common where real-time pricing is prevalent as at Elk River; Empire uses the more reliable day-ahead prices.[25]

[17] Joplin brief 13, 24.
[18] Mertens, T. 5:393 line 21–394.
[19] T. 5:395 lines 16–21; Mooney, T. 5:479 line 8–480 line 7.
[20] T. 5:396 lines 1–11.
[21] OPC brief 42–4; Joplin brief 16, 20–1.
[22] Mertens, T. 5:357 line 7–359 line 1.
[23] Exh. 7, McMahon Surrebuttal, p. lines 10–14.
[24] Joplin brief at 21.
[25] Exh. 7 33 lines 1–11; 34 lines 4–6; T. 5:413 line 6–414 line 18.

Wind degradation. OPC maintains that degradation of wind farms will prevent Empire from realizing the higher energy prices it predicts for the future.[26] This overlooks Empire's ability as owner of the wind farms to upgrade their performance over time.[27]

Respectfully submitted,

/s/ Henry B. Robertson
Henry B. Robertson (Mo. Bar No. 29502)
Great Rivers Environmental Law Center
319 N. Fourth St, Suite 800
St. Louis, Missouri 63102
(314) 231-4181
(314) 231-4184
hrobertson@greatriverslaw.org

Attorney for Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that a true and correct PDF version of the foregoing was filed on EFIS and sent by email on this 12th day of June, 2018, to all counsel of record:

/s/ Henry B. Robertson
Henry B. Robertson

[26] Brief at 38–9; Mantle, T. 7:789 line 22–790 line 7.
[27] T. 5:378 line 12–379 line 10; 393 lines 21–4.