

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of the Application of Empire)
District Electric Company For Approval of) Docket No. 21-EPDE-444-RTS
The Commission to Make Certain Changes)
in its Charges for Electric Service)

POST-HEARING BRIEF OF THE CITIZENS' UTILITY RATEPAYER BOARD

****REDACTED VERSION****

COMES NOW, The Citizens' Utility Ratepayer Board (CURB) and respectively submits its *Post-Hearing Brief* pertaining to Empire District Electric Company's (Empire or Company) proposed acquisition of three wind farms (Wind Projects) and the retirement of the Asbury Coal Plant (Asbury). As set forth below, CURB recommends that the Kansas Corporation Commission (Commission or KCC) approve the Partial Unanimous Settlement Agreement filed in this docket related to Asbury, but deny approval of Empire's request related to the Wind Projects.

A. Background

1. On May 28, 2021, pursuant to an Order from Docket No. 19-EPDE-223-RTS¹, Empire filed an abbreviated rate case application limited in its scope to: (1) recover the capital and operating costs relating to its acquisition of three wind projects; (2) update Empire's revenue requirement to account for the retirement of its Asbury coal plant; and (3) capture the revenue requirement impact directly related to the non-growth plant and related accumulated depreciation and deferred income tax balances as of the end of the test year ending June 30, 2020.²

¹ Order on Motion for an Abbreviated Rate Case, Docket No. 19-EPDE-223-RTS, pg. 7-8.

² Application of Abbreviated Rate Case (May 28, 2021).

2. In the application, Empire states that it currently had a gross revenue deficiency of \$4.465 million. The gross revenue deficiency was offset by a credit to customers of \$924,952 relating to the retirement of the Asbury coal plant on March 1, 2020, and projected wind revenues in the amount of \$2.817 million, for a net revenue increase to customers of \$723,582.

3. On June 14, 2021, CURB filed its Petition to Intervene and Motion for Protective Order and Discovery Order.³

4. On July 8, 2021, the Commission issued its Order Granting CURB's Petition to Intervene and Motion for Protective and Discovery Order.⁴

5. On September 15, 2021, pursuant to the procedural schedule issued by the Commission, Empire filed an update to its abbreviated rate application. In its update, Empire increased its revenue deficiency to \$4.49 million, reduced its projected net wind revenues to \$2,728,907, and increased the net revenue increase to customers to \$836,947.⁵

6. As part of the supplemental filing, Empire proposed an alternative to the traditional way of including the Wind Projects in base rates. Empire proposed using a fixed-price purchase power (FPP) approach similar to the one approved by the Commission in Docket No. 18-WSEE-328-RTS (328 Docket) for Evergy's Western Plains wind farm with a levelized cost of energy (LCOE) of \$33.73/MWh.⁶

7. On January 13, 2022, CURB witness, Andrea Crane, filed direct testimony and exhibits regarding the application. Ms. Crane testified that the Wind Projects were not necessary to serve Kansas customers. However, if the Commission allowed Empire to recover the Wind Project costs from Kansas ratepayers, she recommended that the cost be recovered on a LCOE

³ CURB's Petition to Intervene and Motion for Protective Order and Discovery Order (June 14, 2021).

⁴ Orders Granting CURB's Petition to Intervene and Motion for Protective and Discovery Order (July 8, 2021).

⁵ Supplemental Testimony of Tisha Sanderson (September 15, 2021).

⁶ Supplemental Testimony of Tisha Sanderson pg 6 (September 15, 2021).

basis. CURB proposed a net revenue *decrease* of \$345,690; excluding the Wind Projects from Kansas rates; or, in the alternative, a fixed LCOE charge of \$23.97/MWh for the Wind Projects.⁷

8. On January 14, 2022, the Staff of the Kansas Corporation Commission (Staff) filed its testimony and exhibits. Staff proposed a gross revenue deficiency of \$1.3 million, offset by a credit to customers of \$1.497 million relating to the retirement of Asbury and projected wind revenues of \$2.636 million, for a net revenue decrease of \$2.833 million. Staff testified that the Wind Projects were not necessary to serve Kansas customers and should not be included in rates. However, if the Commission determines it is appropriate to include the Wind Projects in rates, then Staff recommended that Empire's proposal should be adjusted to remove \$28.75 million from rate base and \$1.58 million in operating expenses relating to the Wind Projects and to increase operating expenses by \$1.934 million to reflect Staff's inclusion of the levelized market-competitive Purchase Power Agreement (PPA) prices for Empire's wind investments in the revenue requirement based upon Staff's market-competitive PPA price of \$16.32/MWh.⁸

9. Beginning on February 22, 2022, the parties met to collectively discuss the possible settlement of specific contested issues in this matter and continued those discussions through March 1, 2022.

10. As a result of the settlement discussions, on March 2, 2022, CURB, Empire, and Staff filed a Unanimous Partial Settlement Agreement.⁹ The Partial Settlement resolves two of the three outstanding issues in the abbreviated rate case filing: Empire's revenue requirement to account for the retirement of its Asbury coal plant; and capture of the revenue requirement impact

⁷ Direct Testimony of Andrea Crane (January 13, 2022). (“Crane Direct Testimony”).

⁸ Testimony of Andria Jackson, Brad Hutton, Collin Cain, Nicholas Puga (January 14, 2022).

⁹ Joint Motion for Approval of Unanimous Partial Settlement Agreement (March 2, 2022).

directly related to the non-growth plant and related accumulated depreciation and deferred income tax balances as of the end of the test year ending June 30, 2020.

11. Specifically, the parties agree as follows:

- a. The Asbury regulatory liability amount related to the retirement of Asbury on March 1, 2020, shall be netted against the Company's Asbury regulatory asset so that the net Asbury regulatory asset shall be \$3,340,140 ("Asbury Regulatory Asset"). Empire shall be allowed to recover the Asbury Regulatory Asset over 10 years beginning on the date in which rates set in this case become effective. Empire's request to implement an Asbury Retirement Rider is no longer necessary because that regulatory liability has been netted against the regulatory asset.
- b. Resolution of the Asbury Regulatory Asset and the revenue requirement directly related to the non-growth plant and related accumulated depreciation and deferred income tax balances as of the end of the test year ending June 30, 2020, results in a decrease in Empire's revenue requirement of \$636,091. The reduction in revenue requirement shall be allocated among Empire's customers based upon the recommendation contained in Staff's testimony.
- c. Empire shall be allowed to establish a regulatory asset to capture Asbury decommissioning expenses and costs and Empire shall be allowed to seek recovery of that regulatory asset in its first rate case following completion of decommissioning of Asbury.
- d. Empire shall be allowed to amortize its actual rate case expense incurred by Empire, Staff and CURB in this proceeding over a three-year period.¹⁰

12. The KCC has adopted three guidelines for use in evaluating unanimous settlement agreements. These include: (1) Is the agreement supported by substantial evidence in the record as a whole? (2) Will the agreement result in just and reasonable rates? (3) Are the results on the agreement in the public interest?

13. CURB believes the Unanimous Partial Settlement Agreement satisfies each of these guidelines. In her Testimony in Support of the Unanimous Partial Settlement Agreement, CURB witness Andrea Crane addresses each of the guidelines.

14. Ms. Crane testified that the Settlement Agreement is supported by substantial evidence in the record as a whole. In particular she testified:

¹⁰ Joint Motion for Approval of Unanimous Partial Settlement Agreement pgs 5-6 (March 2, 2022).

The Settlement Agreement provides for a revenue reduction of \$636,091. Therefore, the Settlement Agreement results in a reduction that is even larger than the reduction recommended by CURB. Some of this difference relates to additional adjustments that were proposed by Staff in its Direct Testimony. In addition, the revenue reduction reflects the amortization of a much smaller regulatory asset relating to Asbury's stranded costs, since the parties agreed to offset a portion of the Asbury regulatory asset with the Asbury refunds due to customers. Moreover, in the Settlement Agreement, the amount of the refund being used to offset a portion of the Asbury regulatory asset is greater than the refund proposed by Empire. Therefore, even though the Asbury regulatory asset will be amortized over 10 years, instead of over 26 years as originally proposed by the Company, the annual amortization expense included in the Settlement is not significantly greater than the amount originally proposed by Empire. In its Direct Testimony, Staff recommended a revenue increase of \$1,300,242. However, Staff's filed recommendation included a levelized cost for the Wind Projects of \$1,934,286. If Staff's recommended levelized cost for the Wind Projects is removed from base rates, Staff's recommendation would result in a revenue reduction that is very close to the decrease reflected in the Settlement Agreement. Accordingly, based on the direct testimonies submitted by the parties in this case, there is substantial evidence in the record to support the Settlement Agreement.¹¹

15. In addition Ms. Crane testified that the Settlement Agreement will result in just and reasonable rates. In these regards, Ms. Crane states:

As noted above, the base revenue decrease is well supported by the evidence in this case. Moreover, the allocation of the revenue reduction will be based on the class revenue allocations determined in the 19-EPDE-223-RTS Docket, the Company's most recent rate case. This is appropriate, since class cost allocations and rate design were not issues identified for inclusion in this abbreviated rate case.¹²

16. Finally, Ms. Crane testifies that the results of the agreement are in the public interest, as follows:

This Settlement Agreement is in the public interest and no party is opposed to the Settlement Agreement. The Settlement Agreement results in a base revenue reduction, which will be allocated to each class consistent with the allocations used in the most recent rate case. While the Settlement Agreement does not include the Asbury refund originally proposed by the Company, those funds will be used to offset the Asbury regulatory asset. This approach will result in greater rate stability for ratepayers. In addition, amortizing the net Asbury regulatory asset over 10 years, instead of over the 26 years proposed in the filing, will better match recovery

¹¹ Testimony of Andrea C. Crane in Support of Unanimous Partial Settlement Agreement, pgs 7-8 (March 2, 2022). ("Crane Settlement Testimony").

¹² *Id.* pg 9 (March 2, 2022).

of these costs with the ratepayers that benefitted from the Asbury facility. A ten-year amortization will also significantly reduce the Company's risk of recovering these stranded costs. Given the rate reduction contained in the Settlement Agreement, the provisions for amortization of the Asbury regulatory asset, and the reasonable allocation of the reduction among rate classes, the Settlement Agreement is clearly in the public interest.¹³

17. During the evidentiary hearing in this docket from March 8-9, 2022, the parties presented evidence relating to the remaining issue, the recovery of capital and operating costs relating to Empire's acquisition of the Wind Projects described in Empire's application. Specifically, the parties provided evidence to address three questions:

- a. Whether the investment and cost relating to the Wind Projects should be included in Empire's Kansas rates?
- b. What is the amount of the investment and cost relating to the Wind Projects that should be included in Empire's rates?
- c. Whether the investment and cost relating to the Wind Projects should be recovered using a traditional ratemaking approach or a FPP approach?

B. Arguments and Authorities

a. The Wind Project Costs Should Not Be Allowed Into Kansas Rates Because They Are Not Used or Required to Be Used to Provide Efficient and Sufficient Service for Kansans.

18. In order for an electric public utility to include property into rate base, the property must be "used and required to be used" in the utility's service to the public, whenever the Commission deems the ascertainment of such value necessary in order to enable the Commission to fix fair and reasonable rates, joint rates, tolls and charges.¹⁴ More specifically, the Kansas Court

¹³ Crane Settlement Testimony at pgs 9-10 (March 2, 2022).

¹⁴ K.S.A. 66-128(a).

of Appeals has stated that, “capital costs for new plants, generators, or other facilities are allowed into rates only when they become ‘used and required to be used’ in services to the ratepayers.”¹⁵ If the Commission determines that a utility has invested in unnecessary infrastructure or infrastructure that is in excess of current needs, then that infrastructure is not considered “used and required to be used” and the Commission has the authority to exclude those costs from rate base.¹⁶

19. In Kansas, every electric public utility is required “to furnish reasonably efficient and sufficient service and facilities” in its service territory.¹⁷ In furnishing “reasonably efficient and sufficient service,” the Commission has the power to require an electric public utility to establish “just and reasonable” rates. Furthermore, the Commission has the power to require all electric public utilities “to establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service from such electric public utilities.”¹⁸ The United States Supreme Court has stated that “the fixing of ‘just and reasonable’ rates involves a balancing of the investor and the consumer interests.”¹⁹ Further, Kansas law directs that the Commission’s goal in ratemaking should be to determine a rate that falls within a zone of reasonableness after applying a balancing test in which the interests of all concerned parties are considered.²⁰

20. The initial question posed to the Commission in this docket is whether the investment in and costs to build and operate the three Wind Projects should be included in Kansas rates. CURB believes that they should not. Despite contentions in its post-hearing brief, Empire

¹⁵ *Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan.*, 36 Kan. App. 2d 83, 97, 138 P.3d 338, 350 (2006).

¹⁶ K.S.A. 66-128c.

¹⁷ K.S.A. 66-101b.

¹⁸ *Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan.*, 36 Kan. App. 2d 83, 97, 138 P.3d 338, 350 (2006).

¹⁹ *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).

²⁰ *Kansas Gas and Elec. Co. v. State Corp. Com'n*, 239 Kan 483, 488-92, 720 P. 2d 1063 (Kan. 1986).

has not demonstrated that its Wind Projects are being used and required to be used to maintain reasonably sufficient and efficient service as required by K.S.A. 66-101b. The utility company requesting recovery of such investments must still demonstrate to the Commission that the investments were necessary to continue providing service to its Kansas territory. Empire misconstrues CURB's remarks on Empire's capacity situation as one of prudence, when in reality, it is an examination of whether or not the energy produced is addressing some kind of deficiency in meeting customer energy demands.

21. In this docket, by Empire's own admission, it currently has adequate capacity to serve Kansas ratepayers without the addition of the Wind Projects. Empire is currently well above the 12% capacity and reserve margin required by the Southwest Power Pool (SPP) and will be for some time. Company witness James McMahon acknowledges this in his testimony when attempting to rationalize Empire's decision to acquire 600 MW of wind when it already has adequate capacity and energy resources capable of meeting customer demand.²¹ This is further confirmed in Figure 1 on Mr. McMahon's Rebuttal Testimony²² along with his comments regarding the Figure in which he states: "As Figure 1 shows, Empire is expected to exceed the Planning Reserve Margin (PRM) for several years, even without Asbury, whether the Wind Projects get built or not."²³ Figure 1 indicates Empire has sufficient capacity and reserve margin through 2026. Empire further admits in its Missouri 2019 Integrated Resource Plan (IRP) that it will have relatively flat load through 2038,²⁴ and therefore the Wind Projects are not needed for capacity or generation shortcomings. Empire has failed to meet its initial burden of showing that

²¹ Direct Testimony of James McMahon, pg 4. (May 28, 2021).

²² Rebuttal Testimony of James McMahon, Figure 1, pg 4 (February 15, 2022).

²³ *Id.* at pg 5.

²⁴ Missouri IRP pg 15-16 of Executive Summary Schedule JM-4 Confidential June 2019).

the Wind Projects are used and required to be used under K.S.A. 66-128 and CURB asks the Commission to deny this request based simply on Empire's failure to meet this threshold burden.

22. If the Commission were to find that Empire has satisfied this initial burden, then we must next look to see if the Wind Projects were prudent under 66-128g, which lists 12 factors that shall be considered by the commission in making the determination of "prudence" or lack thereof in determining the reasonable value of electric generating property:

- (1) A comparison of the existing rates of the utility with rates that would result if the entire cost of the facility were included in the rate base for that facility;
- (2) a comparison of the rates of any other utility in the state which has no ownership interest in the facility under consideration with the rates that would result if the entire cost of the facility were included in the rate base;
- (3) a comparison of the final cost of the facility under consideration to the final cost of other facilities constructed within a reasonable time before or after construction of the facility under consideration;
- (4) a comparison of the original cost estimates made by the owners of the facility under consideration with the final cost of such facility;
- (5) the ability of the owners of the facility under consideration to sell on the competitive wholesale or other market electrical power generated by such facility if the rates for such power were determined by inclusion of the entire cost of the facility in the rate base;
- (6) a comparison of any overruns in the construction cost of the facility under consideration with any cost overruns of any other electric generating facility constructed within a reasonable time before or after construction of the facility under consideration;
- (7) whether the utility having an ownership interest in the facility being considered has provided a method to ensure that the cost of any decommissioning, any waste disposal or any cost of clean up of any incident in construction or operation of such facility is to be paid by the utility;
- (8) inappropriate or poor management decisions in construction or operation of the facility being considered;
- (9) whether inclusion of all or any part of the cost of construction of the facility under consideration, and the resulting rates of the utility therefrom, would have an adverse economic impact upon the people of Kansas;
- (10) whether the utility acted in the general public interest in management decisions in the acquisition, construction or operation of the facility;
- (11) whether the utility accepted risks in the construction of the facility which were inappropriate to the general public interest to Kansas;

(12) any other fact, factor or relationship which may indicate prudence or lack thereof as that term is commonly used.²⁵

23. CURB will not address each of these 12 factors individually, but throughout this Brief CURB will refer to these various factors to show that Empire's building of the Wind Projects was not a prudent decision and should not be placed in rate base. It is important to note that no single 66-128g factor is dispositive for a prudency finding and the Commission may review and weigh its consideration of each factor and any other information in the record.

24. Empire's acquisition of the Wind Projects does not contribute to the providing of efficient and sufficient service beyond what was already in Empire's generation portfolio. Empire is proposing to include in its revenue requirement three new Wind Projects as a means to increase shareholder return with the chance of savings flowing to customers in the distant future. Specifically, the Company is seeking to include costs associated with the 301 MW Neosho Ridge wind project in Kansas, as well as the 149.4 MW North Fork Ridge wind project and the 149.4 MW King's Point wind project, both of which are in Missouri. All three of these Wind Projects are currently completed and in-service.²⁶

25. CURB believes the Wind Projects are not needed to serve Kansas ratepayers, but were instead acquired by Empire as a purely financial move, with a goal of increasing shareholder earnings during a stagnant load growth period while only providing *potential* economic benefits to ratepayers at some point over the next thirty years. The proposed Wind Projects represent a major increase in utility investment and shareholder return. The drastic expansion of Empire's rate base is even more concerning in light of the fact that the Wind Projects are not a response to a

²⁵ K.S.A. 66-128g.

²⁶ Crane Direct Testimony pg. 13 (January 13, 2022).

definitive need to maintain reliable and efficient service in their Kansas jurisdiction. Pointing out the potential savings opportunities available to future ratepayers does not substitute for a property's inclusion in rates being predicated on that property being used and required to be used to serve the need of Kansans.

26. As stated earlier, by Empire's own admission, they currently have adequate capacity to serve Kansas ratepayers without the Wind Projects. Empire is currently well above the 12% capacity and reserve margin required by the Southwest Power Pool (SPP) and will be for some time as well as experiencing flat load growth for many years to come. Therefore, the Wind Projects are not needed for capacity nor generation and appear to run afoul of factor 12 of K.S.A. 66-128g, as well as the requirement that the asset be used or required to be used.²⁷ CURB further notes that K.S.A. 66-128a directly addresses acquisition of excess capacity by stating: "Nothing in K.S.A. 66-128b to 66-128i, inclusive, shall be construed to limit the authority of the state corporation commission to review and evaluate the efficiency or prudence of any actions, **including acquisition of excess capacity**, or operating practices of any public utility or common carrier for the purpose of establishing fair and reasonable rates, joint rates, tolls and charges."²⁸

27. Further 66-128c specifically states that the Commission shall have the power to evaluate the efficiency or prudence of acquisition, construction or operating practices of that utility.²⁹ The statute continues by stating that in the event the state corporation commission determines that a portion of the costs of acquisition, construction or operation were incurred due in whole or in part to a lack of efficiency or prudence, or were incurred in the acquisition or construction of excess capacity, it shall have the power and authority to exclude all or a portion of those costs from the revenue

²⁷ *Kansas Indus. Consumers Grp., Inc. v. State Corp. Comm'n of State of Kan.*, 36 Kan. App. 2d 83, 97, 138 P.3d 338, 350 (2006).

²⁸ K.S.A. 66-128a.

²⁹ K.S.A. 66-128c.

requested by the utility.³⁰ Excess capacity is defined as “any capacity in excess of the amount used and required to be used to provide adequate and reliable service to the public within the state of Kansas as determined by the commission. The commission may in its discretion prohibit or reduce the return on costs which were incurred in constructing, maintaining or operating excess capacity”³¹

28. The ownership structure of the Wind Project and Empire’s proposed rate impacts will provide shareholders with immediate access to higher returns while present-day ratepayers may not be on Empire’s system by the time personal benefits can be realized. Each of the Wind Projects was financed through a tax equity partnership arrangement. As discussed in the testimony of Mr. Mooney, the tax equity partnership arrangement allows a tax equity partner to take advantage of Production Tax Credits (PTCs) and other tax benefits associated with the Wind Projects in the early years. Because Empire itself would not be able to benefit from the full tax advantages provided by the Wind Projects in the early years, aligning with a tax equity partner allows these tax benefits to be utilized sooner, thereby reducing the overall cost of the projects to regulated ratepayers.³²

29. As described in the testimony of Mr. Mooney, the Company entered into an arrangement with two tax equity partners, Wells Fargo and JPM Capital Corporation, who are providing a portion of the financing for the Wind Projects.³³ The project costs included in Empire’s rate base exclude that portion of the Wind Projects being financed by the tax equity partners. During the first ten years of the partnership agreement, the tax equity partners receive the vast majority of the tax incentives (including 99% of the PTCs and other tax benefits such as accelerated depreciation) associated with the Wind Projects. During this ten-year period, Empire is able to

³⁰ *Id.*

³¹ K.S.A. 66-128c.

³² Direct Testimony of Todd Mooney pgs 16-19 (May 28, 2021).

³³ *Id.* at pg 22.

benefit from additional annual contributions made by the tax equity partner in the event that actual production is higher than an established production threshold, which would result in additional PTCs being generated. The after-tax value of these additional PTCs is then monetized as a contribution to Empire, which would finally be credited to customers.³⁴

30. In addition to receiving the majority of the PTCs, the tax equity partner also receives cash distributions in the later years (i.e., years 6-10), which reflect a return on capital. Once the tax equity partner has recovered the return on and of its investment, the ownership structure “flips,” with the tax equity partner retaining a small share of the ownership interest and the majority of any financial benefits accruing to the utility. At that time, the utility also has an option to purchase the equity partner’s investment at fair market value.³⁵

31. As stated above, Empire is promoting the Wind Projects on an economic basis as a cost savings to customers, primarily through lower capital costs resulting from the tax equity agreements and through lower fuel costs when the wind replaces other energy resources.

32. As discussed in the direct testimony of Mr. McMahon:

- b. ...Empire, in conjunction with its parent company, Algonquin Power & Utilities Corp., (‘APUC’) identified a potential opportunity to leverage its experience in developing renewable projects in concert with tax equity partners. As a result, Empire launched a new study to assess the impacts of adding wind to its portfolio prior to the expiration of federal production tax credits (‘PTCs’), using the 2016 IRP as a baseline, but updating several key assumptions to reflect market, policy, technology, and regulatory trends.³⁶

33. In regards to this “new study” on adding wind generation, Ms. Crane reviews and summarizes the results of the Company’s Generation Fleet Savings Analysis (GFSA) that was submitted with the initial application:

³⁴ Crane Direct Testimony at pg 14.

³⁵ *Id.* pg 14.

³⁶ Direct Testimony of James McMahon, Pg 5 (May 28, 2021).

The GFSA, conducted after the acquisition of Empire by APUC, updated the Company's 2016 Integrated Resource Plan ("IRP") for three factors: updated capital costs associated with wind generation, updated wind capacity factors, and modeling of the SPP Integrated Marketplace ("IM"). The Company evaluated nine different plans, with various amounts of wind capacity, various assumptions about the Levelized Cost of Energy (LCOE) in various locations where wind could be sited various assumptions regarding gas, coal, and energy prices, and various assumptions regarding retirement of the Asbury plant. The Company's analysis assumed annual capacity factors of 46% in mid-LCOE regions and of 54% in low-LCOE regions. In addition, the GFSA included a sensitivity analysis for each of the nine plans, covering eighteen discrete scenarios. These scenarios examined a range of probabilities for variations in power and fuel prices, carbon taxes, and congestion.³⁷

34. As shown in Table 1 of Mr. McMahon's testimony,³⁸ the optimal plan resulting from the GFSA was to build 800 MW of wind generation and to retire the Asbury plant. The Company utilized both 20-year and 30-year Present Value Revenue Requirements (PVRR) to evaluate the results of the model. On a Net Present Value (NPV) basis, the projected savings based on a thirty-year analysis are approximately double those projected over the next twenty years. This is not surprising, given that a substantial benefit of the Wind Projects are the PTCs and other tax incentives, which accrue primarily to the benefit of the tax equity partners. The fact that much of the savings related to the Wind Projects occur in the later years is troubling, given that assumptions tend to be less accurate the further out one is in the estimation process. These Wind Projects, if approved, will be thrust upon ratepayers in one of the most economically challenged areas of our state. These ratepayers do not need or want any additions to Empire's rate base that will further cause an increase to the monthly bill. CURB believes that Empire did not act in the public interest when building the Wind Projects, thereby not satisfying factor 10 of K.S.A. 66-128g.

35. Testimony suggests that Empire was predisposed to investing in wind projects prior to undertaking a reexamination of its 2016 IRP and completing the GFSA. Even before the

³⁷ Crane Direct Testimony at pg 18, lns 13-22 to pg 19, lns 1-3.

³⁸ Direct Testimony of James McMahon. pg 30 (May 28, 2021).

acquisition of Empire was completed, APUC had identified utility investment in renewable generation as a source of attractive returns and strong cash flow. Empire witness Shaen Rooney explains, “In furtherance of this acquisition strategy, the Company identified two locations in southwestern Missouri that would meet this criterion and acquired the necessary land rights to develop wind generation projects at those.”³⁹ Empire planned to own these Wind Projects with the knowledge that the additional capacity was not needed to serve Kansas ratepayers from the beginning.

b. If the Wind Projects Are Included in Rates, The Commission Should Adopt a LCOE Methodology to Set a Reasonable Price for Energy Which Adequately Protects Ratepayers From Volatile Bill Impacts

36. If the Commission determines Empire should be allowed to recover the costs of the Wind Projects in Kansas jurisdictional rates, then CURB recommends that the Commission adopt a LCOE methodology which provides better protection to ratepayers than traditional ratemaking methodology for this unique situation. CURB believes the Wind Projects will have a significant impact on the Company’s total rate base and on its generation portfolio, and will result in significant bill increases for customers. As shown in Ms. Sanderson’s supplemental testimony,⁴⁰ the Wind Projects will increase the Company’s rate base by \$28.76 million, an increase of 45% over the rate base authorized in the Company’s last base rate case. In addition, the base revenue requirement associated with the Wind Projects is \$4.9 million, approximately 29% over base revenues authorized in the Company’s last base rate case. On a nominal basis, the Wind Projects are expected to increase after-tax shareholder earnings by \$381.4 million over the next twenty

³⁹ Direct Testimony of Shaen Rooney pg 4 (May 28, 2021).

⁴⁰ Supplemental Direct Testimony on Tisha Sanderson, pg 4 (October 1, 2021).

years, or by \$223.3 million on a NPV basis.⁴¹ Further, if the Wind Projects are allowed to be collected, the bill impact on Empire's customers will be significant. The monthly bill increase is estimated at \$5.09 or a 4.58% increase.⁴² CURB believes it has satisfied Factor 1 of K.S.A 66-128g by showing a comparison of the existing rates of the utility with rates that would result if the entire cost of the facility were included in the rate base for that facility. Further, factor 9 of 66-128g is also satisfied, in that a large increase in rate base and the subsequent increase in the monthly bills will adversely impact the people of Kansas and therefore is not prudent.

37. Factor 2 is satisfied by showing a comparison of the rates of any other utility in the state which has no ownership interest in the facility under consideration with the rates that would result if the entire cost of the facility were included in the rate base. Using Empire's proposed LCOE rate will unnecessarily increase monthly bills without ever reviewing alternative means to provide similar value for customers. CURB points out that much time was spent during the Evidentiary Hearing to discuss comparisons between the Empire Wind Projects here and Western Plains Wind Farm from Docket No 18-WSEE-328-RTS. Empire's recommended LCOE of \$33.73 is significantly higher than the LCOE of \$20.70 approved by the Commission in the Western Plains Wind Farm docket.

38. Here, there is a large difference between Empire's proposed LCOE value and the one approved for the Western Plains farm. Empire claims that the other parties have failed to account for the many differences and measures used in Empire's wind farms compared to Western Plains. However, a closer reading of the factor does not measure the *reason* for the discrepancy, but rather the comparative rates. That alone warrants a finding against prudence. If the

⁴¹ Direct Testimony of Andrea Crane pg 20.

⁴² Supplemental Testimony of Tisha Sanderson, pg 6 (October 1, 2021).

Commission were to entertain Empire's interpretation which accounts for the price differential, such a review should naturally include a discussion of the *reason* for those differences to avoid unnecessary costs of excess capacity property. If these additional expenditures are not needed to allow the property to be used and required to be used to provide service, they should not be allowed in rates. As stated above, Empire readily admits that the Wind Projects are not needed to provide service and are just a financial opportunity. The extra features and precautions that Empire took when building the plant, while valuable in their own rights, do not elevate the Wind Project's place in the generation portfolio in providing service. Even if Empire's extra expenditures above Western Plains were considered best practices in constructing wind farms, it does not change how unnecessary the Wind Projects are to serve Kansans. As a result, Factor 2 weighs against a finding of prudence.

39. As noted extensively in testimony and during the Evidentiary Hearing, at no time did Empire solicit proposals for PPAs in order to compare costs and benefits to the ownership of new wind generation assets.⁴³ When asked by his Counsel, "And can you explain why Empire did not do an RFP for PPA at the time it did RFP's for ownership options?"⁴⁴ Mr. Wilson answered, "A simple answer is we didn't need to."⁴⁵ Empire made a conscious decision to reject the PPA option in favor of ownership. This was done without fully exploring the opportunities that may have been available under a PPA. In testimony presented in Missouri, Mr. Mertens was asked why Empire chose not to look into PPAs. He claimed, "Empire is in a unique position to benefit from

⁴³ Testimony of Timothy Wilson, Transcript pg 85, Lines 17-23.

⁴⁴ *Id.* Tr. Pg 113 Lines 12-16.

⁴⁵ *Id.* Tr. Pg 113 Lines 17-18.

APUC's expertise in owning and managing wind farms, and its expertise developing such opportunities with tax equity partners...."⁴⁶

40. However, it should be noted that APUC's experience with wind projects was relatively limited compared with major wind developers and the projects APUC had undertaken prior to that time were small compared to these Wind Projects.

41. Empire states that ownership would allow utility customers to benefit from the Wind Projects over the entire service life of the facilities, which it estimated was at least ten years longer than the traditional twenty-year PPA. While it is true that ratepayers have the potential to benefit over a longer period through the ownership structure, it is also true that they are exposed to greater risks over this period as well. The record remains speculative on any definitive benefits available to customers with the Wind Projects. Empire states that ownership "inherently creates healthier utilities and provides better local economic development opportunities...."⁴⁷ "Healthier" utilities, in this sense, likely refers to the ability for shareholders to earn millions over the life of the Wind Projects compared to entering into PPAs. If positive bill impacts are not realized until ownership structure switches in favor of Empire, there is a significant risk that many of the ratepayers who have been paying for the Wind Projects never see the economic benefits touted by Empire today. While such inequity may be allowed in ratemaking, the Commission should reject doing so to account for investments that essentially contribute to excess capacity not needed to serve Kansans.

42. As stated above, the projects are not serving a current or projected deficiency or improving the quality of service. Moreover, under the alternative levelized approach proposed by

⁴⁶ Direct Testimony of Blake Mertens, Missouri Docket No. 2019-0010, pg 12 and in 18-EPDE-184-PRE pg 9 (October 31, 2017).

⁴⁷ Direct Testimony of Blake Mertens in Docket No. 18-EPDE-184-PRE pg 9 (October 31, 2017).

Empire, shareholders will retain any residual value of the Wind Projects after twenty years. Thus, in that case, ratepayers will not necessarily benefit from project lives that exceed twenty years. In addition, a shorter commitment under a PPA may allow utility customers flexibility to benefit from cheaper future technologies sooner, once its obligations under a PPA expire. Empire also claims that a PPA would be more expensive for customers than utility ownership, but, as Ms. Crane pointed out, because Empire did not solicit bids for PPAs in this case, there is no basis for this conclusion.⁴⁸

43. As pointed out by Commissioner Duffy during the Evidentiary Hearing,⁴⁹ KCC Staff witnesses spell out the deficiencies in Empire's lack of evaluating PPA's, when they state:

- c. The exclusion of PPA's prevented a transparent evaluation that would support resource selection and validate whether the cost of utility-owned wind is efficient, or just and reasonable. In the absence of this critical information, the Request for Proposal (RFP) implementation and Empire's evaluation and selection of projects are insufficient to support the conclusion that the costs Empire would impose on its Kansas ratepayers and resulting rates would be just and reasonable.⁵⁰

44. The Wind Projects increase the Company's rate base and result in greater earnings to shareholders. APUC, as well as other utilities throughout the country, have been very open about their use of increased investment as a vehicle to enhance shareholder earnings. While increased investment does not change the authorized Weighted Average Cost of Capital (WACC), it does result in greater overall earnings, which in turn results in greater earnings per share for APUC investors. All of which are paid by Kansas ratepayers. Therefore, while Empire describes the Wind Projects to regulatory agencies as a means to lower overall costs to ratepayers, the Company

⁴⁸ Crane Direct Testimony at pg. 24, lns 12-15.

⁴⁹ Transcript pg 152 Lines 7-16.

⁵⁰ Direct Testimony of Colin Cain and Nicolas Puga pg 17 (January 14, 2022).

describes the Wind Projects (and other capital additions) to investors as a means to increase shareholder earnings.⁵¹

45. For all the reasons stated above, CURB requests the Commission deny Empire's request to include the Wind Projects in rate base.

c. CURB's LCOE of \$23.97/MWh Is Based on Sufficient Evidence in the Record and Represents a Fair Compromise for All Competing Interests.

46. Empire's fixed cost calculation provides for a hefty return on and of shareholder investment, but fails to additionally consider future external costs associated with the Wind Projects. In its testimony, Empire proposed an alternative ratemaking methodology for adding the Wind Projects into rate base in the traditional method, they propose a different ratemaking methodology based on a levelized cost of the Wind Projects over a period of twenty years. Under Empire's proposal, ratepayers would pay a fixed cost of \$33.73/MWh for the wind generated by the Wind Projects, based on a projected capacity factor of ****[REDACTED]****. Adjustments would be made based on the actual capacity factors over a rolling three-year average. If the rolling average capacity factor is greater than ****[REDACTED]**** then Empire will be permitted to include the charge in the ECA based on the difference in generation multiplied by the per MWh levelized cost. If the actual capacity factor is less than ****[REDACTED]**** then there will be a corresponding credit to the ECA.⁵²

47. CURB is concerned by this alternative proposal and notes that in addition to capital costs associated with the Wind Projects, the Company included an Asset Retirement Obligation

⁵¹ Direct Testimony of Andrea Crane pg. 18 (January 13, 2022).

⁵² Direct Testimony of Tisha Sanderson pgs 15-16 (May 28, 2021).

(ARO) associated with future costs related to retirement of the Wind Projects at the end of their lease terms. The land leases are thirty-year leases with the option to renew for an additional thirty years. At the end of the projects, each lease agreement requires the Wind Projects to be dismantled and all assets to be removed, and for the land to be restored to its prior state. The Company included an ARO even though, under the fixed LCOE approach, shareholders are entitled to all residual value after twenty-years, including any wind margins, asset or land sales.⁵³ It appears that while Empire is proposing that certain benefits associated with the Wind Projects be retained for shareholders, Empire nevertheless expects ratepayers to be responsible for all of the associated costs during the life of the project. This arrangement places the risk of cost overruns and changes upon ratepayers. Empire has made plans for the decommissioning of the Wind Farms it has not included these costs in its Application and these costs are at this time unknown.⁵⁴ Therefore, Empire fails to satisfy factor 7 because it has not indicated whether the dismantling and the clean-up of the sites will be paid by Empire.

48. While CURB believes that a LCOE methodology will help lessen the impacts of price fluctuations compared to traditional ratemaking mechanisms, CURB does not believe that the \$33.73 valuation proposed by the Company will produce just and reasonable rates. This amount appears exorbitant when compared to the costs of wind that may have been available to the Company by other means. Empire claims that “the levelized rate in this proceeding is the rate that recovers the net present value revenue requirement over the projects’ lifetime”⁵⁵ and “the rate that ensures cost recovery, and not a penny more, not a penny less, and that is \$33.”⁵⁶

⁵³ Direct Testimony of Tisha Sanderson, pgs 8-9 (May 28, 2021).

⁵⁴ *Id.* at pg 9-10.

⁵⁵ Transcript of Evidentiary Hearing Day 2, pg 273, lines 11-13.

⁵⁶ *Id.* lines 15-17.

49. During the Evidentiary Hearing Commissioner French posed the question to Mr. Mooney, “So in this case the \$34, if we’re to compare it to, you know, a wind farm that has a levelized cost of energy of \$20, it might reflect that there was either a higher cost to construct it for KW or MW, or there was a higher cost to maintain it. Those types of things would be the primary things that would influence that higher levelized cost of energy, is that fair?”⁵⁷ Mr. Mooney’s response was, “Those are some of the larger factors that influence that, that’s correct.”⁵⁸

50. Later in further questioning of Mr. Mooney, Commissioner French commented “I’m pretty used to seeing wind farm levelized cost of energy or PPA prices between 1.4 and 2 cents,”⁵⁹ and later, “Help me get from 2 cents to 3.4 cents.”⁶⁰ To clarify, Commissioner French then asked, “Could you give me some more details specifically on what drove the cost of these wind farms to be so much higher than what we’ve experienced in other locations?”⁶¹

51. Mr. Mooney’s response is lengthy, stating:

- d. Right. I think you've hit on a number of the key elements. In fact, the list that I was going to run down is almost what you've just said. So on one hand, the lower wind speed in Western Missouri and Southeastern Kansas results in better economic tradeoff, but still a higher cost by investing in higher towers with longer blades. The towers that Empire has used for the vast majority of the wind turbines are 120 meters, which is significantly higher than the average, especially when it's windier, closer to the ground. So that has increased costs. The capital costs to energy ratio is higher. I believe the cost per kilowatt is closer, very approximately to \$2,000 rather than, say, 1,500, which was more of an industry benchmark. But it's just an average and doesn't take into account the situation in lower cost wind regimes where it does make sense to have that investment in higher towers. Cold weather packages is another item that you have mentioned. And that is one other factor as well. Another factor specifically applies to the Kansas wind farm, Neosho Ridge, which does represent half of the portfolio. There, there were local setback requirements that required the facility to be spread out further, further than originally anticipated. That did increase production,

⁵⁷ Testimony of Todd Mooney Transcript pg 347, lines 11-19.

⁵⁸ *Id* lines 20-21.

⁵⁹ *Id* pg 349, lines 8-9.

⁶⁰ *Id* pg 350, lines 6-7.

⁶¹ Transcript pgs 349-350, line 25 on pg 349 and lines 1-3 on pg 350.

because if you spread out the wind turbines, there's less wind resistance and less internal resistance, and has -- and has a higher production, but by the same token, you very much increase the capital costs associated with the collection system and the various balance of plant. Oh so higher costs there as well. Finally, I would say COVID did have an impact. We definitely kept the impact as low as possible, but that impact was about \$24 million, as I believe I mentioned in my direct testimony. 24 million is, you know, approximately 3 to 4 percent of the overall capital costs.⁶²

52. It should be noted that the original estimates of costs for the Wind Projects were

** [REDACTED] ⁶³ While Empire may feel that this 5.2% difference is minimal, CURB does not. Clearly these additional costs will be borne by Empires ratepayers.

53. Commissioner French then posed the question, “So it sounds like the position you are taking is primarily that cost is higher than many other wind farms because you’re building different types of wind farms? Is that a fair way to boil it down?”⁶⁴ Mr. Mooney’s answer: “I think that’s a, one way you could legitimately summarize that, you know.”⁶⁵

54. As pointed out by Justin Grady during the Evidentiary Hearing when referring to the costs of the Wind Projects, “The problem is the construction costs are really high, like the highest number we can find in SPP during that period of time, and the O&M costs are really high, way higher than the average wind farm in SPP.”⁶⁶ This observation is important to consider for the value of such generation projects. Even if budget overruns are “modest” compared to estimates, approval recovery of excess capacity construction well-above projects in the region should be done in limited circumstances that benefit the ratepayer, as the ratepayer is the group most at risk with these investments. Empire’s views on the Wind Project’s potential economic value for customers

⁶² Transcript pgs 350, lines 8-25, pgs 351, lines 1-25.

⁶³ Direct Testimony of Todd Mooney pg 8. (May 28, 2021).

⁶⁴ Transcript pg 352, lines 12-16.

⁶⁵ *Id* lines, 17-18.

⁶⁶ *Id* pg 563, lines5-9.

does not give rise to a finding of prudence when customer demands do not warrant the extra generation. CURB believes this satisfies factors 4 and 6 of the prudency factors by showing that Empire built exceptionally expensive Wind Projects and were significantly over budget in the building and are therefore not prudent.

55. As indicated by the testimony above, Empire appears to have chosen to spend more than what is considered to be normal costs to own and build these Wind Projects, while making no effort to consider lesser cost PPAs and the benefits those may have brought. This is very concerning to CURB, and hopefully, to the Commission. Lesser cost alternatives appear to have been available, if only Empire would have considered other options than ownership.

56. If the Commission determines that Empire is allowed to recover the costs of the Wind Projects from Kansas ratepayers, then CURB's recommended \$23.97 LCOE charge should be adopted by the Commission because it represents a reasonable balance between shareholder earnings and savings values for residential customers. Because the Company did not solicit proposals for PPAs, we do not — and *cannot* — know what price it may have been able to obtain with a PPA. Empire's critical take on CURB's reliance on Empire's GFSA to analyze the Wind Projects should not be misconstrued as substantive attacks, but rather as a distraction from Empire's justification for spending millions on excess capacity to increase shareholder returns. Empire ignores the inquiries into the decision to disregard PPAs as a matter of personal preference and confidence with its internal analysis. CURB's number is based on Empire's own study related to the economic justification to open this docket. It takes into account documented PPA prices and Empire's actual investments into the Wind Project. CURB's LCOE accounts for examination of close proxies to PPAs and Empire's own GFSA, which in of itself is indicative of consideration of Empire's analysis and outcomes from other projects. Therefore, CURB's recommendation most

fairly balances Empire's reasonable opportunity to earn a fair return of and on this investment while lessening the monthly bill impact for customers to gain access to additional capacity and potential savings from off-system sales.

57. CURB's recommendation of \$23.97 is based on several factors. First, \$23.97 is the cost on which the GFSA was based. The GFSA, which was conducted after the acquisition of Empire by APUC, updated the Company's 2016 IRP for three factors: updated capital costs associated with wind generation, updated wind capacity factors, and modeling of the SPP Integrated Market (IM). The GFSA was the primary support provided by the Company in both Missouri and Kansas for its wind projects. The Company not only used the GFSA to support its predetermination proposal in Kansas, but it has continued to use the GFSA in this case to support its proposals. Although reliant upon the GFSA here, the Company also takes the position in this case that it has now revised its methodology for calculating its proposed LCOE, and that the new formula would result in a cost of closer to \$30.00. However, the \$23.97 was, and continues to be, the LCOE reflected in the GFSA, which is the primary support for the wind projects.

58. Second, in addition to the \$23.97 reflected in the GFSA, CURB also considered the LCOE price approved for the Western Plains Wind Farms of \$20.70/MWh. While there may be differences between the Western Plains Wind Farm and the projects being proposed here, the LCOE of \$20.70 approved by the Commission provides a good indication of the prices that would have been available to Empire had it solicited PPAs.

59. Third, CURB examined prices for PPAs as reported by the Lawrence Berkeley National Laboratory, which were consistently less than \$25.00/MWh for PPAs of projects of similar size (150 to 300 MW) executed in the SPP from 2017 through 2021. In fact, as shown in Exhibit ACC-1 to Ms. Crane's testimony, between 2017-2019, the overwhelming majority of

PPAs were priced under \$15.00 per MWh. CURB would note that, despite Empire's allegations, CURB *did not* ignore revenues in its consideration. Any sales that Empire makes from its wind farms could have been made with energy procured through a PPA. CURB believes this satisfies factor 3 in the prudence requirements that showing that the costs of the Wind Projects in relation to the final cost of other facilities constructed were not prudent. CURB further believes the testimony shows that by proceeding with the ownership option instead of investigating the potential of PPAs, Empire accepted risks in the construction of the Wind Projects that were inappropriate to the general public interest of Kansas. Thereby the Company did not satisfy the requirements of factor 11 regarding whether the utility accepted risks in the construction of the facility which were inappropriate to the general public interest to Kansas

60. After consideration of the GFSA LCOE of \$23.97, KCC Staff's proposed LCOE of \$15.60, Empire's proposed LCOE of \$33.73, as well as the Western Plains Wind Farms rate of \$20.70, and the PPA prices as reported for other PPAs in the SPP, CURB believes that a rate of \$23.97 per MWh is most reasonable.

Conclusion

61. CURB requests that the Commission approve the terms of the Unanimous Settlement Agreement as filed by the signatory parties. CURB believes that the terms of this agreement are fair and reasonable and the product of thorough negotiations among the parties.

62. The Wind Projects are not needed to serve Kansas customers and, as such, the inclusion of these investments in rate base would not bring about just and reasonable rates for Kansas ratepayers and the same should be disallowed. The Wind Projects are presented as an economic opportunity, paid for by the ratepayers, without commensurate improvements to service.

Even if the Commission determines that the Wind Projects were needed to maintain efficient and sufficient service, the factors in 66-128g do not weigh in favor of a finding of prudence. The Wind Project costs will result in unreasonable rate increases compared to service benefits.

63. If the Commission believes it best to allow Empire to recover the costs from ratepayers, CURB encourages the Commission to closely look at the alternative methods presented by the parties in this docket and to authorize recovery based on the LCOE methodology rather than the traditional form of cost recovery, in line with CURB's testimony. CURB believes its recommendation of an LCOE of \$23.97 is a reasonable amount that would be fair to ratepayers and Empire alike.

WHEREFORE, CURB submits this *Post-Hearing Brief* and requests the Commission approve the Partial Unanimous Settlement Agreement filed in this docket. CURB further requests the Commission deny Empire's request for an inclusion of its Wind Projects in rate base. In the alternative, if the Commission determines that the Wind Projects are to be recovered from ratepayers, CURB recommends that this be done at the LCOE of \$23.97 per MWh.

Respectfully submitted,




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VERIFICATION

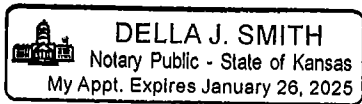
STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:


I, Todd E. Love, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief under the pains and penalties of perjury.



Todd E. Love

SUBSCRIBED AND SWORN to before me this 18th day of April, 2022.





Notary Public

My Commission expires: 01-26-2025.

CERTIFICATE OF SERVICE

21-EPDE-444-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 18th day of April, 2022, to the following:

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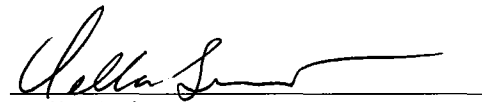
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