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 Three Solar Generation Facilities.	)))))	**File No. EA-2019-0371**

FILING REGARDING INTERPRETATION OF SECTIONS 393.1665 AND/OR 393.170, RSMo.

COMES NOW the Staff of the Missouri Public Service Commission, by and through the undersigned counsel, and provides its argument regarding the applicability of Sections 393.1665 and 393.170 to the requested certificates of convenience and necessity (CCN) as follows:

Background

On September 3, 2019, Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") filed an Application requesting three Certificates of Convenience and Necessity ("CCNs") under subsection 1 of Section 393.170 RSMo.[1] to construct, install, own, operate, maintain, and otherwise control and manage a solar generating asset to be constructed near Green City, Missouri in Sullivan County ("Green City Project"); a solar generating asset to be constructed near Richwoods, Missouri in Washington County ("Richwoods Project"); and, a solar generating asset to be constructed near Utica, Missouri in Livingston County ("Utica Project") (collectively, "the projects"). According to the Application, each of the generating assets will be paired with battery storage "to address reliability concerns and an alternative to a traditional 'wires only' solution."[2]

[1] All statutory references are to the 2018 edition of the Revised Statutes of Missouri.
[2] *See* ***Application***, p. 2.

Ameren Missouri indicates the battery storage to be paired with the solar generating assets for each project is not an "asset" as defined in 20 CSR 240-20.045(1)(A); thus, Ameren Missouri is not seeking CCNs for any of the battery storage components of the projects.[3] In support of its *Application*, Ameren Missouri claims that as the projects are built under the auspices of 393.1665, RSMo. the projects are deemed prudent.[4] Therefore, Ameren Missouri states it does not need to demonstrate need or economic feasibility[5] for the projects.[6]

As discussed further in *Staff's Rebuttal Report*, filed concurrently with this document, the technical specifications for the projects are as follows:

- The Green City Project will include 10 MW AC of single-axis tracking photovoltaic ("PV") solar panels. The Green City Project includes a 2.5 MW battery energy storage system. The estimated total cost is $22.7 million.[7]
- The Richwoods Project will include 10 MW AC of single-axis tracking PV solar panels and a 4 MW battery energy storage system. The estimated total cost is $24.6 million.[8]
- The Utica Project will include 10 MW AC of single-axis tracking PV solar panels and a 2 MW battery energy storage system. The estimated total cost is $21.6 million.[9]

[3] *Id.*
[4] *Id.* at p. 5.
[5] Need and economic feasibility are two of five "Tartan Factors" used, but not mandated, by the Commission to analyze a CCN request. *See In Re Tartan Energy*, GA-94-127, 3 Mo.P.S.C.3d 173, 177 (1994).
[6] ***Application*** at p. 6.
[7] *Id.* at p.7.
[8] As updated in the ***Amended Application***, p. 7.
[9] ***Application*** at p. 7.

On November 25, 2019, Ameren Missouri filed an amended application adding a request for a CCN for the battery storage, as the Utica Project is outside of Ameren Missouri's certificated service territory, in addition to the original three CCN requests.[10]

Some parties indicated disagreement with Ameren Missouri's statements regarding the interplay of Section 393.1665 RSMo. and/or 393.170 RSMo. and this case. As the initially proposed procedural schedule was abbreviated, it did not allow time for the traditional motion practice and oral argument before the evidentiary hearing, as is usually the most typical route for legal disagreements impacting the course of a case.[11] Therefore, in order to ensure the legal issues are properly addressed, and to provide notice and a record for the Commission in advance of the scheduled oral argument, parties agreed to allow filings regarding legal issues to be made coincident with testimony. The legal interpretations at issue today involve Ameren Missouri's claim that the solar facilities are "deemed prudent" under Section 393.1655 RSMo. and Ameren Missouri's position that a battery storage unit is not an asset under 20 CSR 4240-20.045 (1)(A) and does not need review under Section 393.170 RSMo. to ensure it is an improvement justifying its cost.

Section 393.1655 RSMo. is not a blank check for all solar investment before 2023

393.1655 RSMo. was promulgated as part of Senate Bill 564, and went into effect August 28, 2018. 393.1655 RSMo. provides:

[10] *See* ***Request For Leave to Amend Its Original Application and Amended Application***, p. 2-3.

[11] *See*, e.g., *In the Matter of Missouri-American Water Company's Request for Authority to Implement a General Rate Increase for Water and Sewer Service Provided In Missouri Service Areas*, File No. WR-2017-0285 (future test year), *In the Matter of the Propriety of the Rate Schedules for Electric Service of Union Electric Company, Doing Business as Ameren Missouri*, File No. ER-2018-0226, *In the Matter of the Propriety of the Rate Schedules for Electric Service of the Empire District Electric Company*, File No. ER-2018-0228 (capturing the impacts of Tax Cuts and Jobs Act of 2017 through an accounting authority order), and *In the Matter of Ameren Missouri and Noranda's Joint Request for a Variance from Certain Tariff and Commission Regulation Requirements* File No. EE-2016-0090 (highly confidential designation justification).

393.1665. Utility-owned solar facilities in Missouri, investment in, when — expiration date. — 1. For purposes of this section, **"electrical corporation"** shall mean the same as defined in section 386.020, but shall not include an electrical corporation as described in subsection 2 of section 393.110.

2. An electrical corporation with one million or more Missouri electric customers shall invest in the aggregate no less than fourteen million dollars in utility-owned solar facilities located in Missouri or in an adjacent state during the period between August 28, 2018, and December 31, 2023. An electrical corporation with less than one million but more than two-hundred thousand Missouri electric customers shall invest in the aggregate no less than four million dollars in utility-owned solar facilities located in Missouri or in an adjacent state during the period between August 28, 2018, and December 31, 2023. An electrical corporation with two hundred thousand or fewer Missouri electric customers shall invest in the aggregate no less than three million five hundred thousand dollars in utility-owned solar facilities located in Missouri or in an adjacent state during the period between August 28, 2018, and December 31, 2023. If the rate impact of the electrical corporation's investment in such facilities would cause the electrical corporation to exceed the one percent maximum average retail rate increase limitation required by subdivision (1) of subsection 2 of section 393.1030, that part of such costs that would cause such one percent limitation to be exceeded shall be deferred by the electrical corporation to a regulatory asset. Carrying costs at the electrical corporation's weighted average cost of capital shall be added to the regulatory asset balance and the regulatory asset shall be recovered through rates set under section 393.150 or through a rate adjustment mechanism under section 393.1030, as soon as is practical.

3. An electrical corporation's decision to invest in utility-owned solar facilities consistent with subsection 2 of this section shall be deemed to be prudent. An electrical corporation shall not be required to obtain the permission of the commission to construct the facilities required by this section, notwithstanding the provisions of section 393.170. The commission shall retain the authority to review the specific costs incurred to construct and own the facilities to ensure that rates are based only on prudently incurred costs.

4. Nothing in this section shall preclude an electrical corporation from recovering costs of investing in or purchasing electricity from additional solar facilities beyond those provided for under subsection 2 of this section.

5. This section shall expire on December 31, 2023, provided that after such expiration the electrical corporation shall be entitled to recover any remaining regulatory asset balance as provided in subsection 2 of this section.

Ameren Missouri is an electric corporation with one million or more customers, therefore must invest in the aggregate at least $14 million dollars in utility owned solar. (Subsection 2 “covered facilities”) Under subsection 3, Ameren Missouri’s decision to invest in the solar facilities as required by subsection 2 are deemed prudent, and Ameren Missouri does not need to request a CCN for those particular facilities. Ameren Missouri is also not precluded from recovering costs of investing in or purchasing electricity from additional solar facilities beyond those provided for under subsection 2 of Section 393.1655 RSMo. (Subsection 4 “additional solar facilities”). The provisions of Section 393.1655 RSMo. could be read to apply to Ameren Missouri as follows:

Under subsection 2, Ameren Missouri must spend approximately $14 million in solar investments in the aggregate before 2023. The approximately $14 million spent on solar investments will be deemed prudent, and Ameren Missouri does not have to appear before the Commission to secure permission to build the required facilities. Making the approximately $14 million investment under Section 393.1655 RSMo. does not preclude Ameren Missouri from requesting CCNs and cost recovery of additional solar facilities beyond those provided for and covered by the provisions of Section 2 and 3. However, the additional solar facilities are distinguished from the covered facilities, therefore do not receive the same exemption from the CCN process or prudency review under subsection 3 as the approximately $14 million in utility owned solar required by subsection 2.

This is how Staff reads Section 393.1655 RSMo. as a whole.

Ameren Missouri seems to read Section 393.1655 RSMo. as stating that any solar investment made by Ameren Missouri before 2023 is deemed prudent, and does not

require all Tartan Factors to be met.[12] Ameren Missouri focuses on the *at least* language in subsection 2 to bolster this interpretation that Section 393.1655 RSMo. has a floor, but apparently no ceiling.

The statute therefore is ambiguous, as reasonably well-informed individuals could, and have, read the statute differently.[13] As Section 393.1655 RSMo. has not been challenged before, there is no guiding authority to resolve the ambiguity, so the rules of statutory construction must be used to resolve the issue.[14] "The law favors a construction that harmonizes with reason, gives effect to the legislature's intent, and tends to avoid absurd results."[15] Staff believes its reading of the statute accomplishes all three.

Staff suggests its reading of Section 393.1655 RSMo. does not render an entire section of the statute redundant, and therefore harmonizes it as a whole. If the legislature's intent was to allow all utility-owned solar investment before 2023 to bypass the CCN process, it would be unnecessary to add subsection 4. For if all utility owned solar investment is prudent over a certain threshold, all that is needed to accomplish that is setting a threshold, and then adding a provision (i.e., subsection 3) regarding the jurisdiction of the Commission over such facilities. The addition of subsection 4 therefore signals that there could be additional facilities, but those facilities are beyond the scope and provisions of Section 393.1655 RSMo. If the language of subsection 2 stating:

> An electrical corporation with one million or more Missouri electric customers shall invest in the aggregate no less than fourteen million dollars in utility-owned solar facilities located in Missouri or in an adjacent state during the period between August 28, 2018, and December 31, 2023.

[12] However, the statute's plain meaning is that solar facilities under Section 393.1655 RSMo. do not require a CCN at all.
[13] Maples v. Dep't of Soc. Servs., Div. of Family Servs. of State of Mo., 11 S.W.3d 869, 872–73 (Mo. Ct. App. 2000).
[14] *Id.*
[15] *Id.*

meant every solar facility, no matter the cost, would be deemed prudent and recoverable, and did not require a CCN, it makes little sense for the legislature to repeat in subsection 4 that utility is not precluded from making additional investments in solar by this statute, as subsection 2 already captured all investments in solar. This reasoning is identical to a Supreme Court case in which the meaning of the phrase "tangible object" was in dispute.[16] The US government brought suit against defendant Yates under the Sarbanes-Oxley Act for destruction of a "tangible object"[17] to thwart a government investigation.[18] Defendant Yates argued the government's reading was much too expansive.[19] The Supreme Court held for defendant Yates, reasoning:

> The Government argues, and Yates does not dispute, that § 1512(c)(1)'s reference to "other object" includes any and every physical object. But if § 1519's reference to "tangible object" already included all physical objects, as the Government and the dissent contend, then Congress had no reason to enact § 1512(c)(1): Virtually any act that would violate § 1512(c)(1) no doubt would violate § 1519 as well, for § 1519 applies to "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United *1085 States ... or in relation to or contemplation of any such matter," not just to "an official proceeding."
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> The Government acknowledges that, under its reading, § 1519 and § 1512(c)(1) "significantly overlap." Brief for United States 49. Nowhere does the Government explain what independent function § 1512(c)(1) would serve if the Government is right about the sweeping scope of § 1519. We resist a reading of § 1519 that would render superfluous an entire provision passed in proximity as part of the same Act.[6] See *Marx v. General Revenue Corp.,* 568 U.S. 371, 386, 133 S.Ct. 1166, 1178, 185 L.Ed.2d 242 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").[20]

[16] Yates v. United States, 574 U.S. 528, 135 S. Ct. 1074, 1085, 191 L. Ed. 2d 64 (2015).
[17] The tangible object in dispute was a fish.
[18] *Id.*
[19] *Id.*
[20] *Id.* Footnotes omitted.

Similarly, if subsection 2 and 3 applied to all utility solar investment, then by default all solar investments beyond the $14 million is included. To ensure subsection 4 is not rendered superfluous language, there must be some difference in the solar investment covered by subsection 2, and the additional investments referred to in subsection 4. Resolving ambiguity in statutes as to avoid superfluous language is always the preferred outcome. This is again exemplified in a case determining the meaning of "resident alien" in regards to residency requirements to qualify for in-state vs out-of-state tuition rates at a college.[21] The Court stated

> Second, if we interpreted 6 C.S.R. § 10-3.010(7) as referring to the IRC to determine the meaning of "resident alien status," the Noncitizen Residency Requirements would become meaningless. Every individual who meets the General Residency Requirements of 6 C.S.R. § 10-3.010(9) also necessarily meets the criteria under the IRC for claiming they are a "resident alien" on their federal income taxes. Missouri's General Residency Requirements that apply to all individuals, not just noncitizens, already require individuals to be present "within the state of Missouri for a minimum of the twelve (12) immediate past, consecutive months," 6 C.S.R. § 10-3.010(9)(C), which is always sufficient to meet the much less demanding requirements for "alien resident" status provided in the IRC. Moreover, under the "first year election," individuals can essentially decide to declare themselves a "resident alien" so long as they have been present in the United States for seventy-five percent of the days in a consecutive thirty-one day period, which equates to a mere twenty-four days. See 26 U.S.C. § 7701(b)(4)(A). Any individual who has resided in Missouri consecutively for the last twelve months is de facto a "resident alien" under the IRC. See 26 U.S.C. §§ 7701(b)(1)(A), 7701(b)(3)(A), and 7701(b)(4)(A). Thus, Ms. Doe's interpretation relying on the IRC's definition of "resident alien" renders meaningless the additional Noncitizen Residency Requirements contained in 6 C.S.R. § 10-3.010(7). Since this interpretation *342 would render an entire section of the Student Residency Regulation "mere surplusage" we must reject it. Cook v. Newman, 142 S.W.3d 880, 889 (Mo. App. W.D. 2004) (courts reject interpretations that render statutory language "mere surplusage" because "[p]resumably, the legislature does not insert superfluous language in a statute").[22]

[21] Doe v. St. Louis Cmty. Coll., 526 S.W.3d 329, 341–42 (Mo. Ct. App. 2017), reh'g denied (Aug. 22, 2017).
[22] *Id.*

Reading Section 393.1655 RSMo. as a floor to all utility solar spending through 2023 renders the entirety of subsection 4 unnecessary and superfluous. Avoiding outcomes that render an entire section of a statute unnecessary and superfluous is a primary principle of statutory construction.

The best outcome is a result that gives effect to both subsections, and harmonizes them to work in concert. From the Missouri Supreme Court all the way to the United States Supreme Court, it is an oft-cited and well-established canon of construction that statutes are to be harmonized. Harmonizing statutes unless there is an explicit conflict allows the intent of legislators to be upheld by giving effect to both statutes; by giving effect to both statutes, courts are also following the canon of construction to strive to interpret statutes without rendering statutes or portions of statutes meaningless. In Epic Sys. Corp. v. Lewis,[23] a 2018 case regarding provisions of the National Labor Relations Act and the Arbitration Act, the United States Supreme Court stated "When confronted with two Acts of Congress allegedly touching on the same topic, the court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both."[24] As the United States Supreme Court held, respect for the Legislature as drafters cautions us against too easily finding irreconcilable conflicts in its work.[25]

Another canon of statutory construction is to avoid absurd results. Reading Section 393.1655 RSMo. as a mechanism to allow unfettered utility investment in solar

[23] 138 S. Ct. 1612, 1616, 200 L. Ed. 2d 889 (2018).
[24] *Id.*
[25] *Id.*

facilities without CCN oversight from the Commission would be an absurd result. In fact, in an appeal of a Commission decision over statutory interpretation the Court held

> But, in construing the statute, it is not inappropriate to look at the possible effects of alternative constructions, and to read the statute in the context of the established pattern of utility regulation. We should hesitate to mandate a result not explicitly required by the language if invidious consequences may result.[26]

In the established pattern of utility regulation, carte blanche spending authority with no record establishing the need or economic feasibility of a project, or even the need to seek Commission approval, would run contrary to over 100 years of Commission historic regulatory practice.

A case involving the interpretation of a tax provision provides a useful thought exercise in determining if an interpretation would lead to absurd and unintended results.

> The position of the Tax Commission under the facts of this particular case does not lead to a result so unreasonable that it thereby demonstrates it is contrary to the intention of the Legislature, but the statute must apply to all situations. We need but refer to two assumed factual situations, neither of which is unreasonable nor improbable, to show that the Legislature could not possibly have intended the results necessarily reached by the interpretation of Section 151.060 by the Tax Commission when applied to the assumed facts. The record shows that the Cotton Belt owns no road and has no road under exclusive lease in the state of Illinois, but it does use and regularly operate its trains over a total of 123.93 miles of track in that state pursuant to so-called trackage agreements. If we assume that the total operations of the Cotton Belt consisted only of the existing road in Missouri and Illinois, then according to the view of the Tax Commission the proportionate share of the rolling stock subject to tax by Missouri would be 100%, *564 a result obviously not intended, and a result which would cast considerable doubt on the validity of the statute as applied to those facts. See Standard Oil Co. v. Peck, supra. Next, if we assume that all of the operations of the Cotton Belt in Missouri were conducted over track covered by trackage agreements, as they now are in Illinois, then under the position of the Tax Commission, Missouri would not be entitled to tax any proportion whatever of the value of the rolling stock of the railroad company even

[26] State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, 687 S.W.2d 162, 167 (Mo. 1985).

> though it would regularly and continuously operate its trains and rolling stock over a total of 220.9 miles of track in this state.[27]

The Court's simple hypothetical situations illustrated the Tax Commission's interpretation was incorrect, as it could result in 100% of interstate track in Missouri and Illinois being subject to taxing by Missouri, or 0% of the track being subject to taxing by Missouri.[28] The use of hypotheticals can be illuminating in this case as well. Imagine that Ameren Missouri spent $100 million instead of $14 million, or approximately 5 times the figure provided in the statute. Under Ameren Missouri's interpretation, that $100 million would be deemed prudent, and would not require approval via the CCN process. This illustrative example is barely a hypothetical; Ameren Missouri proposes to spend $69 million in this case,[29] and $14 million on the Neighborhood Solar Projects,[30] for a total cost of $83 million, nearly $70 million more than provided for in Section 393.1655 RSMo. It seems unlikely that the legislature would provide for their constituents to be subject to investment of that magnitude without Commission oversight.

"The law favors statutory construction which harmonizes with reason, and which tends to avoid absurd results."[31] Staff's reading of Section 393.1655 RSMo. harmonizes all subsections of the statute, does not render entire subsections superfluous, and does not provide for absurd results. Staff's reading does not impose heavy burdens on other parties or the Commission; it simply requires the projects to be improvements justifying their cost,[32] or economically feasible and needed.

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[27] St. Louis Sw. Ry. Co. v. State Tax Comm'n of Mo., 319 S.W.2d 559, 563–64 (Mo. 1959).
[28] *Id.*
[29] ***Request For Leave to Amend Its Original Application and Amended Application***, p. 7-8.
[30] *Id.* at p. 5.
[31] State ex rel. Trautman v. City of Farmington, 799 S.W.2d 638, 642 (Mo. Ct. App. 1990).
[32] *See* State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n of Missouri, 848 S.W.2d 593, 597 (Mo. Ct. App. 1993).

Battery storage should be evaluated and included in the determination to grant a CCN to a project.

Section 393.170 RSMo. states:

> **393.170. Approval of incorporation and franchises — certificate. —** 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system, other than an energy generation unit that has a capacity of one megawatt or less, without first having obtained the permission and approval of the commission.
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> 2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.
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> 3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

This statute requires a utility to show that it would be necessary and convenient for it to begin construction of utility plant, under what is known as a line certificate (Section 393.170(1)) or for it to begin servicing a territorial area, under what is known as an area certificate (Section 393.170(2)). This case was filed pursuant to Section 393.170 (1), the line certificate required before constructing utility plant.

Statutorily, utility plant is defined as:

> all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or

> property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power;

Judicial review has narrowed the scope of what is required to be certificated under Section 393.170(1) as to not require an application for each and every piece of utility equipment used to facilitate the provision of electric service to customers in the certified service territory. Commission rules have further narrowed the scope. Currently the Commission defines an asset, in 20 CSR 4240 20.045(1)(A) as:

> 1. An electric generating plant, or a gas transmission line that facilitates the operation of an electric generating plant, that is expected to serve Missouri customers and be included in the rate base used to set their retail rates regardless of whether the item(s) to be constructed or operated is located inside or outside the electric utility's certificated service area or inside or outside Missouri; or
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> 2. Transmission and distribution plant located outside the electric utility's service territory, but within Missouri;

Ameren Missouri believes that battery storage constructed in its service territory does not meet the definition of asset, so Ameren Missouri is not seeking a CCN for the two within its service territory.[33] Staff argues that as battery storage is more akin to the production facilities that require a CCN than to types of electric plant that do not, and that the batteries in question are a necessary and essential part of the projects, according to Ameren Missouri, therefore the CCN applications should be evaluated with consideration to both the battery component and the solar facilities. In other words, if approved, one CCN for each project site should be issued, allowing Ameren Missouri to construct, install, own, operate, maintain, and otherwise control and manage the specified project.[34]

[33] ***Request For Leave to Amend Its Original Application and Amended Application***, p. 3.
[34] The authority granted would only be for the site as described in the initial CCN application. Subsequent modifications or additions to a project site may require an additional CCN under the effective Commission rules at the time.

Unlike typical electric plant, such as transformers, poles, and wires, a facility that produces energy for injection into the grid undergoes an evaluation to ensure it is an improvement justifying the cost. Battery storage more closely resembles and performs functions similar to productions assets as opposed to poles and wires. Batteries act as a source of energy for the grid, much like production facilities. Battery storage solutions can be several megawatts, and have price tags comparable to production facilities. In this case, ** _____

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_____ . ** With costs such as these, only by including the battery portion in considering the project can a fair evaluation of economic feasibility and need, along with the other Tartan Factors, be done.

Although the case has been appealed, the opinion from the Western District guides the Commission towards Staff's recommended approach. The Court stated:

> With respect to energy generating plants, "necessity" refers to whether existing generating plants are sufficient to meet anticipated future demands, and to whether the cost to increase generating capacity can be justified. *See, e.g.*, *In re Application of KCP & L Greater Mo. Operations Co. for Permission & Approval of a Certificate of Pub. Convenience & Necessity Authorizing It to Construct, Install, Own, Operate, Maintain & Otherwise Control & Manage Solar Generation Facilities in W. Mo.*, 515 S.W.3d 754, 759-60 (Mo. App. W.D. 2016) (holding that "necessity" includes whether additional service would be important to public convenience and at a justifiable cost). Thus, a utility is prohibited by section 393.170.1 from beginning construction of an energy generating plant unless and until the PSC has determined pursuant to section 393.170.3 that the energy generating facility is necessary and convenient to meet the present and future energy consumption needs of those within the utility's certificated area, at a cost that can be justified. *See, e.g.*, *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n of Mo.*, 848 S.W.2d 593, 597-98 (Mo. App. W.D. 1993) (holding that "necessary or convenient for public service" contemplates avoiding duplication of service, and where the need for the

> improvement to serve the public interest justifies the cost of the improvement).
>
> Given this legislative intent, the phrase "begin construction of an electric plant" must be construed to include not only the initial construction of a new electric plant, but also construction on existing plants intended to increase the plant's electric generating capacity. Were we to conclude otherwise, an electric utility would be required, for example, to secure a CCN before constructing a plant to increase its generating capacity at a new location, but would not be required to secure a CCN before undertaking construction on an existing plant to increase generating capacity. This result would be inconsistent with the General Assembly's intent to require the PSC's approval before an electric utility incurs the cost to construct energy generating plants that will increase the utility's energy generating capacity in its certificated area. *See Reichert v. Bd. of Educ. of St. Louis*, 217 S.W.3d 301, 305 (Mo. banc 2007) ("Construction of statutes should avoid unreasonable or absurd results.")[35]

Viewed from the grid, if the solar facilities are producing energy,[36] and if the batteries are also discharged, the capacity output from the Projects would be higher than just the nameplate capacity of the solar facilities.

The Federal Energy Regulatory Commission (FERC) has also released several orders and final rules that support Staff's contention. Both the Large Generator Interconnection Procedures/Agreement and the Small Generator Interconnection Procedures/Agreement were amended to specifically include electric storage resources.[37] FERC has defined an electric storage resource as "a resource capable of receiving electric energy from the grid and storing it for later injection of electric energy back to the grid."[38] This definition is intended "to cover electric storage resources capable of receiving electric energy from the grid and storing it for later injection of electric energy

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[35] Matter of Amendment of Commission's Rule Regarding Applications for Certificates of Convenience & Necessity, No. WD 82182, 2019 WL 2651187, at *7 (Mo. Ct. App. June 28, 2019)
[36] Assuming the solar facilities are producing at their full nameplate capacity.
[37] *See* Reform of Generator Interconnection Procedures and Agreements, 163 FERC 61,043 and Small Generator Interconnection Agreements and Procedures, 78 FR 73240-01.
[38] Order No. 841, 162 FERC ¶ 61,127 at P 29.

back to the grid, regardless of their storage medium (e.g., batteries, flywheels, compressed air, and pumped-hydro)."[39] The battery storage solutions proposed in this case do exactly that. Nor, FERC says, does system location matter. The Commission stated that "electric storage resources located on the interstate transmission system, on a distribution system, or behind the meter fall under this definition."[40] No matter where the battery storage asset is booked, or where it's located on a system, it's clear that FERC and the regional transmission organizations and independent system operators view battery storage akin to production facilities.

Finally, a holistic view of a site that is the subject of a CCN request accomplishes the main point of the CCN rule, to ensure that an investment will justify the cost of that investment. The Tartan Factors help evaluate an application, but the determining factor is the public interest. Viewing the battery asset and the solar asset together provides the most complete record of the true costs and benefits of the projects to make this determination. This is especially important in a case where both components are integral parts to a project, that without one, the other component would not go forward. Ameren Missouri has claimed this in discovery. For example, in Staff Data Request 33 Ameren Missouri stated both components are necessary for reliability improvement:

> "The combination of both solar and battery was determined to be essential to provide a distribution solution so no evaluation was performed that looked at solar or battery in isolation."

[39] Elec. Storage Participation in Markets Operated by Reg'l Transmission Organizations & Indep. Sys. Operators, 167 FERC ¶ 61154 (May 16, 2019)

[40] Elec. Storage Participation in Markets Operated by Reg'l Transmission Organizations & Indep. Sys. Operators, 167 FERC ¶ 61154 (May 16, 2019).

> "There was no analysis done for a solar facility only as it does not provide a sufficient reliability solution."

Pairing the solar and storage together allows for a significant reduction in the size of the batteries.[41] It also allows Ameren Missouri to utilize the 30% Investment Tax Credit for battery storage charged by renewable sources.[42] If Ameren Missouri has decided the two components are necessary to move forward with the Projects, why would the Commission not undertake that analysis too?

Conclusion

The public interest is best served by examining the costs and benefits of the site as a whole, with both essential components considered, and no "deemed prudency" in regards to need and economic feasibility. In regards to the CCN process, the Appellate Court has stated:

> This function requires a balancing of the needs and interests of ratepayers and investors. Although the PSC always has the power to disallow capitol[sic] improvements in a utility's rate base, that *post hoc* authority is toothless *550 if a major disallowance would jeopardize the interests of either ratepayers or investors.[43]

Balancing the interests of the ratepayers and investors requires careful consideration of all relevant factors before construction on the site begins. Post hoc challenges to prudency are also often met with accusations of using hindsight to evaluate a decision. To ensure ratepayers are only paying for assets that are in the public interest, as well as to avoid disallowances to the utility and its shareholders based on information not known at the time of the decision, CCN applications should consider all relevant factors.

[41] Kevin Anders Direct Testimony, Page 13, Lines 11- 19.
[42] Staff Data Request 50.
[43] State ex rel. Cass Cty. v. Pub. Serv. Comm'n, 259 S.W.3d 544, 549–50 (Mo. Ct. App. 2008).

"Orders of the PSC are made on the basis of the public interest. The PSC would be entitled to consider any relevant circumstance."[44] In this case, those factors including the battery component into evaluation of the projects, as well as considering the two most pressing Tartan Factors for making an overall public interest determination, need and economic feasibility. It's not often the public interest determination in a CCN application is decided on the utility's ability to finance the project or the qualifications to build it. The costs, the benefits, and comparing all relevant factors to ensure these projects are improvements justifying their cost provides the best record on which to base a decision approving or denying a CCN application.

WHEREFORE, on the basis of all the foregoing, Staff prays the Commission will reject Ameren Missouri's argument regarding deemed prudency for the solar facilities under Section 1655 RSMo., reject the argument that battery storage is not an asset and therefore is excluded from evaluation of the Richwoods and Green City applications, and based on all relevant factors as provided in Staff's concurrently filed *Rebuttal Report* only issue a certificate of convenience and necessity for the Richwoods Project.

Respectfully submitted,
/s/Nicole Mers
Deputy Counsel
Missouri Bar No. 66766
P.O. Box 360
Jefferson City, MO 65012
(573) 751-6651 (Telephone)
(573) 751-9285 (Fax)
Nicole.mers@psc.mo.gov

Attorney for the Staff of the
Missouri Public Service Commission

[44] State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n of Missouri, 848 S.W.2d 593, 597 (Mo. Ct. App. 1993). (Internal citations omitted.)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission, on this 12th day of December, 2019.

/s/ Nicole Mers