**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| In the Matter of the Petition of The Empire District Electric Company d/b/a Liberty to Obtain a Financing Order that Authorizes the Issuance of Securitized Utility Tariff Bonds for Qualified Extraordinary Costs | ) ) ) ) ) | Case No. EO-2022-0040 |
| In the Matter of the Petition of The Empire District Electric Company d/b/a Liberty to Obtain a Financing Order that Authorizes the Issuance of Securitized Utility Tariff Bonds for Energy Transition Costs Related to the Asbury Plant | ) ) ) ) ) | Case No. EO-2022-0193 |

**REPLY IN SUPPORT OF**
**MOTION FOR RECONSIDERATION OR CLARIFICATION**
**AND/OR APPLICATION FOR REHEARING**

Staff's response to Liberty's motion for reconsideration, clarification, or rehearing as to ADIT offset fails to defend—or even mention—what the Commission's Order says on that issue. The Order adopts the position, previously advanced by Staff, that "Liberty's calculation of the net present value of its ADIT offset effectively and inappropriately discounted the ADIT twice by discounting the yearly amounts related to the remaining balance of ADIT, and then discounting the sum of the yearly amounts again." Order, p. 52 (citing Bolin Rebuttal, Ex. 102, Page 11, Lines 10-14); *see id.* at p. 54. Liberty's motion explained in detail why there was no inappropriate double discount in the methodology Liberty used for calculation of the ADIT offset, and the filings by Evergy and Ameren agreed with Liberty's conclusion. Staff's failure to respond to those showings tacitly concedes that the reasoning Staff previously pressed is wrong and that the Order reflecting that reasoning is in need of correction.

Instead, Staff advances several brand-new arguments, none of which is supported by the record and all of which are plainly incorrect. Staff contends that the "net tax benefit" of ADIT is the same as the ADIT balance. That position cannot be reconciled with RSMo.

§393.1700.2(3)(c)m, which refers *separately* to "accumulated deferred income taxes" and to the "net tax benefits" arising from those taxes and therefore cannot be read to equate those two terms. Staff also is dead wrong in asserting that Liberty will be made whole for tax liability even if the error in the Order's approach to the ADIT offset is not corrected. Although Staff does not deny that the Commission's Order cannot permissibly deprive Liberty of a source of revenue for paying taxes that will be owed going forward, Staff suggests that Liberty was relieved of relevant tax obligations when Asbury was retired. That argument contradicts the Order's finding, and Staff's testimony, that Liberty will incur future tax liability as it receives securitized charges. Staff's further assertion that Liberty's position would lead to double recovery of taxes is equally incorrect: Liberty never asked for a double recovery of taxes, and nothing in the statute mandates Commission approval of such a double recovery in the future if Liberty's ADIT offset methodology is adopted. In addition, Staff's criticism of the expert affidavit that Liberty filed in an effort to aid the Commission is misplaced, since there was nothing improper about that filing and since Liberty's arguments expressly do not depend on the content of the affidavit in any event.

Finally, and critically, the Order's error as to ADIT offset will discourage future use of the securitization statute. Staff's observation that a future Commission would not be bound to reach the same result as a matter of *stare decisis* is beside the point. If the Commission fails to correct the Order, the practical reality is that Liberty, Evergy, and Ameren, as they have each explained, will have a strong disincentive to pursue securitization. The Commission should not apply the statute in a manner that would *deprive* Missouri customers of the benefits that the Missouri legislature intended to confer on the public when it approved the securitization procedure.

Staff's attempt to support the outcome adopted by the Order on grounds not previously advanced, and which the Order itself does not adopt, demonstrates the flaws in the Order. And, as

shown below, Staff's new positions are equally without merit. Accordingly, the Commission should reconsider, clarify, and/or rehear the Order for the purpose of adopting Liberty's methodology for calculating the ADIT offset. At a minimum, if the Commission were inclined to give any credence to Staff's current arguments, the best course of action would be for the Commission to grant rehearing, reopen the record to permit parties to present further evidence on the positions Staff now advances, and issue a new decision on the basis of that record.

## I. The Commission's Calculation Of ADIT Offset Is Contrary To Law And Unreasonable

### A. Staff incorrectly asserts that "net tax benefits" in the statute refers to the full amount of the ADIT balance

Staff's first argument is that the term "net tax benefits" in Section §393.1700.2(3)(c)m refers to the full amount of the ADIT balance. *See* Resp. ¶ 12 ("[T]he 'net tax benefit' of an ADIT balance is the full balance of the ADIT balance."). Staff agrees that under the statute the relevant amount is subject to a present-value calculation—but in Staff's view all that is necessary is to calculate the present value of the full ADIT balance amount. Staff's position is incompatible with the governing statute.

The securitization statute sets forth a detailed "procedure for the treatment of accumulated deferred income taxes," RSMo. §393.1700.2(3)(c)m—that is, for the treatment of the full amount of the ADIT balance. That procedure, the statute explains, is to exclude "[t]he accumulated deferred income taxes" from rate base and to credit customers with "the net tax benefits" of that accumulated amount. *Id.*; *see* RSMo. §393.1700.1(7)(a) (stating that the amount of energy transition costs is "to be reduced by applicable tax benefits of accumulated . . . deferred income taxes"). The statute then sets forth a specific formula for calculating the "net present value of the tax benefits" for the "accumulated . . . deferred income taxes at the time of securitization." RSMo. §393.1700.2(3)(c)m.

If "net tax benefits" of the ADIT amount were synonymous with the ADIT amount itself, then significant portions of that statutory language would be superfluous. The Missouri legislature would have had no need to refer separately, and in close juxtaposition, to the "accumulated deferred income taxes" and to the "net tax benefits" of ADIT if those terms meant the same thing. Indeed, the legislature would have had no need to refer to "net tax benefits" at all. The legislature would simply have instructed that a net present value calculation be carried out as to the "accumulated deferred income taxes" themselves. In short, Staff's interpretation renders the phrase "net tax benefits" superfluous, contrary to basic principles of statutory construction. *See Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 109 (Mo. Ct. App. 2008). Where a legislature chooses to use different terms in a single provision, those terms must necessarily be referring to different things. *See City of Wellston v. SBC Commc'ns, Inc.*, 203 S.W.3d 189, 196 (Mo. banc 2006), *as modified on denial of reh'g* (Oct. 31, 2006) (discussing use of different terms in the same statutory section and holding that "[w]here the legislature uses two different terms in the same statute, it must be presumed that it intended the terms to be given different meanings"); *see also generally, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) (where the legislature "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion").

As Liberty's motion explains, the "accumulated deferred income taxes" and "the net tax benefits" of ADIT *do* mean different things. The tax benefits of an ADIT balance are the benefits arising from the time value of money only, given that any amount in an ADIT balance will inevitably be paid in taxes by the Company in the future. *See* Liberty Mot. p. 5. Indeed, the very term "ADIT" makes clear that the taxes are only "deferred," not avoided.

That conclusion is cemented by Staff's *own description* of how ADIT functions. *See* Resp. ¶¶ 13-17. As Staff explains, the "compensation" customers get for prepayment of taxes—*i.e.*, the "benefit"—is equal to the rate base offset. Resp. ¶ 15. Translated to customer rates, the benefit of the rate base offset is the ADIT balance multiplied by the authorized rate of return. Liberty Mot., pp. 5-6 & Table 1. Staff's description of the "compensation" to customers for ADIT thus tracks steps 1 and 2 of the statutory calculation, as laid out by Liberty in its motion. *See id.* at pp. 5-7. In addition, Staff states that "the amount of income taxes paid by the utility to the taxing authorities in theory should be equal to the amount of income taxes collected from customers." Resp. ¶ 16. That indicates that the full ADIT balance (at present value) should *not* be credited to customers here, because doing so will leave the Company without a source of funds to meet its tax liability.

Staff fails to respond to Liberty's showing that the credit due to customers in the securitization context under the statute is essentially equivalent to the credit that would be due to customers in a traditional ratemaking setting. *See* Liberty Mot. pp. 5-8 & Tables 1-3. Staff simply has no explanation for why anything about the mechanics of cost recovery through securitization would dictate that customers should be credited with the full amount of the ADIT balance, thus requiring a return to customers of amounts that the Company collected for payment of taxes and that are needed as a source of funding for future tax liabilities. *See* Liberty Mot. pp. 5-6 (citing, *inter alia*, Order, p. 34 (Finding of Fact 54) ("Customers do not receive the recorded amount of the ADIT liability, instead, they benefit because ADIT liability reduces rate base and customers are charged a lower revenue requirement reflecting the lower cost of capital"), and *State ex rel. Util. Consumers Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 606 S.W.2d 222, 224 (Mo. Ct. App. 1980)).

Staff asserts in passing that, because the statute says the credit should "include" the net present value of tax benefits, the Commission could increase the credit to a greater amount. Resp. ¶ 23 (citing RSMo. §393.1700.2(3)(c)m). Staff's argument fails to give effect to the immediately preceding sentence, which states, in mandatory terms, that "the net tax benefits . . . *shall* be credited to retail customers," RSMo. §393.1700.2(3)(c)m (emphasis added)—no more, and no less. The subsequent sentence, to which Staff points, is simply an instruction for how to determine the net tax benefits and convert the relevant amount to "present value." *Id.* By stating that the credit "shall include the net present value of the tax benefits," the legislature has provided that the credit should consist of the *present value* amount of those benefits, and that the amount *without* the present-value calculation should be excluded. The word "include" also signals that the legislature has set forth multiple separate steps for calculating "the net present value of the tax benefits," all of which must be included to make the calculation complete—just as one might describe in full all of the personnel that work at a legal office by saying that "my office includes two attorneys, one assistant, and one paralegal."

Finally, Staff errs in claiming that the statutory interpretation question here is resolved by a four-word response from Staff witness Bolin. It is blackletter law that statutory interpretation is a legal question and that fact and expert testimony on an ultimate legal question is not proper. *See, e.g.*, *DMK Holdings, LLC v. City of Ballwin*, 646 S.W.3d 708, 714 n.4 (Mo. Ct. App. 2022) (question of "statutory construction" of a particular term used in a statute is a "question of law" and is not "one of fact for determination by expert testimony"). Testimony regarding the ADIT offset can properly provide background and context on what ADIT is, on how ADIT-related calculations work in practice in the utility context, on what taxes a company owes, on how a particular calculation was actually performed in the real world, and the like. *See, e.g.*, Ex. 8, Emery

Surreb., pp. 14-15. But the tiny snippet of Bolin's testimony on which Staff relies does none of those things. Bolin was asked whether the "tax benefit" of ADIT is "[t]he full amount" of the ADIT balance and answered "[t]he full amount. Yes." Resp. ¶ 12 (citing Tr. 243:11-245:3). That answer does not provide any factual background or any context—or even, for that matter, any explanation of what justifies Bolin's personal opinion about the meaning of "tax benefit" in Section 393.1700.2(3)(c)m.

Even if Bolin's four-word response were of relevance in interpreting the statute (which it is not), Bolin's opinion about the statutory interpretation question would not be sufficient to support Staff's position. Bolin previously stated that Liberty had "inappropriately discounted the ADIT twice by discounting the yearly amounts related to the remaining balance of ADIT, and then discounting the sum of the yearly amounts again," Order, p. 52 (citing Bolin Rebuttal, Ex. 102, Page 11, Lines 10-14)—a claim that Staff has now abandoned, and therefore has tacitly conceded is not correct. Bolin is not a tax expert. *See* Liberty Mot. 13. And her conclusory statement is inconsistent with more substantial record evidence about how ADIT functions, Ex. 8, Emery Surreb., pp. 14-15, as well as the conclusions drawn by tax experts at Liberty, Ameren, and Evergy (as reflected in the filings in this proceeding).

### B. Staff incorrectly contends that Liberty has another avenue for obtaining revenue for paying taxes or otherwise will somehow recover that revenue twice if Liberty's calculation is adopted

Staff's response does not take issue with the Company's position that income taxes are a cost of service that customers should pay in rates. On the contrary, Staff appears to concede that the Company should be made whole for taxes it will owe on Asbury. *See* Resp. ¶ 18 (asserting that the Company has been "made . . . 'whole' for the tax consequences of the Asbury unit"). But Staff's arguments that the Order complies with that standard are incorrect.

First, Staff argues that the Company "halted the process" of depreciating Asbury when it took a plant abandonment deduction, thereby preventing the unwinding of ADIT that would normally occur as the plant is depreciated. Resp. ¶ 17. The flaw in that argument is that Staff overlooks the tax liability that will arise when the Company receives payments on the securitized bonds.

The retirement of Asbury does not interrupt the unwinding of ADIT. A comparison between what happens in traditional ratemaking scenarios and what happens in the context of securitization illustrates why that is so:

- Had Asbury not been retired, the Company would have recovered in rates a depreciation expense, *i.e.*, amounts to recover its remaining investment in the plant. To the extent such ratemaking depreciation exceeded tax depreciation in the future, the Company would have had a tax obligation that would have exceeded the amounts collected in rates in those future years, thereby reducing the ADIT balance.

- After Asbury's retirement and removal from rate base, the Company no longer recovers plant depreciation, but instead would recover the remaining investment balance. In that scenario, because the Company has already recognized an abandonment deduction, the revenues received to amortize the regulatory asset are taxable without a corresponding depreciation deduction, which would accelerate the reduction in the ADIT balance compared to a no-retirement scenario.

- If the Asbury balance is securitized, the principal payments on the securitized bonds would represent a similar amortization of the he remaining investment balance and would generate taxable income. That would lead to a similar unwind of the ADIT balance as in the scenario in which it amortizes the remaining investment balance after removing the plant from rate base.

In other words, the ADIT balance is unwound in a securitization transaction, just as it would be in conventional ratemaking, as the Company receives taxable income to amortize its remaining investment.

Staff adverts to that explanation but nevertheless claims that the record does not address "to what extent income taxes associated with securitization charge collections will in fact be due and payable on future securitized utility tariff charges." Resp. ¶ 21. On the contrary, the Order

expressly finds that "the [securitization] charges that will be used to pay the bonds is taxed as income to the utility." Order, p. 33. Moreover, Staff's own witness's surrebuttal testimony states: "I have reviewed, however, IRS Revenue Procedure 2005-62, which states . . . '[t]he non-bypassable charges are gross income to the utility recognized under the utility's usual method of accounting.'" Ex. 103, Bolin Surreb., p. 5, lines 6-9; *see* Tr. 242 (Bolin).

The Company must have a source of ratepayer funds to defray the tax liability the Company will incur upon receipt of the securitized charges. The ADIT balance is that source of funds. The Company's methodology, as dictated by the statutory language, permits the Company to retain the ADIT balance while reducing the amount to be securitized by the present value of the net tax benefits of the ADIT balance. That approach, which precisely tracks the three-step process set forth in the statute, is "how customers would be appropriately compensated for use of their funds for this purpose through the ADIT customer credit," a topic that Staff incorrectly asserts the record fails to address. Resp. ¶ 21. In contrast, the approach supported by Staff, which the Order adopts, would reduce the securitization amount by the full ADIT balance amount (present valued), thereby leaving the Company without a source of funds to meet its future tax liability as it receives customer payments for the securitized charges.

Second, Staff argues that the Company's proposed approach would lead "utilities [to] recover twice from their ratepayers the income taxes that may be paid on securitized utility charges: once through retaining the balance of the ADIT under Section 393.1700.2(3)(c)m, and again through financing charges included in the securitized utility tariff charges themselves under Sections 393.1700.1(8)(d) and 393.1700.1(16)." Resp. ¶ 27. Staff's argument *supports* the Company's position, because that argument acknowledges that retaining the ADIT balance, as the

Company proposes, would in fact allow the Company to "recover" the "income taxes that may be paid on securitized utility charges." *Id.*

But Staff's professed concern that the Company would recover the tax obligation a second time through securitized charges is without merit. Staff cites RSMo. §393.1700.1(8)(d), which defines financing costs to include taxes "imposed on the revenues generated from the collection of the securitized utility tariff charge or otherwise resulting from the collection of securitized utility tariff charges." Liberty interprets that provision to refer to sales tax, not income tax, because the provision covers taxes imposed on "revenues." *Id.* The more fundamental problem with Staff's argument, however, is that the statute does not *require* the Commission to permit recovery of income tax as a financing cost. The "securitized utility tariff charge" is the amounts "authorized" by the Commission to pay finance costs, among other costs. RSMo. §393.1700.1(16). In this proceeding, Liberty did not request, and the Commission did not authorize, inclusion in the securitized utility tariff charge of an amount for recovery of income tax liability. Instead, Liberty proposed to recover that tax liability once—by retaining the ADIT balance and crediting customers with the present value of the net tax benefits of ADIT, calculated in a manner that tracks conventional ratemaking. In contrast, the Order would require the Company to return the ADIT balance amount (present valued), without making any other provision for the collection of that tax liability from customers.

Because Staff does not dispute, and in fact appears to agree, that customers should be responsible for tax liability, the Order's ruling on ADIT offset should be reconsidered, clarified, or reheard.

## II. Staff's Additional Arguments Lack Merit

Staff makes two additional arguments in response to Liberty's submission as to the ADIT offset: that there is some problem with the affidavit that Liberty filed along with its rehearing

petition (Resp. ¶¶ 32-37), and that an error by the Commission here does not matter because *stare decisis* does not apply to bind the Commission in the future (Resp. ¶¶ 29-31). Both of those arguments lack merit.

First, there is nothing improper about Liberty's filing of an affidavit along with its motion. Nothing in the Commission's rules forbids such a filing. And, as Liberty's motion explains, Liberty's argument on the ADIT offset does not depend on anything in the affidavit. The record contains substantial testimony by witness Emery about the proper calculation of the ADIT offset. *See* Liberty Mot. pp. 13-14. Liberty submitted the affidavit solely to provide the Commission with additional background and expert analysis on how ADIT works, in order to aid the Commission's understanding of the flaw in its Order. And Liberty did so without citing to or relying on the affidavit in its motion (except for a single footnote explaining that lack of reliance and the reasons for submission of the affidavit).[1]

There also is nothing improper about the form or content of the affidavit. The affidavit was submitted by an expert on ADIT, not by one of Liberty's counsel in this matter. That expert's background is readily available in his biography found on the internet. *See* https://us.eversheds-sutherland.com/people/Bradley-M-Seltzer. Nevertheless, Liberty did intend—as Staff indicates (Resp. ¶ 33)—to include biographical information as an attachment to the affidavit, but inadvertently failed to do so, and so provides that information here as an exhibit to this reply (Exhibit A). Finally, there is nothing wrong with using an electronic signature on the affidavit. Nothing in any statute or in the Commission's rules requires anything different, and such a signature is perfectly standard—especially where, as here, a filing must be made within a short period of time. *Cf.* RSMo. §509.030 ("In a proceeding, evidence of a record or signature shall not

[1] Liberty has not moved to reopen the record, as Staff suggests. *See* Resp. ¶ 35.

be excluded solely because it is in electronic form."); RSMo. §509.030 ("Any statutory requirement that pleadings be acknowledged under oath, verified or notarized may be satisfied by a declaration that the pleading is made under penalty of perjury."). Indeed, Staff signed its response here in exactly the same way. Should the Commission wish for some reason to have a copy of the affidavit with a wet signature and/or a notarized signature, Liberty of course would be happy to supply such a copy.

Second, Staff's argument that *stare decisis* does not bind the Commission here is beside the point. As a practical matter, utilities in Missouri will be deterred from undertaking the securitization procedure if they believe that the Commission will employ a flawed calculation of the ADIT offset—as not only Liberty but also Ameren and Evergy have explained in their filings.[2] The Commission's failure to correct its erroneous analysis here would therefore present serious risks going forward, including the risk of depriving Missouri customers of the benefits associated with cost recovery through securitization. Contrary to Staff's suggestion, the utilities will not be able to depend on the prospect that the Commission might somehow just change its mind on a statutory interpretation question, especially when the decision in this case is the *only* decision interpreting the new securitization statute and the interpretive question is a legal rather than a

[2] Contrary to Staff's suggestion (Resp. ¶¶ 8, 36), Evergy was entitled to file a rehearing request under RSMo. §386.500. Pursuant to that provision, such requests are not limited to the utility that filed the petition on which the Commission acted; rather, they may be filed by "*any* corporation or person or public utility interested therein." RSMo. §386.500 (emphasis added). Evergy is plainly interested: it has requested Commission approval under the securitization statute in a pending matter and may well do so again in the future. Commission Rule 20 CSR 4240-2.075 does not affect that statutory dictate, because that rule relates only to intervention or to the filing of amicus briefs, not to the filing of a rehearing request. Of course, should the Commission wish to add Evergy as a party to the case, Liberty—like Staff (Resp. ¶ 8)—would not oppose that course of action.

factual one. It is therefore especially important that the Commission's Order resolve the ADIT offset issue correctly.

For the reasons set forth here, in Liberty's motion, and in Ameren's and Evergy's filings, the decision of the Commission should be reconsidered, clarified, or reheard, and the Order should be amended or superseded to address and correct the ADIT offset issue as well as the other errors raised by Liberty in its motion (none of which Staff's response addresses).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the above document was filed in EFIS on this 14th day of September, 2022, and sent by electronic transmission to all counsel of record.

/s/ Diana C. Carter