CIVIL PROCEDURE FORM NO. 8-A(2)

IN THE_____JUDICIAL CIRCUIT,_____COUNTY, MISSOURI

FILED
JAN 25 2019
Missouri Public Service Commission
9:53 am CJ

Judge or Division:	**Circuit Court Case Number:** **EA-2018-0202**		
Plaintiff/Petitioner: Office of the Public Counsel	Appellate Number:	☐ Filing as an Indigent	
	Date of Judgment/Decree/Order: **(ATTACH A COPY)** Issued: December 12, 2018 Effective: December 22, 2018	Court Reporter:	
vs.	Date Post Trial Motion Filed: December 21, 2018	☐ Sound Recording Equipment	
Defendant/Respondent: Missouri Public Service Commission	Date Ruled Upon: January 3, 2019	The Record on Appeal will consist of: ____Legal File only or X Legal File and Transcript	(Date File Stamp)

Notice of Appeal to Missouri Court of Appeals - Civil

District: ☒ Western ☐ Eastern ☐ Southern

Notice is given that the Office of the Public Counsel____ appeals from the judgment/decree/order entered in this action on January 25, 2019.

Appellant's Name (If multiple, list all or attach additional pages) Office of the Public Counsel	Respondent's Name (If multiple, list all or attach additional pages) Missouri Public Service Commission
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Brief Description of Case (May be completed on a separate page)

Union Electric d/b/a Ameren Missouri's application for a renewable energy standard rate adjustment mechanism in conjunction with plant-in-service accounting.

Issues Expected To Be Raised On Appeal (May be completed on a separate page. Appellant is not bound by this list.)

The Public Service Commission's order is unlawful because it misapplies the law as to the operation of plant-in-service accounting concurrent with a renewable energy standard rate adjustment mechanism, granting of a request to allocate cost recovery within two mechanism contrary to a statute's plain language, and improper reading of a statute broadly in favor of an applying public utility.

Signature of Attorney or Appellant Caleb Hall	Date 1/25/19

Certificate of Service on Persons other than Registered Users of the Missouri eFiling System

I certify that on January 25, 2019 (date), a copy of the foregoing was sent to the following by facsimile, hand-delivery, electronic mail or U.S. mail postage prepaid to their last known addresses.

The Missouri Public Service Commission

Caleb Hall

Appellant or Attorney for Appellant

Directions to Clerk

Transmit a copy of the notice of appeal and all attached documents to the clerk of the Court of Appeals and to any person other than registered users of the eFiling system in a manner prescribed by Rule 43.01. Clerk shall then fill in the memorandum below. See Rule 81.08(i). Forward the docket fee to the Department of Revenue as required by statute.

Memorandum of the Clerk

I have this day served a copy of this notice by ☐ regular mail ☐ registered mail ☐ certified mail ☐ facsimile transmission to each of the following persons at the address stated below. If served by facsimile, include the time and date of transmission and the telephone number to which the document was transmitted.

I have transmitted a copy of the notice of appeal to the clerk of the Court of Appeals, Western District.

☐ Docket fee in the amount of $70.00 was received by this clerk on _____ (date) which will be disbursed as required by statute.

☒ No docket fee was received because:

☒ a docket fee is not required by law under Mo. Rev. Stat. § 386.440.3 Rule 100.02(b) (cite specific statute or other authority).

☐ a motion to prosecute the appeal in forma pauperis was received on _____ (date) and was granted on _____ (date).

1/25/19
Date

Cynthia Thevenin
Clerk

Additional Parties and Attorneys

List every party involved in the case not listed on page 1, indicate the position of the party in the circuit court (e.g. plaintiff, defendant, intervenor) and in the Court of Appeals (e.g. appellant or respondent) and the name ofthe attorney of record, if any, for each party. Attach additional pages to identify all parties and attorneys if necessary.

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LIST OF PARTIES TO THE COMMISSION PROCEEDINGS

(As required by § 386.510 RSMo)

The following parties participated in Public Service Commission Case Number EA-2018-0202.

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STATEMENT OF THE ISSUES

(As required by § 386.510 RSMo)

Appellant Public Counsel will raise the following issue on appeal:

The Office of the Public Counsel challenges the lawfulness and reasonableness of the Public Service Commission's December 12, 2018 *Report and Order* for failing to limit Union Electric d/b/a Ameren Missouri's recovery to eighty-five percent of depreciation expense and return through its election of plant-in-service accounting, but instead permitting the electing utility to split those sums between a plant-in-service accounting regulatory asset and a renewable energy standard rate adjustment mechanism to recoup one hundred percent of depreciation expense and return.

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 APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel (OPC), by and through counsel, and files an Application for Rehearing pursuant to Section 386.500, RSMo. The Missouri Public Service Commission (Commission) should grant this request for a rehearing because the Commission's Report and Order is unlawful. The Commission should grant OPC's request and provide relief consistent with the arguments contained herein:

1. On December 12, 2018, the Commission issued its Report and Order in this case regarding the question of whether Ameren Missouri may account for depreciation expense and return within both a renewable energy standard rate adjustment mechanism (RESRAM) and a regulatory asset created through plant-in-service accounting (PISA). Both PISA and the RESRAM are interim rate mechanisms addressing costs traditionally lost to regulatory lag, such as depreciation expense and return. The RESRAM specifically secures all prudently incurred Renewable Energy Standard (RES) costs.[1] The PISA statute in question provides 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."[2]

[1] Section 393.1030.2(4) (2013); 4 CSR 240-20.100(1)(Q).
[2] Section 393.1400.2(1), RSMo (2018) (emphasis added).

The phrase "this chapter" refers to Chapter 393 of Missouri statutes where both the PISA and RES statutes are situated.[3] Despite this textual limitation of "eighty-five percent," the Commission ordered Ameren Missouri to recover the fifteen percent not addressed anywhere in statute through its RESRAM.

2. The Commission's Report and Order is unlawful because it enables Ameren Missouri to recover depreciation expense and return beyond explicit statutory limitations. The Commission is "purely a creature of statute", and therefore has powers only as far as those granted to it by legislative acts.[4] Such statutes are liberally interpreted in favor of the "public welfare."[5] However, no matter how liberal one views the statute at issue; the Commission cannot issue an order that ignores explicit text. The PISA statute limits recovery to "eight-five percent of all depreciation expense and return" notwithstanding "any other provision" of Chapter 393, including the RES' one hundred percent recovery guarantee of prudent RES costs.[6]

In response, the Commission states that the "notwithstanding" language does not apply because the "RES statute is not contrary to the PISA statute."[7] The RES statute is not contrary to the PISA statute when a utility utilizes one statute to the exclusion of the other. However, when a utility decides to mix-and-match two different statutory mechanisms to weaken consumer protections in both, there becomes an unavoidable conflict in law. One statute allowing for the recovery of one hundred percent of depreciation expense and return is necessarily contrary to a

[3] *Id.*; Sections 393.1020-1050, RSMo.
[4] *State ex rel. Utility Consumers Council v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979); *Pub. Serv. Comm'n v. Mo. Gas Energy*, 388 S.W.3d 221, 230 (Mo. Ct. App. 2012).
[5] *State ex rel. Laundry v. Pub. Serv. Comm'n*, 327 Mo. 93, 106, 34 S.W.2d 37, 41-43 (1931).
[6] Section 393.1400.
[7] *Report and Order*, Case No. EA-2018-0202 (Dec. 12, 2018).

later-in-time statute that secures instead eighty-five percent. The Commission has misapplied the law as written, and has thus acted unlawfully.

3. The Commission's Report and Order is also unlawful because it thwarts clear legislative intent. The Commission secures lawful action by effectuating legislative intent and state public policy.[8] The Commission correctly identifies legislative intent by turning to the legislative history of the PISA statute's passage and recognizing that "the eighty-five percent limitation on the utility's ability to defer costs is likely a legislative compromise intended to maintain some regulatory lag to protect ratepayer interests."[9] The Commission also observes that unlike "the RESRAM, which allows for an electric utility to immediately recover RES costs from its ratepayers through the RESRAM, the PISA statute does not allow for immediate recovery of depreciation expense and return."[10] However, the Commission's Report and Order contravenes legislative intent by unjustifiably eradicating PISA's remaining fifteen percent of regulatory lag without any statutory authority to so order. The Commission also fails to rationalize its view that the Missouri Legislature intended to divide RES costs and treat them differently absent language so clearly providing. There is no apparent justification for the immediate recovery of fifteen percent of depreciation expense while delaying the remaining eighty-five percent, and there is certainly no statute positively approving such treatment. If differing accounting were the Missouri Legislature's desired policy, such a result would be better drafted by amending the RES. Instead, the Legislature vociferously debated how much depreciation expense and return was to be recovered by utilities that elect PISA. The Commission's Report and Order has rendered the Missouri Legislature's actions meaningless.

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[8] *State ex rel. Dalton v. Miles Laboratories*, 365 Mo. 350, 365, 282 S.W.2d 564, 573-74 (1955).
[9] *Report and Order*, Case No. EA-2018-0202 (Dec. 12, 2018).
[10] *Id.*

The Commission further undermines legislative intent by subverting the RES' one percent retail rate cap. Missouri's RES and associated RESRAM limit rate increases due to compliance costs to one percent based on the utility's cost of compliance.[11] By permitting electric utilities to split their depreciation expense and return between the RESRAM's one percent limitation and the higher 2.85 or three percent caps associated with PISA,[12] the Commission sets the precedent for the effective avoidance of the RESRAM's one percent cap. The Commission's Report and Order risks this result 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. Without an explicit statutory directive to undermine the RES' retail rate impact cap, the Commission cannot lawfully enable this behavior.

4. The Commission's Report and Order is additionally unlawful because the Commission read any ambiguity in the statute broadly in favor of the applying utility rather than narrowly with the public's interest at the forefront. When confronted with the PISA statute and its associated legislative history clearly signaling that some negligible amount of regulatory lag is to be preserved, the Commission responds that "the legislature could have written a provision into the PISA statute to forbid recovery of any portion of the fifteen percent by other means, but it did not do so."[13]

This analysis fails for three reasons. Firstly, the Legislature did indeed so write a provision into the PISA statute forbidding stacked recovery: the "notwithstanding" language making the PISA statute controlling over other statutes in Chapter 393.[14] Secondly, the Commission essentially endorses a view that an applicant's view prevails so long as a statute does not

[11] Section 393.1030.2, RSMo; 4 CSR 240-20.100(6)(A).
[12] Section 393.1655, RSMo.
[13] *Id.*
[14] Section 393.1400.2.

pedantically preclude every variant of a request. Ameren Missouri could have presumably requested for more than one hundred percent recovery under the Commission's reasoning. Thirdly, this reasoning impermissibly gives deference to Ameren Missouri's application for an interim rate mechanism contrary to the judicial history of interpreting mechanism statutes narrowly.[15] Missouri Courts have so narrowly construed rate mechanism provisions with a critical view of the private applicant's position because a "commission that attends only to these private requests puts the public interest on the sidelines."[16]

5. The Commission's Report and Order further compounds its unlawful nature by misapplying statutory canons of construction. The Commission is correct that a proper canon of statutory construction is to disfavor repeals or amendments by implication. However, this axiom is not at play when reading the PISA statute as no party to this case argued that the PISA statute repeals or modifies Missouri's RES by implication. Instead, the OPC plainly and repeatedly maintained that PISA is a distinct rate treatment option, separate and apart from other mechanisms that entail the same costs. Ameren Missouri knew of the possibility of recovering one hundred percent of regulatory lag associated with RES compliance through a RESRAM, but it chose to operate under a different statutory mechanism that prevails notwithstanding the RES' competing

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[15] *See, e.g., Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Off. of Pub. Counsel*, 464 S.W.3d 520, (Mo. 2015) (admonishing the Commission for using an "expansive view of the definition of 'deteriorate'" when interpreting an infrastructure system replacement surcharge statute); *see also 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 deteriorated condition . . . This creates a challenge for Laclede because our Supreme Court has found this requirement to be mandatory and has interpreted it narrowly"); *State ex rel. Union Elec. Co.*, 399 S.W.3d 467, 492 (Mo. App. W.D. 2013) ("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").

[16] Scott Hempling, PRESIDE OR LEAD?: THE ATTRIBUTES AND ACTIONS OF EFFECTIVE REGULATORS 13 (2nd ed. 2013).

guarantees. The RESRAM and PISA are two separate tracks, and one cannot simultaneously ride in both carts and switch paths whenever consumer protections are seen as an obstruction.

WHEREFORE, the OPC requests that the Commission grant this application for rehearing to reconsider the Commission's Report and Order.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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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 21st day of December, 2018, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall

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 Convenience and Necessity Authorizing it to Construct a Wind Generation Facility	)))))	File No. EA-2018-0202

REPORT AND ORDER

Issue Date: December 12, 2018

Effective Date: December 22, 2018

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 Convenience and Necessity Authorizing it to Construct a Wind Generation Facility	)))))	**File No. EA-2018-0202**

APPEARANCES

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For Union Electric Company d/b/a Ameren Missouri.

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For the Staff of the Missouri Public Service Commission.

Caleb Hall, Senior Counsel, and **Ryan Smith**, Senior Counsel, Office of the Public Counsel, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102-2230.

For the Office of the Public Counsel and the Public.

Chief Regulatory Law Judge: **Morris L. Woodruff**

REPORT AND ORDER

Table of Contents

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

Union Electric Company d/b/a Ameren Missouri filed an application on May 21, 2018, seeking a certificate of convenience and necessity (a CCN) to construct and operate a wind generation facility in Schuyler and Adair Counties in Missouri. That application also sought leave to establish a Renewable Energy Standard Cost Recovery Mechanism (RESRAM) related to the cost of the wind generation project. At the same time, Ameren Missouri filed a tariff designed to implement the RESRAM. That tariff carried a January 1, 2019 effective date. The Commission granted applications to intervene filed by the Natural Resources Defense Council (NRDC); the Missouri Department of Conservation; the Missouri Department of Economic Development – Division of Energy; the Missouri Industrial Energy Consumers (MIEC); Renew Missouri Advocates, d/b/a Renew Missouri; and Sierra Club.

On October 12, Ameren Missouri, Staff, Public Counsel, Renew Missouri, MIEC, Department of Conservation, Division of Energy, and the NRDC filed a Third Stipulation and Agreement[1] that resolved all issues regarding the requested CCN, and resolved all but one

[1] Various parties filed two earlier stipulations and agreements that were opposed by one or more

issue regarding the requested RESRAM. The Commission approved that stipulation and agreement in an order issued on October 24.

By approving the stipulation and agreement, the Commission granted Ameren Missouri's request for a CCN to construct and own a wind generation facility to be constructed in Schuyler and Adair Counties under terms of a Build Transfer Agreement with TG High Prairie Holdings, LLC. Further, Ameren Missouri was given authority to merge TG High Prairie, LLC, into Ameren Missouri, with Ameren Missouri to be the surviving entity. Ameren Missouri was also required to comply with various provisions intended to mitigate the impact of the wind project on the environment and Missouri wildlife.

The one remaining unresolved issue concerns the requested RESRAM. While the signatories agree the Commission should grant Ameren Missouri's request to establish a RESRAM, subject to the conditions contained in the stipulation and agreement, the stipulation and agreement provides that if the Commission accepts Ameren Missouri's position on the unresolved issue, it should approve an Ameren Missouri tariff in the form attached to the stipulation and agreement as Appendix B. If the Commission accepts Public Counsel's position on that issue, it should approve an Ameren Missouri tariff in the form attached to the stipulation and agreement as Appendix C. The Commission's determination of which RESRAM tariff should be approved will be made in this Report and Order. The pending RESRAM tariff, which was filed along with Ameren Missouri's application on May 21, was rejected in the order approving the stipulation and agreement.

An evidentiary hearing was held on October 31. Thereafter, the parties filed initial briefs on November 13, and reply briefs on November 20.

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parties. The third stipulation and agreement superseded the two previous filings.

Findings of Fact

1. Ameren Missouri is a Missouri certificated electrical corporation as defined by Subsection 386.020(15), RSMo 2016, and is authorized to provide electric service to portions of Missouri.

2. Ameren Missouri filed an application on May 21, 2018, seeking a certificate of convenience and necessity (a CCN) to construct and operate a wind generation facility in Schuyler and Adair Counties in Missouri. That wind generation facility will be referred to as the High Prairie project.

3. As part of its May 21, 2018 Application, Ameren Missouri requested that it be allowed to establish a Renewable Energy Standard Cost Recovery Mechanism, which is frequently referred to by its acronym, RESRAM.[2]

4. The purpose of the RESRAM is to allow the electric utility an opportunity to recover its prudently incurred costs, and to pass through to its customers any benefits of savings achieved, resulting from the utility's compliance with the renewable energy mandates imposed by Missouri's Renewable Energy Standards law.[3]

5. The wind generation project for which Ameren Missouri has been granted a CCN in this case is intended to comply with the renewable energy mandates of the law.[4]

6. The operation of the RESRAM allows the electric utility to recover its investment in renewable energy production more quickly than it would be able to recover those costs if it had to wait to recover those costs in a general rate case. The use of the RESRAM also allows the electric utility to avoid the effects of regulatory lag, which would otherwise prevent the utility from recovering RES compliance costs associated with the

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[2] Application, Page 9.

[3] Section 393.1030, RSMo 2016.

[4] Wills Direct, Ex. 119, Page 3, Lines 8-22.

investment during the period between when the asset goes into service until the completion of a general rate case that included the in-service assets within the true-up period.[5]

7. Missouri's General Assembly passed Senate Bill 564 during the 2018 legislative session.[6] That bill included a provision, codified at Section 393.1400 RSMo, that requires an electric utility that elects to come under this provision to "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 the effective date of this section."[7] This is referred to as "plant in service accounting" or PISA.

8. When Senate Bill 564 was initially introduced, it required all depreciation expense and associated return to be deferred. The eighty-five percent limitation was added to the legislation by the General Assembly during the legislative process.[8]

9. Ameren Missouri elected to make the deferrals required under the terms of Section 393.1400, and to be subject to the terms of Senate Bill 564, through a notice filed with the Commission on September 1, 2018.[9]

Conclusions of Law

A. Subsection 386.020(15), RSMo 2016 defines "electrical corporation" as including:

> every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, ... owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others;

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[5] Wills Direct, Ex. 119, Pages 4-5, Lines 16-23, 1-12.

[6] Ex. 127.

[7] Section 393.1400.2.(1), RSMo.

[8] Ex. 127.

[9] Notice, File No. EO-2019-0044, September 1, 2018.

By the terms of the statute, Ameren Missouri is an electrical corporation and is subject to regulation by the Commission pursuant to Section 393.140, RSMo 2016.

B. Missouri's "Renewable Energy Standard" portfolio requirements are found in Subsection 393.1030.1, RSMo. That statute requires electric utilities to provide electricity from renewable energy resources at set percentages increasing from year to year. For 2018-2020, no less than ten percent of electricity sold must be from renewable resources. That percentage increases to no less than fifteen percent for each year beginning in 2021. Subsection 393.1030.2 gives the Commission authority to "make whatever rules are necessary to enforce the renewable energy standard." Subdivision 393.1030.2.(4) requires that the rules to be promulgated by the Commission make "[p]rovision for recovery outside the context of a regular rate case of prudently incurred costs and the pass-through of benefits to customers of any savings achieved by an electrical corporation in meeting the requirements of this section."

C. Commission Rule 4 CSR 240-20.100 is the regulation promulgated by the Commission to implement the Renewable Energy Standard. That regulation allows for the establishment of a Renewable Energy Standard Rate Adjustment Mechanism, a RESRAM, which is defined by 4 CSR 240-20.100(1)(P) as "a mechanism that allows periodic rate adjustments to recover prudently incurred RES compliance costs and pass-through to customers the benefits of any savings achieved in meeting the requirements of the Renewable Energy Standard."

D. For both the statute and the implementing regulation, the only limitation on the amount of RES costs that the electric utility may recover through the RESRAM is that those costs be "prudently incurred." In other words, the electric utility will be allowed to recover 100 percent of its "prudently incurred" RES costs.

E. Subdivision 393.1400.2.(1), RSMo, which will be referred to as the Plant in Service Accounting (PISA) statute, states:

> 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. In each general rate proceeding concluded after August 28, 2018, the balance of the regulatory asset as of the rate-base cutoff date shall be included in the electrical corporation's rate base without any offset, reduction, or adjustment based upon consideration of any other factor, other than as provided for in subdivision (2) of this subsection, with the regulatory asset balance arising from deferrals associated with qualifying electric plant placed in service after the rate-base cutoff date to be included in rate base in the next general rate proceeding. The expiration of this section shall not affect the continued inclusion in rate base and the amortization of regulatory asset balances that arose under this section prior to such expiration.

Subdivision 393.1400.2.(2), which is referenced in subdivision 393.1400.2.(1), states:

> The regulatory asset balances arising under this section shall be adjusted to reflect any prudence disallowances ordered by the commission. The provisions of this section shall not be construed to affect existing law respecting the burdens of production and persuasion in general rate proceedings for rate-base additions.

F. Unlike the RESRAM, which allows an electric utility to immediately recover RES costs from its ratepayers through the RESRAM, the PISA statute does not allow for immediate recovery of depreciation expense and return. Instead, those amounts are to be deferred in a regulatory asset for recovery in rates that will be established in a subsequent general rate case. Further, unlike the RESRAM, which applies only to RES costs and benefits related to the generation and provision of renewable energy, the PISA statute applies to all depreciation expense and return associated with qualifying electric plant, not limited to costs associated with renewable energy.

G. Subsection 393.1400.5, which is also referenced in subdivision 393.1400.2.(1), indicates the PISA statute applies only to an electrical corporation that files notice with the Commission of its intent to be subject to that statute. As the Commission found in Finding of Fact No. 9, Ameren Missouri has chosen to be subject to the PISA statute.

H. In interpreting a statute, the Commission must determine the intent of the legislature, giving the language used its plain and ordinary meaning.[10] Here the language of the PISA statute and the RES statute are clear and unambiguous and not subject to further construction.

I. In interpreting a statute, a "notwithstanding clause" does not create a conflict, but eliminates the conflict that would have occurred in the absence of the clause.[11] In this case, there is no conflict between the PISA statute and the RES statute so the "notwithstanding clause" has no effect.

J. If the legislature intends to repeal or amend a statute it must do so explicitly.[12] The Commission will not infer that the legislature intended to amend the RES statute by implication because amendments by implication are not favored.[13]

Decision

Ameren Missouri proposes to use the PISA statute to defer 85 percent of the depreciation expense and return associated with the High Prairie wind project for recovery in a future rate case. All parties agree it can do that. Indeed, by the terms of the PISA

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[10] *Lane v. Lensmeyer*, 158 S.W.3d 218, 226, (Mo. banc 2005).

[11] *Earth Island Institute v. Union Electric Co.* 456 S.W.3d 27, 34, (Mo. banc 2015)

[12] Missouri Constitution, Art. 3, Section 28.

[13] *Fisher v. Waste Management of Missouri*, 58 S.W.3d 523, 525 (Mo. banc 2001). *See also, Sours v. State*, 603 S.W.2d 592, 599 (Mo. banc 1980).

statute, it must do that. The issue before the Commission concerns the other 15 percent of the depreciation expense and return associated with the High Prairie project.

Ameren Missouri proposes to use the RES statute and the RESRAM to recover that 15 percent of the depreciation expense and return from its ratepayers. Staff agrees that Ameren Missouri can do so. Public Counsel argues that when Ameren Missouri elected to be subject to the PISA statute, it was precluded, by the terms of that statute, from recovering that 15 percent from its ratepayers through the RES statute and its RESRAM.

This disagreement is a legal issue founded on the language of the PISA statute. The first clause of the first sentence of that statute says "[n]otwithstanding any other provision of this chapter to the contrary." Public Counsel contends the RES statute is contrary to the PISA statute and argues that the "notwithstanding" clause in the PISA statute precludes application of the RES statute and the associated RESRAM, which are also a part of Chapter 393. The flaw in Public Counsel's argument is that the RES statute is not contrary to the PISA statute, and therefore the "notwithstanding" clause does not come into play in this situation.

The PISA statute requires the subject electric utility to "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. ..." By deferring those amounts into a regulatory asset, the electric utility is allowed to avoid some of the financial effect of regulatory lag that results from the time gap between when an item of electric plant is put in service and when it is added to the utility's rate base as part of a general rate proceeding. As Public Counsel contends, the eighty-five percent limitation on the utility's ability to defer costs is likely a legislative compromise intended to maintain some regulatory lag to protect ratepayer interests. The PISA statute is silent about what is to be done with the other fifteen percent of those costs.

For most utility "depreciation expense and return associated with all qualifying electric plant recorded to plant-in-service on the utility's books," the silence of the PISA statute means the fifteen percent cannot be deferred for future recovery and remains subject to regulatory lag. However, the subset of the fifteen percent associated with renewable energy and thus eligible for recovery under the RES statute falls within the terms of the RES statute and thus can be recovered through the RESRAM.

This interpretation of the two statutes as consistent with each other allows both to be harmonized as fully effective, in compliance with the rule of statutory interpretation that presumes that to be the intent of the legislature. Certainly, the legislature could have written a provision into the PISA statute to forbid recovery of any portion of the fifteen percent by other means, but it did not do so. Similarly, it could have explicitly amended the RES statute, but it did not do so and the Commission will not presume that it amended the RES statute by implication.

The Commission finds and concludes that Ameren Missouri may recover depreciation expense and return associated with the High Prairie project recorded to plant-in-service on the utility's books as it is permitted to do by the RES statute, exclusive of the eighty-five percent of that expense and return deferred for future recovery pursuant to the PISA statute.

So that Ameren Missouri can proceed with the High Prairie project as soon as possible, and because only a single, narrow issue has been decided, the Commission will make this report and order effective in ten days.

THE COMMISSION ORDERS THAT:

1. Union Electric Company d/b/a Ameren Missouri shall file a RESRAM tariff on the terms reflected in the tariff sheets attached to the approved Third Stipulation and Agreement as Appendix B.

2. This report and order shall become effective on December 22, 2018.

BY THE COMMISSION

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and
Coleman, CC., concur;
and certify compliance with the
provisions of Section 536.080, RSMo 2016

Dated at Jefferson City, Missouri,
on this 12th day of December, 2018.