BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of The Empire District Electric Company d/b/a Liberty to Obtain a Financing Order that Authorizes the Issuance of Securitized Utility Tariff Bonds for Energy Transition Costs Related to the Asbury Plant	)))))	**Case No. EO-2022-0193[1]**

RESPONSE

The Staff of the Missouri Public Service Commission (Staff) hereby responds to the accumulated deferred income tax (ADIT) issue raised in the applications for rehearing and *amicus curiae* brief filed in this matter.

Summary

1. Staff's response is limited to the ADIT issue raised in the applications for rehearing and *amicus* brief.

2. Staff recommends the Commission deny the applications for rehearing filed by Empire District Electric Company d/b/a/ Liberty, and Evergy Metro, Inc. and Evergy Missouri West (collectively Evergy), with regards to the ADIT issue for four separate reasons.

3. *First*, the record in this case supports the Commission's findings of fact and conclusions of law, because the term "net tax benefits" as used in Section 393.1700.2(3)(c)m is not defined, and Staff adduced competent and substantial evidence that the "net tax benefits" of an ADIT balance for retired plant is the "full amount" of the ADIT balance.[2]

4. *Second*, the applications promote an unlawful interpretation of the securitization statute, reading some parts of the statute in isolation and ignoring other provisions in a manner that would allow for improper double recovery of income tax expense from ratepayers.

[1] Staff responds to the applications for rehearing and amicus briefs addressing accumulated deferred income tax (ADIT) relating to Asbury, which is an issue limited to Case EO-2022-0193, not EO-2022-0040. Staff does not oppose
[2] Transcript at pages 243-245.

5. *Third*, the Commission is not bound by *stare decisis*, and would be free to implement the statute based on a different record in a different case. Its decision here therefore should not discourage utilities from applying for securitization where it is otherwise warranted.

6. *Fourth*, the application filed by Liberty relies on extra-record facts that Liberty failed to adduce during hearing, despite the opportunity to do so with pre-filed testimony and an in-person hearing.

7. Staff does not oppose Ameren Missouri's motion for leave to file an *amicus curiae* brief, which may be filed with the Commission pursuant to a Commission order under 20 CSR 4240-2.075(11).

8. To the extent an order adding Evergy as a party to the case is necessary for Evergy to file an application for rehearing, Staff would not oppose a Commission order adding Evergy as a party. However, Staff does not concede that Evergy is necessarily "interested" in this case for purposes of Commission Rule 20 CSR 4240-2.075, or Section 386.500, RSMo (2016).

Response

9. Based upon its review of the arguments regarding the ADIT customer credit issue found in the motions for rehearing and amicus brief, Staff is not persuaded that the electric utility's position on the ADIT customer credit is correct in terms of either ratemaking policy or statutory interpretation.

I. The Commission's order is supported by competent and substantial evidence on the whole record.

10. The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue. *Union Electric Co. v. Pub. Serv. Comm'n*,

591 S.W.3d 478, 485 (Mo. App. W.D. 2019). Statutory definitions will govern, and if no statutory definitions are provided, the plain and ordinary meaning, which may be derived from a dictionary or from the technical import of technical words and phrases having a peculiar and appropriate meaning in law. *Id.*

11. The term "net tax benefit" at Section 393.1700.2(3)(c)m is not defined by statute.

12. Staff adduced competent and substantial evidence that the "net tax benefit" of an ADIT balance is the full balance of the ADIT balance:[3]

> Q. Okay. Now, speaking of ADIT, what does ADIT represent at a very -- fundamentally, what is it?
> A. It refers to the -- when the company in the beginning of the life of an asset, they incur – for this example, they incur -- they get a higher tax break because their tax deprecation is higher than what we use for ratemaking purposes. So that is a deferred tax, and the company gets the benefit of the cash, so it is reflected as a rate base deduction in rate base. Over time, that amount should turn around, and the customer should get the benefit while the company is paying lower -- it has a lower tax deduction is paying higher taxes than what we would reflect in rates.
> Q. Okay. **So as long as the ADIT balance is positive, that is money that ratepayers have paid to the company; correct?**
> **A. It is the difference in the -- in the tax deductions.**
> **Q. And -- and the company possesses that ADIT balance?**
> **A. That is correct.**
> Q. And absent securitization, what would the company -- how would the company treat that ADIT balance over time?
> A. Over time, it would eventually for like one item, it would eventually be zero.
> Q. And what -- what brings it to zero? What transactions bring it to zero?
> A. It is the differences that are corrected over time, and the customers receive the benefit.
> Q. Got it. So the benefit is early on in the life of the asset customers are overpaying actual taxes, and late in the life of the asset, they're underpaying actual taxes?
> A. That is correct.
> Q. Okay. So when you talk about today there's a -- an ADIT balance, **what is the tax benefit of that balance?**
> A. The customer should be receiving that tax benefit.
> **Q. The full amount?**

[3] Transcript at 243:11-245:3.

A. The full amount. Yes.

13. Under normal ratemaking practices, in the first years of a plant asset's life, the amount of depreciation expense used to calculate income taxes to be paid to the government is more than the depreciation expense used to calculate income taxes for ratemaking purposes. Thus, ratepayers will initially be paying more income taxes than what the Company will actually pay to the government.

14. The amount of the over-payment is referred to as "deferred tax expense." This is caused by the difference in depreciation rates used to calculate federal income tax liabilities (accelerated depreciation rates) and the rates used to calculate income tax expense for ratemaking purposes (straight-line depreciation rates). Over time, this over-collection of income taxes will reverse and the Company will pay more in income taxes to taxing authorities than the amount of income tax expense collected from customers for ratemaking purposes.

15. To compensate the ratepayers for their prepayment of income tax expense, the amount of the prepayment is included as a reduction to rate base. The rate base offset is labelled as "accumulated deferred income taxes" (ADIT), and this treatment appropriately gives credit to customers for capital contributed to the utility by ratepayers through payment of deferred taxes.

16. At the end of a plant asset's life, the amount of income taxes paid by the utility to the taxing authorities in theory should be equal to the amount of income taxes collected from customers, meaning that the utility's books would no longer reflect an ADIT offset for that particular asset.

17. Accordingly, the Asbury ADIT balance at issue in this proceeding represents dollars that ratepayers prepaid to Liberty in the past for tax liabilities related to Asbury that Liberty had not yet been required to pay at the time of its retirement. At the time of its retirement

Liberty had collected approximately $27.5 million[4] more from customers in income tax expense from customers than it had yet to pay out in relation to Asbury. Liberty's decision to retire the Asbury plant early halted the process of depreciating the unit for tax purposes, as Empire received a "plant abandonment" tax deduction at the time of retirement equal to its remaining unrecovered plant investment in the unit.

18. This deduction made Empire "whole" for the tax consequences of the Asbury unit, but it is important to understand that its customers were not made "whole" regarding Asbury related income taxes. Because of the early cessation of tax depreciation on Empire due to the retirement, the $27.5 million of taxes paid in by customers but not paid out by Empire for Asbury taxes will never be returned to customers absent Commission action.

19. For this reason, Staff interprets the relevant language in the statute concerning the ADIT customer credit as necessarily encompassing a return of capital to the customer in the form of ADIT that would otherwise be retained by the utility. Staff's treatment appropriately recognizes that the applicable tax benefit accruing to the utility because of the Asbury retirement was retention of the existing amount of Asbury income tax prepayment at the time the plant was shut down. Staff reflected that benefit in the ADIT customer credit by including the net present value (NPV) of the face value of the ADIT amount in the calculation of the credit.

20. Under Liberty's proposal, in contrast, the ratepayers would only be credited an amount of approximately $3 million instead of reflecting the entire amount of the Asbury deferred tax prepayment as a benefit in the calculation.

21. The ultimate result of the electric utilities' position on this issue would be to improperly retain amounts collected from customers intended to pay taxes associated with the

[4] Net Present Value of $27.5 million is approximately $21.2 million. The net present value amount of $21.2 million was used in calculating the total to be securitized.

Asbury plant, and instead to somehow use the retained Asbury funds to cover future tax liabilities associated with securitization charge collections. However, both the evidentiary record in this case and the motions for rehearing entirely fail to address to what extent income taxes associated with securitization charge collections will in fact be due and payable on future securitized utility tariff charges, or should be properly be charged to customers at all, and how customers would be appropriately compensated for use of their funds for this purpose through the ADIT customer credit or some other means if the electric utility position prevails.

22. Regarding interpretation of the applicable language in the statute as it applies to this issue, Liberty cites the wording in section 393.1700 2.(3)(c)m concerning use of "net tax benefits" to support its position on the ADIT customer credit. Liberty asserts that the only component of this benefit is the net present value (NPV) of the reduction to rate base for ADIT that would have flowed to ratepayers in future general rate proceedings if Asbury had not been retired.

23. However, the utilities' suggested definition of "net tax benefit" is too narrow, and does not encompass the substantial tax benefit that will be retained by the utilities upon retirement of power plants. Further, the utilities' insistence that only the NPV of the return on rate base value of the ADIT balance is properly included in the customer credit calculation is undermined by the actual language of the statute: "the customer credit **shall include** the NPV of the tax benefits…" (Emphasis added.) The word "include" clearly implies that other values may be included in the calculation as well, as Staff recommended and the Commission ordered.

II. The Commission should not construe Section 393.1700 to authorize double recovery of income taxes due on securitized utility tariff charges, as that would be an absurd result that reads the ADIT provision in isolation and ignores the provisions on collection of financing costs, including income taxes on securitized utility tariff charges.

24. Construction of a statute should avoid unreasonable or absurd results. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 480-81 (Mo. App. W.D. 2013).

25. Statutory provisions must be read in the context of the whole statute, and not in isolation. *Osage Util. Operating Co., Inc. v. Pub. Serv. Comm'n*, 637 S.W.3d 78, 88 (Mo. App. W.D. 2021).

26. Section 393.1700, provides for the payment of income taxes due on securitized utility tariff charges through financing costs. Section 393.1700.1(8)(d), RSMo (Supp. 2021), defines "financing costs" to include "[a]ny *taxes* or license fees or other fees *imposed on the revenues generated from the collection of the securitized utility tariff charge* or otherwise resulting from the collection of securitized utility tariff charges, in any such case whether paid, payable, or accrued." (emphasis added.) Under the securitization statute, utilities recover securitized utility tariff costs and "financing costs" in the form of securitized utility tariff charges. § 393.1700.1(16), RSMo (Supp. 2021). Read together, these provisions allowing recovery of "taxes … on the revenues generated" is clear authority for recovery of income taxes.[5]

27. As a result, interpreting Section 393.1700 to allow a utility to retain the ADIT balance to pay future taxes would lead to an absurd result where utilities recover twice from their ratepayers the income taxes that may be paid on securitized utility tariff charges: once through retaining the balance of the ADIT under Section 393.1700.2(3)(c)m, and again through financing charges included in the securitized utility tariff charges themselves under Sections 393.1700.1(8)(d) and 393.1700.1(16).

[5] This is a matter of statutory interpretation. Whether and to what extent Liberty actually requested such authority is not part of Liberty's application for rehearing. Moreover, whether and to what extent Liberty actually pays income taxes on such amounts would be subject to true-up and reconciliation procedures provided for the in the securitization statute and the Commission's financing order.

28. Consequently, the Commission should reject the unlawful construction of Section 393.1700.2(3)(c)m proposed by the applications for rehearing and the *amicus* brief.

III. The Commission is not bound by *stare decisis*.

29. Liberty, Evergy, and Ameren Missouri all raise concerns that the Commission's order might discourage future securitization applications. The Commission need not grant rehearing on this issue. A simple clarification that the Commission will decide future securitization and ADIT issues on the record of the future cases, and is not bound by *stare decisis*, should be sufficient.

30. The Commission, like other administrative agencies, is not bound by *stare decisis*. *Spire Missouri, Inc. v. Pub. Serv. Comm'n*, 618 S.W.3d 225, 235 (Mo. banc 2021). It is free to depart from prior practice so long as its decisions are supported by competent and substantial evidence. *Id.*

31. Here, the Commission agreed with Staff's calculation of the net tax benefit calculation. In another securitization case, the Commission is free to rely on other evidence of what constitutes the proper calculation of the net tax benefit of another generating plant.

IV. The applications for rehearing and *amicus* do not cite to the record, and in some respects improperly rely on facts not in the record.

32. Unsworn statements of counsel are not competent and substantial evidence. *Plaas v. Lehr*, 538 S.W.2d 919, 922 (Mo. App. K.C. 1976).

33. Liberty attaches a so-called affidavit to its application for rehearing. The affidavit is not notarized. It purports to be electronically signed, but it carries no indicia of an electronic signing certificate or other authentication. It inaccurately states that a biography of the witness is attached, as no biography is attached.

34. Liberty's affidavit contains no indication of what capacity the individual has been retained by Liberty. The individual states that he is an attorney, but if he has been retained as an attorney for Liberty, arguments of counsel are not competent and substantial evidence. *Plaas*, 538 S.W.2d at 922.

35. If the individual has been retained as a witness, there is no explanation from the individual or from Liberty explaining why the witness could not have been made available for pre-filed testimony, in the in-person hearing, and subjected to cross examination in the course of this case. Without such evidence, there is no good cause to reopen the record here.

36. Similarly, Evergy never intervened in the case. Evergy contains no explanation why, if it is interested in the case, it could not have timely intervened and adduced evidence of what it argues is the proper calculation of the net present value of the tax benefits of Liberty's ADIT balance. Either way, Evergy's calculations are not record evidence of a party to the case.

37. Ameren Missouri never intervened, either. Its *amicus* brief purports to explain, without citation to law or the record, what the term "tax benefit" means. As identified above, the securitization statute does not define the term "tax benefit." Staff adduced competent and substantial evidence of what the "tax benefit" means.[6] The Commission should not adopt Ameren Missouri's argument that the term "tax benefit" is self-evident. The Excel file attached to Ameren Missouri's *amicus* brief is not record evidence in the case.

CONCLUSION

38. Staff is not convinced that the entities seeking rehearing in this case have properly interpreted the securitization statute as a whole.

[6] Transcript at 243-245.

39. Staff is not concerned that denying rehearing would discourage utilities from using the securitization statute. In the evidentiary record, Liberty failed to adduce competent and substantial evidence of what the term "net tax benefit" means. Like Evergy and Ameren Missouri here, Liberty argues that the meaning of this highly technical legal term is self-evident. It is not self-evident. Staff, in contrast, adduced competent and substantial evidence that the "net tax benefit" of the ADIT balance is the full amount of the ADIT balance.[7]

40. Staff is concerned that granting rehearing to reopen the record for evidence that should have been adduced in the original hearing would improperly encourage parties to seek rehearing on every issue for which they fail to adduce proper evidence initially. Denying rehearing will encourage parties to put on all relevant evidence of their case in chief in one hearing, thus improving the quality of hearings before the Commission and ensuring the Commission's resources and attention are not used twice to address the same matter.

Respectfully submitted,

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[7] Transcript at 243-245.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 8th day of September, 2022, to all parties and/or counsels of records.

/s/ Curt Stokes
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