BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Construct a Wind Generation Facility.	)))))	Case no. EA-2018-0202

PUBLIC COUNSEL'S POST-HEARING REPLY BRIEF

Respectfully submitted,

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November 20, 2018

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COMES NOW the Office of the Public Counsel (OPC or Public Counsel), by and through counsel, and for its Post-Hearing Reply Brief states as follows:

I. Introduction

Public Counsel reaffirms all of its arguments made in its Initial Post-Hearing Brief, and reincorporates them by reference. The Public Service Commission (Commission) is now tasked with deciding whether depreciation expense and return may be stacked within both a renewable energy standard rate adjustment mechanism (RESRAM) and a regulatory asset created through plant-in-service accounting (PISA). A plain reading of the PISA statute directs that notwithstanding the guaranteed full recovery of depreciation expense and return through a RESRAM, a utility that elects the PISA deferral mechanism track receives no more than eighty-five percent of such sums until the associated plant is incorporated into base rates. Public Counsel's reading succeeds because the Missouri Legislature did not include any language allowing the remainder not included in PISA to be recouped elsewhere. To conclude instead that Ameren Missouri gets one hundred percent of all depreciation expense and return is to rely solely upon inference and speculation, and to nullify the customer protection provided by the eighty-five percent limitation.

Not only is the language textually clear, but the legislative history of PISA's enacting legislation, Senate Bill (SB) 564, also supports the conclusion from a plain reading. However, Public Counsel's position prevails even if one ignores legislative history.

Although the OPC believes that these points were sufficiently made in the Initial Post-Hearing Brief, Public Counsel will use this Reply Brief period to briefly highlight the more glaring deficiencies in both Union Electric d/b/a Ameren Missouri (Ameren Missouri) and the Staff of the Public Service Commission's (Staff) briefs.

II. Reply

Rather than addressing every point[1] or trivial error[2] in Ameren Missouri and Staff's briefs, Public Counsel will instead analyze the broader structural flaws within opposing counsels' briefs.

A. Ameren Missouri and Staff's Arguments Impermissibly and Necessarily Rely Upon Altering or Discounting Statutory Text.

Whereas Public Counsel relies on a plain reading of the text as provided, both Ameren Missouri and Staff present arguments that either change or ignore the PISA statute. It is well established that implementers shall "give effect to legislative intent as reflected in the plain

[1] *E.g.,* Ameren Missouri devotes nearly a quarter of its Initial Post-Hearing Brief to interpreting *Columbia v. Public Service Commission*, 329 Mo. 38, 43 S.W.2d 813 (1931). Ameren Missouri does so in an attempt to argue that Public Counsel misinterpreted case law. Despite this much attention, Ameren Missouri neglects that Public Counsel cited it as one of many cases that legislation has been considered alongside the enacted statute, not that *Columbia* alone provides the maxim that legislative history may be considered. The Missouri Supreme Court's analysis of a bill in *Columbia* is but one case among many that contradicts Ameren Missouri's idea that legislation and other "extrinsic evidence cannot be relied upon to interpret a statute." *See Ameren Missouri's Initial Post-Hearing Brief*, Case No. EA-2018-0202, p. 3 (Nov. 13, 2018).

[2] *E.g.,* Staff asserts that the Missouri General Assembly enacted Missouri's RES and the RESRAM. Neither is true. The RES was passed by voter reference via Proposition C in 2008, and the RESRAM is a creation of Commission rule. *Initial Brief*, EA-2018-0202, p. 5-6 (Nov. 13, 2018).

language of the statute at issue."[3] Legislative intent is to be effectuated by using the plain and ordinary meaning of statutory text whenever possible,[4] and every word in the text shall be presumed to be meaningful and that the "legislature did not insert superfluous language."[5] Recall that the PISA statute reads that:

> "*Notwithstanding any other provision of this chapter to the contrary*, electrical corporations shall defer to a regulatory asset *eighty-five percent of all depreciation expense and return associated with all qualifying electric plant* recorded to plant-in-service on the utility's books commencing on or after August 28, 2018, if the electrical corporation has made the election provided for by subsection 5 of this section by that date, or on the date such election is made if the election is made after August 28, 2018."[6]

Read plainly, notwithstanding any provision of chapter 393 to the contrary, such as the RES statute and RESRAM creating an opportunity to recover one hundred percent recovery of regulatory lag,[7] utilities electing the PISA track shall defer eighty-five percent of all depreciation expense and return. Missouri Courts have repeatedly held that a statute containing "notwithstanding any other provision" or similar language is to control over other statutes regarding conflicting or similar matters.[8]

Contrary to the plain language, Ameren Missouri asserts that:

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[3] *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. 2014) (quoting *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. 2009); *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. 1995); *Stiffelman v. Abrams*, 655 S.W.2d 522, 528 (Mo. 1983); *State v. White*, 622 S.W.2d 939, 944 (Mo. 1981) *cert. denied*, 456 U.S. 963 (1982).

[4] *Butler*, 895 S.W.2d at 19.

[5] *Missouri American Water Co. v. Office of Pub. Counsel*, 2016 Mo. App. LEXIS 204, 22-23 (quoting *In Matter of Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 524-25 (Mo. 2015)).

[6] Section 393.1400.2(1), RSMo (2018) (emphasis added).

[7] Section 393.1030.2, RSMo (2013).

[8] *E.g., Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76, 83 (Mo. 2018); *Earth Island Inst. v. Union Elec. Comp.*, 456 S.W.3d 27, 34 (Mo. 2015); *Kiddie America, Inc. v. Dir. of Rev.*, 242 S.W.3d 709, 711-12 (Mo. 2008) ("Section 32.069 applies "[n]otwithstanding any other provision of law to the contrary," which means that section 32.069 overrides all provisions that would otherwise be applicable, section 143.811 included"); *Parkville Benefit Assessment Spec. Road Dist. v. Platte Cnty.*, 906 S.W.2d 766, 768-69 (Mo. Ct. App. W.D. 1995).

> "As explained above, the mandate in § 393.1030.2(4) that the Commission create a RES compliance cost/benefit rider from the inception of that statute always had to mean that the rider would only cover RES compliance costs/benefits *not* being recovered elsewhere. Understanding that key legal principle, the "notwithstanding" language in § 393.1400.2(1) doesn't in any way "operate on" or "trump" § 393.1030.2(4). *Put another way, had the notwithstanding language not been included in S.B. 564 at all, exactly the same result would have obtained*: 85% of the return and depreciation would have been deferred to the PISA regulatory asset because there is no question but that such a deferral is mandated by S.B. 564, and that 85% could not also have been included in a RESRAM because the law was always that a utility can't recover the same cost twice. *The "notwithstanding" language in S.B. 564 is simply not needed to avoid a conflict with 393.1030.2(4) because there is not, and never was, a conflict to begin with.*"[9]

Ameren Missouri is quite literally arguing that the phrase "notwithstanding any other provision of this chapter to the contrary" is superfluous as to its operation with the RES, and that its supposed plain reading prevails regardless of whether the "notwithstanding" dependent clause is included. Ameren Missouri presents this reading of "notwithstanding" despite the Missouri Supreme Court's clear and recent instructions to the contrary.[10] An argument that one prevails regardless of what the statute says is simply not one rooted in a plain reading. Ameren Missouri is not just asking for the Commission to ignore established case law, but it also seeks an order conflicting with the multitude of case law providing that every word and clause within statutory text is to be given value.[11]

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[9] *Ameren Missouri's Initial Post-Hearing Brief*, Case No. EA-2018-0202, p. 7 (Nov. 13, 2018) (emphasis added).

[10] *See Earth Island Inst.*, 456 S.W.3d at 34 ("[I]f the later-adopted statute contains the "notwithstanding any other provision of law" language, it clearly indicates an intent for that later-adopted statute to prevail to the extent that the two statutes are inconsistent. If the earlier-adopted statute contains the "notwithstanding any other provision of law" language, the legislature's decision to leave that language in place rather than repealing it at the time of the adoption of the later, partially inconsistent statute also indicates an intent that the earlier statute is to continue to be given effect to the extent that the two are inconsistent").

[11] *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. 2013) ("This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language"); *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. 2009) (quoting *Hyde Park Hous. P'ship v. Dir. of Rev.*, 850 S.W. 2d 83, 84 (Mo. 1993) ("Conversely, it will be presumed that the legislature did not insert verbiage or superfluous language in a statute")); *Young v. Boone Elec. Coop.*, 462 S.W.3d 783, 792 (Mo. App. W.D. 2015) ("It is also a cardinal rule of statutory construction that we presume the Legislature does not employ superfluous or meaningless language").

Similarly, Staff makes the startling admission towards the very end of its brief:

> "It is as equally likely that "all" was changed to "85%" to recognize that certain PISA eligible investments are discretionary, and should be subject to regulatory lag as a cost control incentive. *Or it just could be that "85%" has no significance* to how other statutes operate, but instead just happened to be the number all parties could agree, for this statute."[12]

Staff speculates that the "eighty-five percent" figure from the PISA statute may be considered meaningless, rather than conceive of legitimate explanation for why "eighty-five percent" was decided upon. If the "eighty-five percent" phrase has no significance, then why did this number change so frequently and only become finalized after a twenty-four hour Senate debate?[13] Neither Ameren Missouri nor Staff provide a satisfying answer to that question.

When Ameren Missouri and Staff are not ignoring statutory language, they are writing their own. Both parties submit that the plain reading of "notwithstanding any other provision of this chapter to the contrary" is instead "notwithstanding section 393.270 to the contrary."[14] Of course the former phrase is the actual law at issue, whereas the latter is merely a fabricated phrase. If the PISA statute was meant to only contravene Section 393.270 as opposed to the entirely of chapter 393, then the Legislature had the dexterity to draft it as such.[15] Both the Missouri House of

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[12] *Initial Brief*, EA-2018-0202, p. 15 (Nov. 13, 2018) (emphasis added).
[13] *See* Exhibit 123, *Rebuttal Testimony of Geoff Marke*, Case No. EA-2018-0202 (Aug. 20, 2018) (relating widely publicized news about the filibuster effort that SB 564 endured).
[14] *Ameren Missouri's Initial Post-Hearing Brief*, Case No. EA-2018-0202, p. 8 (Nov. 13, 2018) ("The "notwithstanding" language exists to ensure that if the mandate to defer 85% and to include the deferral in rates conflicts with another statute in Chapter 393, S.B. 564's mandate will control, and there is such a conflict: § 393.270's prohibition on single-issue ratemaking, which is clearly trumped by the PISA statute"); *Initial Brief*, EA-2018-0202, p. 14 (Nov. 13, 2018) ("The plain reading of the PISA statute is "notwithstanding the language of 393.270 to the contrary, the value of the regulatory asset shall be placed into rates without consideration of all relevant factors").
[15] One key example of the specificity employed by the Missouri General Assembly is in the field of tax law. *See, e.g.,* Section 143.431, RSMo (2018) (using the phrasing "[N]et operating loss deduction allowed for Missouri income tax purposes under paragraph (d) of subsection 2 of section 143.121, but not including any net operating loss deduction that is allowed for federal income tax purposes but disallowed for Missouri income tax purposes under paragraph (d) of subsection 2 of section 143.121"). Missouri statutes have even been so specifically drafted so as to identify specific court cases. *See, e.g.,* Section 144.030, RSMo (2018) (" The preceding two sentences reaffirm legislative intent consistent with the

Representatives and Senate employ drafters and analysts specifically for that purpose. Consider also that when drafting other recovery mechanisms, such as the fuel adjustment clause (FAC), the Legislature took pains to elucidate that the FAC's creation could not be construed to affect "any existing adjustment mechanism, rate schedule, tariff, incentive plan, or other ratemaking mechanism."[16] The PISA statute did not receive that disclaiming treatment.[17] Instead, the PISA statute was passed notwithstanding any other provision of Chapter 393, including the provisions in Missouri's RES and RESRAM.[18]

B. Ameren Missouri and Staff's Own Inferential Logic Leads to Public Counsel's Conclusion

When reading the PISA statute Ameren Missouri and Staff display some reasonable inferences, but then stop short of consistency. Ameren Missouri infers that PISA does not allow for double recovery, despite there being no statutory language on point.[19] They also seem to agree that, although no such limit is explicitly provided, electric utilities may not request for the recovery of above one hundred percent of depreciation expense and return via PISA and another mechanism.[20] In this manner, Ameren Missouri and Staff are reading beyond the text to understand

interpretation of this subdivision and subdivision (5) of this subsection in Southwestern Bell Tel. Co. v. Director of Revenue, 78 S.W.3d 763 (Mo. banc 2002) and Southwestern Bell Tel. Co. v. Director of Revenue, 182 S.W.3d 226 (Mo. banc 2005), and accordingly abrogates the Missouri supreme court's interpretation of those exemptions in IBM Corporation v. Director of Revenue, 491 S.W.3d 535 (Mo. banc 2016) to the extent inconsistent with this section and Southwestern Bell Tel. Co. v. Director of Revenue, 78 S.W.3d 763 (Mo. banc 2002) and Southwestern Bell Tel. Co. v. Director of Revenue, 182 S.W.3d 226 (Mo. banc 2005)").

[16] Section 386.266.11, RSMo (2018).

[17] *See* Section 393.1400, RSMo.

[18] *Id.*

[19] *Ameren Missouri's Initial Post-Hearing Brief*, Case No. EA-2018-0202, p. 18 (EA-2018-0202).

[20] Both Ameren Missouri and Staff discusses the remainder not considered by PISA to be "15%", which when added to the amount in PISA equates to one hundred percent. At no point does either party consider that more than one hundred percent may be requested. *See Ameren Missouri's Initial Post-Hearing Brief*, Case No. EA-2018-0202, p. 4 (EA-2018-0202); *see also Initial Brief*, Case No. EA-2018-0202, p. 5 (Nov. 13, 2018).

what recovery thresholds may exist, but they do not apply this reasoning to PISA's language. Section 393.1400 unequivocally states that PISA electing utilities defer "eighty-five percent of all depreciation expense and return associated with all qualifying electric plant", with no mention of the remainder.[21] If one reasonably infers beyond literal text that electric utilities may not game mechanisms so as to double recovery and that utilities may not ask for more than one hundred percent recovery, then there is no clear reason why one cannot also infer that a statute that explicitly delineating a percentage of gain is necessarily disallowing deferrals above that percentage. If the Missouri Legislature did not have to explicitly state that customers were not going to pay for more than the actual amount of depreciation, then it similarly did not have to pedantically provide that recovery above eighty-five percent was foreclosed.

C. Legislative History may Indeed be Considered when Interpreting Statute.

Although Public Counsel does not see legislative history as foundational for its argument, it nonetheless aids in divining legislative intent. When three parties all claim to use a plain reading, and yet have differing views, it certainly cannot hurt to peruse the public record. Ameren Missouri and Staff would rather that the Commission artificially bind itself by insisting that Missouri law simply does not allow for the consideration of legislative history.[22] Except the canons of statutory construction, including reviewing legislative history, may be employed even when a statute's terms are unambiguous so as to avoid an absurd result.[23] Public Counsel offers that nullifying the

[21] Section 393.1400, RSMo.
[22] *Ameren Missouri's Initial Post-Hearing Brief*, Case No. EA-2018-0202, p. 3 (Nov. 13, 2018) (Under Missouri law, when the statute is unambiguous, as here, it is to be interpreted solely based on the plain language of the statute at issue"); *Initial Brief*, EA-2018-0202, p. 8 (Nov. 13, 2018) ("Turning to legislative history without arguing that a statute is ambiguous is an attempt for OPC to argue what a statute should be without examining what the statute actual is").
[23] *Bateman*, 391 S.W.3d at 446 (quoting *Akins v. Dir. of Rev.*, 303 S.W.3d 563, 565 (Mo. 2010) ("A court 'will look beyond the plain meaning of the state only when the language is ambiguous or would lead to an

"notwithstanding" and "eighty-five percent" language in Section 393.1400 is an absurd result. The molehill[24] of cases they invoke where certain legislative action was not dispositive,[25] does nothing to negate the mountain of judicial history where Missouri courts have peered into the inner machinations of the General Assembly.[26]

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absurd or illogical result")); *Gladstone Special Rd. Dist. No. 3 v. Cnty. of Clay*, 248 S.W.3d 60, 64 (Mo. App. W.D. 2008) (quoting *Knob Noster Educ. v. Knob Noster R-VIII Sch. Dist.*, 201 S.W.3d 356, 361 (Mo. App. W.D. 2003) ("We will, however, resort to rules of construction [and look to legislative history] where the terms of the statute: (1) are ambiguous; or (2) are unambiguous, but, when given their ordinary meaning, produce an illogical or absurd result in light of the statute's purpose").

[24] Ameren Missouri cites to *Missouri Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 354 (Mo. 2013) for the proposition that it is "difficult to tell what the General Assembly would have done simply by looking at the legislative history of a given bill." Not only does the OPC rely on more than just legislative history, but "difficult" does not mean "impossible" or "never to be considered." Ameren Missouri then relies on *Butler v. Mitchell-Hugeback*, 895 S.W.2d 15, 19 (Mo. 1995) where the deletion of the word "knowingly" during the drafting phase was not "highly persuasive" when that was the defendant's primary argument. Again, the OPC is not primarily relying upon legislative history, the deletion of word from a bill is not comparable to the heavy amount of attention that SB 564 received, and one instance where legislative history was not persuasive does not mean that legislative history is to be wholly disregarded in the future. Ameren Missouri's Initial Post-Hearing Brief also uses *Spudich v. Director of Revenue*, 745 S.W.2d 677, 680 (Mo. 1988) for the position that extrinsic legislative history cannot be considered. *Spudich* endorses no such imperative. Ameren Missouri finally employs *Accord Page v. Scavuzzo*, 412 S.W.3d 263, 268 (Mo. App. W.D. 2013), which says the Missouri Supreme Court "has cautioned that the use of the history of a Missouri bill's enactment is not highly persuasive." However, an admonition cautioning that legislative history may not be persuasive is not a complete bar to considering history.

[25] Staff primarily cites to federal case law for the idea that legislative history is to be discounted. Although federal case law may be persuasive when used in tandem with an understanding of state law, it is otherwise meaningless alone when discussing a state law matter. The only Missouri Supreme Court case that Staff relies upon is *Butler*, which was addressed earlier in footnote 24.

[26] *See, e.g., Humane Soc'y of the United States v. State*, 405 S.W.3d 532, 534 (Mo. 2013) (comparing the titles of introduced and passed versions of bills); *see also Berkemeyer*, 298 S.W.3d at 519 (noting that words should be "used in their plain and ordinary meaning" but also that the Court may still also "review earlier versions of the law" to discern legislative intent); *United Pharm. Co. of Mo. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 911-12 (Mo. 2006) ("To discern legislative intent, the Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem the statute was enacted to remedy"); *Pollard v. Board of Police Comm'rs*, 665 S.W.2d 333, 337 (Mo. 1984) ("Even if a reader of the bare language might have some question as to the scope of the express preemption, the legislative history shows clearly that Congress did not intend the preemption language of § 453 to annul state little Hatch Acts, and other state laws, such as § 84.830, having similar incidence and purpose"); *Laughlin v. Forgrave*, 432 S.W.2d 308, 312 (Mo. 1968) ("The significance of this legislative history, particularly that beginning with the year 1921, is that it shows clearly a legislative intent to treat particularly with medical malpractice actions and fix a specific date when the statute of limitation shall begin to run against those actions, a date different from the date and time when the statute begins to run against other actions covered by what is now § 516.140"); *Missouri-American Water Co.*, 2016 Mo. App. LEXIS 204 at 24 (Mo. App. W.D. 2016) ("Although we recognize that we do not resort to

D. Ameren Missouri and Staff's Collateral Attacks upon Public Counsel's Witness are not Merited and do not Advance their Positions.

Ameren Missouri and Staff also focus on Dr. Geoff Marke's lack of lawyerly credentials in their rebuttals of the OPC's position.[27] Their reactions are fallacious for two reasons. Firstly, they are mere collateral attacks upon one OPC witness rather than the substance of the argument, which stands regardless of Dr. Marke's position. Public Counsel's Initial Post-Hearing Brief only cites to Dr. Marke to report on otherwise widely published information regarding how long the Missouri Senate was in session debating SB 564.[28] One simply does not win by shooting the messenger alone.

Secondly, both Ameren Missouri and Staff present non-attorneys to speak on legal matters and yet now inconsistently cry foul. The Endangered Species Act (ESA) is by its nature a law, and its implementation via habitat conservation plans is likewise a legal matter.[29] Despite this, Ameren

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statutory interpretation where the language is plain and unambiguous, we find that the legislative history of section 1.100 supports and bolsters our finding as to the plain meaning of the statutory language"); *State ex rel. Union Elec. Co.*, 399 S.W.3d 467, 481 (Mo. App. W.D. 2013) ("Thus, before we resort to dictionary and industry definitions to determine the meaning of terms not defined in the Ameren tariff, we must first appreciate the constraints imposed by the legislature on the PSC with respect to approval and interpretation of fuel adjustment clauses"); *Lance v. Div. of Empl. Sec.*, 335 S.W.3d 32, 36 (Mo. App. W.D. 2011) ("We also consider the statute's history and the problems it addresses"); *Knob Noster Educ.*, 201 S.W.3d at 361 (quoting *Sisco v. Board of Trustees of the Police Retirement Sys.*, 31 S.W.3d 114, 119 (Mo. App. E.D. 2000) ("We will, however, resort to rules of construction where the terms of the statute: (1) are ambiguous; or (2) are unambiguous, but, when given their ordinary meaning, produce an illogical or absurd result in light of the statute's purpose")).

[27] *Ameren Missouri's Initial Post-Hearing Brief*, Case No. EA-2018-0202, p. 13 (Nov. 13, 2018); *Initial Brief*, Case No. EA-2018-0202, p. 14 (Nov. 13, 2018); *Transcript of Proceedings Evidentiary Hearing*, Case No. EA-2018-0202, pgs. 23 & 38 (Oct. 31, 2018); *Staff's Statement of Position*, Case No. EA-2018-0202 (Oct. 23, 2018) (referring to a position of the OPC as a "lay opinion"); Exhibit 121, *Surrebuttal Testimony of Tom Byrne*, Case No. EA-2018-0202 (Sept. 28, 2018) ("Dr. Marke is not a lawyer and to my knowledge has no legal training. As a consequence, Dr. Marke's opinion on the issue is simply not competent").

[28] *See Public Counsel's Initial Post-Hearing Brief*, Case No. EA-2018-0202, p. 14 (Nov. 13, 2018).

[29] 16 U.S.C. §§ 1531-44.

Missouri presents Ajay Arora and Terry VanDeWalle as non-attorney witnesses to speak on the ESA.[30] Mr. Arora is also offered to speak on the law even though Ameren Missouri's legal expert directly contradicts him.[31] Mr. Arora is also employed to speak to Ameren Missouri build transfer agreement, or contract, for the High Prairie Wind Farm.[32] Since contracts are legal instruments, Mr. Arora presumably cannot speak to them if one finds Ameren Missouri's argument persuasive. If neither Ameren Missouri nor Staff found Mr. Arora or Mr. VanDeWalle's testimony inappropriate, then they have no grounds for attacking Dr. Marke.

E. Ameren Missouri's Policy Arguments are Unconvincing

Ameren Missouri briefly puts the text aside to discuss policy, and so a response is warranted. Ameren Missouri argues that it would be "nonsensical" or unfair when "the utility recovers 85% of the RES compliance costs between rate cases but passes 100% of the RES compliance benefits" as the statute directs.[33] However, just because a regulatory tool has tradeoffs does not mean that it is unfair. Ameren Missouri may have lost fifteen percent of depreciation expense and return when it elected PISA, as compared to the RESRAM, but what immediate gratification it does receive applies to far more electric plants that the RESRAM can encompass.

[30] *See* Exhibit 103, *Surrebuttal Testimony of Terry J. VanDeWalle*, Case No. EA-2018-0202 (Sept. 28, 2018) (speaking to habitat conservation plans); *see also* Exhibit 102, *Surrebuttal Testimony of Ajay K. Arora*, Case No. EA-2018-0202 (Sept. 28, 2018) (maintaining the position that no endangered species related permits are required to operate the High Prairie Wind Project).
[31] *Compare* Exhibit 100, *Direct Testimony of Ajay K. Arora*, Case No. EA-2018-0202 (May 21, 2018) (Explaining that although Ameren Missouri does not believe it needs to obtain a CCN before the High Prairie Wind Farm is built that Ameren Missouri is nonetheless applying because "…the spirit of the CCN statute's requirement that an electrical corporation obtain a CCN prior to construction applies, even if by the letter of the statute it arguably may not apply") *with* Exhibit 121, *Surrebuttal Testimony of Tom Byrne*, Case No. EA-2018-0202 (Sept. 28, 2018) ("Under Missouri statutes, CCNs have to be issued in advance of construction – before one spadeful of earth is turned").
[32] Exhibit 100, *Direct Testimony of Ajay K. Arora*, Case No. EA-2018-0202 (May 21, 2018).
[33] *Ameren Missouri's Initial Post-Hearing Brief*, Case No. EA-2018-0202, p. 9 (Nov. 13, 2018).

Ameren Missouri is also able to ultimately recover funds quicker through PISA than RESRAM because the former has higher retail rate impact caps.[34]

Furthermore, the loss of funds due to regulatory lag is the exception, not the rule. Plant-in-service accounting is the exception, but it did not cover all regulatory lag specifically because of the consumer protection benefits of regulatory lag.[35] If Ameren Missouri wishes to reduce the amount of regulatory lag, it is fully capable of doing so by returning to the Commission to incorporate qualifying plant into base rates. Ameren Missouri's customers lack such agency, and must instead accept a utility that accepts either PISA or the RESRAM. Ameren Missouri was fully apprised of the legal consequences should they elect PISA, and therefore cannot complain about the consequences now.

True fairness also requires considering that the "primary purpose of public regulation of utilities is the ultimate good of the public. Protection afforded utilities is merely incidental to the attainment of that object."[36] There is certainly no entitlement that a regulatory mechanism operate just as an electric utility desires.[37] To the contrary, other rate mechanisms, such as the infrastructure system replacement surcharge are narrowly read against an applying utility's interpretation.[38] There is then no policy justification why PISA should be read in favor of the applying utility.

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[34] *Compare* Section 393.1655, RSMo (2018) (subjecting utilities that elect PISA to either a three or 2.85% retail rate impact cap with deferrals) *with* Section 393.1030, RSMo (limiting cost recovery for RES expenses to a one percent retail rate impact threshold).

[35] As Staff pointed out, "Regulatory lag can be beneficial, as it mimics the competitive environment that a traditional business operates in, which encourages utilities to operate efficiently and productively by controlling costs." *Initial Brief*, Case No. EA-2018-0202, p. 5-6 (Nov. 13, 2018).

[36] *State ex rel. Pitcairn v. Pub. Serv. Comm'n*, 232 Mo.App. 755, 761-62, 111 S.W.2d 982, 987 (Mo. Ct. App. W.D. 1937).

[37] *See, e.g., State ex rel. Union Elec. Co.*, 399 S.W.3d at 492 ("Ameren was not obligated to include a fuel adjustment clause in its tariff. It sought to do so. The *quid pro quo* for a fuel adjustment clause is its potential operation both to a utility's benefit and detriment").

[38] *Pub. Serv. Comm'n v. Office of Pub. Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 839 (Mo. App. W.D. 2017) ("No party contests that the plastic mains and service lines were not in a worn out or

There is a State policy that statutes are to be read so as to avoid an absurd result.[39] Absurdity can occur if Ameren Missouri is permitted to split its depreciation expense and return between the RESRAM and PISA because the RES' retail rate impact cap may be subverted. Missouri's RES limits retail rate increases due to compliance costs to one percent based on the utility's cost of compliance.[40] Recovery through a RESRAM is limited to the same one percent cap.[41] If electric utilities are permitted to split their depreciation expense and return between the RESRAM's one percent limitation and the higher 2.85 or three percent caps with PISA,[42] then the one percent cap may be effectively avoided. The retail rate impact cap may be avoided because nearly all of the costs that would be subject to the RESRAM's one percent boundary are instead measured under PISA's higher caps.

Such a result may not occur when accounting for solely the High Prairie Wind Farm subject to this case, but with more RESRAM eligible facilities being built over the five years of PISA,[43] the potential increases substantially that PISA prevents an exceedance of the RESRAM's one percent restraint without actually mollifying customer bill impacts. The Missouri Legislature conceived of PISA as a mutually exclusive track apart from the RESRAM specifically to avoid this absurd result; that the one percent cap approved by the people of Missouri would not be nullified without an express statutory change enabling electric utilities to bifurcate their depreciation accounting. If electric utilities are allowed to split these costs amongst the programs,

deteriorated condition . . . This creates a challenge for Laclede because our Supreme Court has found this requirement to be mandatory and has interpreted it narrowly").
[39] *See Bateman*, 391 S.W.3d at 446.
[40] Section 393.1030.2, RSMo.
[41] 4 CSR 240-20.100(6)(A).
[42] Section 393.1655, RSMo.
[43] PISA shall be available for a guaranteed five years until December 31, 2023, and may be available for an additional five years pending Commission approval. Section 393.1400.5, RSMo.

the caps may be rendered meaningless. Such a result would be absurd in light of SB 564 never amending the RES or otherwise endorsing that outcome.

III. Conclusion

For the aforementioned reasons, Ameren Missouri's request to stack depreciation expense and return through both PISA and a RESRAM is unlawful, and should be promptly rejected. Ameren Missouri and Staff's urgings to the contrary ignore the clear statutory text, misstate the law, unreasonably discount legislative history, illogically and inconsistently attack an OPC witness rather than advance their own positions, and circumvent State policy.

WHEREFORE, the OPC reiterates that the Ameren Missouri's application for a RESRAM that captures the fifteen percent of depreciation and return not covered by PISA is unlawful, and requests that the Commission approve a RESRAM on the terms reflected in the tariff sheets attached to the Third Stipulation and Agreement as Appendix C excluding such sums from Ameren Missouri's RESRAM.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 20th day of November, 2018, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall