BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of Union Electric Company d/b/a Ameren Missouri for a Financing Order Authorizing the Issuance of Securitized Utility Tariff Bonds for Energy Transition Costs related to Rush Island Energy Center.	))))	File No. EF-2024-0021

AMEREN MISSOURI'S RESPONSE IN OPPOSITION TO STAFF MOTION TO STRIKE PORTIONS OF THE SURREBUTTAL TESTIMONY OF AMEREN MISSOURI WITNESS MATT MICHELS

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri") and for its response to the above-referenced Staff Motion, states as follows:

1. Staff's Motion consists of a single, conclusory contention, as follows: That the testimony and the results of two analyses Mr. Michels' presented in his surrebuttal testimony should have been included in Ameren Missouri's direct testimony. Tellingly, Staff completely fails to explain why its contention has merit, other than to quote the Commission's rule's definition of "direct testimony." Staff neither contends that the testimony at issue is improper surrebuttal testimony (that is, does not contend that it is not responsive to matters raised in another party's rebuttal testimony), nor does Staff explain in any way why Ameren Missouri "should have" been required to provide the testimony as part of its direct case.

As outlined below, Staff's contention lacks merit, both as a matter of law, and as a matter of fact.

A. <u>The Company was not required to include an analysis in its direct testimony, i.e., in its case in chief *at all*, let alone the specific analyses that were prepared in direct response to prudence disallowances *first proposed by others in rebuttal testimony*.</u>

2. The Commission has many times, including in the only other securitization case involving retirement of a coal-fired power plant, enunciated what it is required before the Commission may make a finding of imprudence:

> The standard for the evaluation of whether costs are, or are not, prudently incurred is built on four principles. First, prudence relates to actions and decisions. Costs themselves are neither prudent nor imprudent. It is the decision or action that led to cost incurrence that must be reviewed and assessed, not the results of those decisions. In other words, prudence is a measure of the quality of decision-making, and does not reflect how the decisions turned out. The second feature is **a presumption of prudence**, which is often referred to as a rebuttable presumption. **The burden of showing that a decision is outside of the reasonable bounds falls, at least initially, on the party challenging the utility's actions**. The third feature is the total exclusion of hindsight from a properly constructed prudence review. A utility's decisions must be judged based upon what was known or reasonably knowable at the time of the decision being made by the utility. Information that was not known or reasonably knowable at the time of the decision being made cannot be considered in evaluating the reasonableness of a decision and subsequent information on "how things turned out" cannot influence the evaluation of the prudence of a decision. The final feature is that decisions being reviewed need to be compared to a range of reasonable behavior; prudence does not require perfection, nor does prudence require achieving the lowest possible cost. This standard recognizes that reasonable people can differ and that there is a range of reasonable actions and decisions that is consistent with prudence. Simply put, a decision can only be labelled as imprudent if it can be shown that such a decision was outside the bounds of what a reasonable person would have done under those circumstances.[1]

3. As a matter of law, the presumption of prudence means that a utility need not go forward with any evidence as part of its case in chief to establish the prudence of its decision-making. Why? Because the presumption satisfies the utility's burden of going forward with

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[1] *Amended Report and Order*, File Nos. EO-2022-0040 & EO-2022-0193, p. 29 (Issued Oct. 2, 2022) (emphasis added).

evidence,[2] dispensing with the need to provide evidence in its direct testimony regarding prudence at all. The presumption is, however, rebuttable and *if* some other party to the proceeding at issue creates a serious doubt about the prudence of that decision-making, *then* the utility's burden of going forward with affirmative evidence arises. *See, e.g., State ex rel. Associated Natural Gas Co v. Pub. Serv. Comm'n,* 954 S.W2d 520, 528-529 (Mo. App. W.D. 1997):

> A utility's costs are presumed to be prudently incurred…. However, the presumption does not survive "a showing of inefficiency or improvidence" … **Where** some other participate in the proceeding **creates a serious doubt** as to the prudence of an expenditure, **then** the applicant has the burden of dispelling these doubts[3] (emphasis added).[4]

4. Finally, no utility can suffer a cost disallowance, even if it is found to have acted imprudently, unless that imprudence caused harm to ratepayers. *State ex rel. KCP&L Greater Missouri Operations Co v. Pub. Serv. Comm'n,* 408 S.W.3d 153, 163 (Mo. App. W.D. 2013) ("In order to disallow a utility's recovery of costs" the Commission must find imprudence and that "such imprudence resulted in harm to the utility's ratepayers.").

5. A utility's case in chief consists of the case the Company needs to put on to secure the relief it seeks – nothing more, and nothing less. The utility may choose (and the Company did here) to go beyond the evidence it needs or is required to present, by anticipating arguments that may come up, etc., but it is not required to do so. Indeed, this is made crystal

[2] Which is one aspect of what is sometimes referred to as the overall "burden of proof," the burden of persuasion being the other. *See, e.g., Kinzenbaw v. Dir. of Revenue*, 62 S.W.3d 49, 53-53 (Mo. *banc* 2001) ("the burden of proof has two components: the burden of producing (or going forward with) evidence and the burden of persuastion.").

[3] *Id.*, at 528, quoting *Union Electric,* 27 Mo. PSC (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, Etc. v.* ****529*** *Fed. Energy Reg. Com'n,* 669 F.2d 799, 809 (D.C.Cir.1981)).

[4] Nor does the securitization statute, Section 393.1700 RSMo (Cum. Supp. 2024), require either pleading or providing evidence on prudence issues in the utility's direct case. See Section 393.1700.2(1), which specifies the elements required to be addressed by the utility's securitization petition. Addressing prudence is not one of those elements.

clear in terms of the prudence issues raised in this case given the existence of the just-cited presumption of prudence, that is the requirement, *initially*, that others put on evidence creating a serious doubt about imprudence, and the requirement that even if prudence were established, customers must be harmed.

6. The Company therefore did include all testimony and exhibits asserting and explaining its entire case-in-chief; it did in fact comply with the Commission's rule on direct testimony, leaving only one question: whether Mr. Michels' testimony about which Staff complains was responsive to rebuttal testimony. It plainly was.

B. The Surrebuttal Retirement v. Retrofit Analysis Directly Responds to OPC's Claim that the Retirement Decision was Imprudent and that Post-Retirement Decision Facts Demonstrated as Much.

7. Mr. Michels' surrebuttal testimony (from page 23, line 12 to page 28, line 10) addresses an update to a retirement versus retrofit analysis that was originally completed by the Company in late 2021 and that underlies the Company's decision to retire Rush Island rather than retrofitting it with flue gas desulfurization units ("FGD", a/k/a scrubbers) at a cost of hundreds of millions of dollars. The original analysis showed, and thus Ameren Missouri decided, that it was in its customers' best interests not to retrofit the Rush Island and that instead customer interests were best served by retiring the plant instead. The Company made that decision and publicly announced it in December 2021.[5] The Company formally advised the Commission of the decision on January 20, 2022, in a Request for Variance and Waiver of 60-Day Notice Requirement, submitted in File No. EE-2022-0192.[6] The Staff responded to the

[5] Ameren Missouri public 8-K Filing with the Securities and Exchange Commission, December 14, 2021.
[6] File No. EE-2022-0192, EFIS Item No. 1

Company's filing on February 14, 2022, indicating it did not oppose the requested variance, which had sought additional time to make a formal Change in Preferred Resource Plan filing.[7]

8. Mr. Michel's filed direct testimony in this docket that explained and presented this original retirement versus retrofit analysis. He had also presented similar direct testimony sponsoring the same analysis in the Company's last electric rate case, File No. ER-2022-0337. As Mr. Michels' direct testimony in File No. ER-2022-0337 explained, his analysis used the assumptions/parameters from the Company's 2020 IRP. The full workpapers for the 2020 IRP were provided to Staff (and all parties) shortly after the Company filed the 2020 IRP (in late September 2020). Mr. Michels provided an additional workpaper specific to his direct case analysis shortly after the Company filed the ER-2022-0337 rate case. At that moment, Staff and all of the parties possessed all of the workpapers and testimony needed to fully evaluate Mr. Michels' analysis and when the Company filed the analysis again in this docket, those parties still had all the workpapers needed to evaluate that analysis.

9. No party raised any issues about the analysis in the ER-2022-0337 docket. Moreover, the retirement decision based on that analysis was formalized at the Commission in a Notice of Change in Preferred Resource Plan filing made in June 2022.[8] No party raised any issues about the analysis or the retirement decision in that docket, or any other docket, that is, until rebuttal testimony was filed in *this docket.*

10. Specifically, in this docket the Office of the Public Counsel ("OPC"), at pages 6 – 10 of OPC witness Seaver's rebuttal testimony, claimed that the analysis presented in Mr. Michel's direct testimony was "wholly insufficient" and did not support the conclusion that the Company's retirement decision was prudent. Among Mr. Seaver's criticisms were his claims

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[7] Staff Recommendation, File No. EE-2022-0192, EFIS Item No. 2.
[8] File No. EO-2022-0362, EFIS Item No. 1.

that since the retirement decision had been made a capacity shortage that presumably he would contend should be filled by adding scrubbers to Rush Island and not retiring it had arisen, and his claims that certain solar facilities (that were not even proposed when the Company made the retirement decision[9]) would not have been needed had the decision to retire Rush Island not been made. Based on these criticisms, Mr. Seaver disagrees with the retirement decision that rested on the analysis and *seeks a $34 million disallowance*.

11. *Directly responding to Mr. Seaver's rebuttal testimony*, as the Commission's rule on surrebuttal testimony provides for (20 CSR 4240-2.130(70(c)), Mr. Michels presented testimony explaining and presenting an updated retire versus retrofit analysis, the conclusion of which is that Mr. Seaver is wrong. Accounting for current conditions, including those arising since the Company made the original retirement decision, Mr. Michel's surrebuttal testimony and the analysis it explains demonstrate that the retirement decision remains in customers' best interest. As such, the harm Mr. Seaver claims – the $34 million disallowance he seeks – does not, according to the surrebuttal testimony analysis, exist. But for Mr. Seaver's rebuttal testimony, there would have been no reason to prepare an updated analysis that accounted for Mr. Seaver's criticisms.

12. In summary, once *OPC injected post-decision information and criticisms* of the analysis the Company chose to file in its direct case at issue via OPC's rebuttal testimony, once OPC at least created a risk that the Commission might find that a serious doubt about the retirement decision had been created, the Company was and is entitled to respond, to defend itself, against those claims. It matters not that *Staff itself* did not place the direct case analysis at issue because OPC did.

[9] They were not proposed until June 2023, in File No. EA-2023-0286.

C. <u>The Analysis to Rebut the Harm Claimed by Both OPC and Staff Directly Responds to OPC's and Staff's Rebuttal Testimony Claiming Imprudence Has Harmed Customers.</u>

13. The second analysis presented by Mr. Michels in his surrebuttal testimony (page 39, line 9 to page 44, line 4) is in direct response to two claims made by OPC and the Staff, respectively, in their rebuttal testimony:

> (a) Mr. Seaver's claim that the retirement decision imprudently caused $34 million of harm to customers in the form of solar projects that but for the imprudence, he claims, would not be needed, coupled with Mr. Seaver's second claim of imprudence, that is, that the Company should have obtained NSR permits,[10] in which case the retirement would not have occurred; and
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> (b) what amounts to a claim by Staff that customers would be harmed if the Commission does not "acknowledge" the Company's imprudence and in effect disallow $52 million in transmission upgrade costs arising from upgrades being made on account of Rush Island's retirement.[11]

14. As discussed earlier, the Company was not required to put on any direct case evidence at all about the prudence of its decisions that led to the retirement (i.e., about its NSR permit decisions or about its retirement decision once it failed to prevail in the NSR case). Nor was the Company required to put on any direct evidence about the prudence of the transmission upgrade costs it is incurring because of the retirement or its planning decisions relating to those upgrades, which but for Staff's rebuttal testimony, would not have been at issue in this docket in the first place (the ratemaking treatment of those projects will be for the first Company electric rate case after they are in service, which has not yet occurred). Nor was the Company required

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[10] Seaver Rebuttal, p. 6, l. 4.

[11] Eubanks' Rebuttal, p. 40, ll. 4-8. As for Staff's claim, we say "in effect" because while Staff does directly propose a "disallowance" *in this case*, its direct request for this "acknowledgement" and its request that recoverable transmission upgrade costs be capped at $115 million is tantamount to proposing a disallowance given that the transmission upgrades are expected to cost approximately $167 million (a difference of 52 million).Staff's prudence disallowance could be more or less than $52 million but given the advanced stage of the transmission upgrade work, the Company is reasonably confident that the final costs will not materially vary from the current $167 million estimate.

to put on any direct evidence that if it did act imprudently (a claim the Company denies), there was no harm to customers.

15. But when both OPC and Staff put on rebuttal evidence claiming imprudence and claiming harm arising from that imprudence, the Company would obviously act at its own peril if it did not *respond to that rebuttal testimony*. This is because if the Commission were to find that such rebuttal testimony raised a serious doubt about prudence and proved harm, the Company could face tens of millions of dollars of cost disallowances. So, as the Commission's rule on surrebuttal testimony contemplates, the Company responded to the rebuttal testimony with evidence both on the questions of prudence that Staff and OPC raised, and in direct response to the harm they claimed.

D. That the Company voluntarily chose to provide extensive direct testimony in this case on the prudence of its NSR permitting decisions and its retirement decision did not create or enlarge its otherwise non-existent duty to have done so.

16. Many of the issues being debated in this case have been debated before, in the Company's last electric rate case, File No. ER-2022-0337. This is because shortly after the Company announced its retirement decision, Staff filed a motion (filed February 14, 2022) asking the Commission to open an investigation respecting "Ameren Missouri's plans to retire its Rush Island Generating Station." See Exhibit A, *Order Opening Investigation*, File No. EO-2022-0215, attached hereto.

17. On April 15, 2022, the Staff filed a report in that investigatory docket. The Staff's report made four recommendations, including, "that the Commission direct Ameren Missouri to file a memorandum, supported by affidavits and other exhibits as necessary, showing how its decisions resulting in the present circumstances were prudent."[12] Ameren Missouri responded to

[12] Staff Initial Investigation Report, File No. EO-2022-0215, p. 22, ¶ 7 (EFIS Item No. 8).

the Staff report on April 22, 2022, indicating that it had no objection to any of the Staff's four recommendations but indicating that it would comply with the just-quoted recommendation by filing testimony on the topic in its upcoming electric general rate case, which it filed on August 1, 2022 (File No. ER-2022-0337). The Commission's *Order Opening Investigation* contemplated that Ameren Missouri would comply in that manner, by filing testimony in that rate case. Exhibit A, p. 2, fn.1

18. Consequently, Ameren Missouri was *required* in that case to file the direct testimony that it did file on Rush Island-related prudence issues and it in fact *complied with that requirement* by filing extensive direct testimony from four witnesses addressing the question of "how its decisions resulting in the present circumstances were prudent." The Company's viewpoint was (and is) that assuming the "present circumstances" meant "the retirement of Rush Island", there were two distinct decisions that it had been ordered to address: the prudence of its decision not to seek NSR permits for the 2007 and 2010 projects at Rush Island that led to the NSR litigation, and the prudence of the decision to retire the plant rather than to retrofit it with scrubbers after it failed to prevail in that then decade-old lawsuit.

19. Staff filed extensive testimony in response to Ameren Missouri's prudence-related Rush Island testimony filed in File No. ER-2022-0337.[13] As noted earlier, Staff took no issue with any aspect of Mr. Michels' direct case analysis in the ER-2022-0337 case (the same analysis presented in direct in this case). Indeed, Staff conducted no discovery about it at all in that case. In summary, no party to the ER-2022-0337 case raised any question about the validity or sufficiency or accuracy of that analysis or about the retire versus retrofit decision itself.

[13] File No. ER-2022-0337, Eubanks' Rebuttal (EFIS Item No. 135) and Surrebuttal (EFIS Item No. 214); Majors' Rebuttal (EFIS Item No. 150) and Surrebuttal (EFIS Item No. 200).

20. Instead, the Staff's ER-2022-0337 Rush Island-related testimony consisted primarily of Staff rebutting, but purportedly without taking a direct position on, Ameren Missouri's testimony that Ameren Missouri contended demonstrated that Ameren Missouri's decisions not to seek NSR permits prior to the 2007 and 2010 Rush Island projects that led to the NSR litigation were prudent. Ultimately, after insisting that the Company file the testimony in the first place, the Staff advised the Commission that it "is Staff's position that that case [i.e., this securitization case] would be the most appropriate case for the Commission to consider the prudence of Ameren Missouri's decision-making and ultimate recovery of the stranded asset."[14] For that reason and because the revenue requirement in that rate case was settled, the prudency questions the Staff insisted the Company address and about which Staff filed rebuttal testimony were not resolved.

21. While the Company had fully satisfied its obligation from the EO-2022-0215 investigatory docket and need not have filed direct testimony on prudence issues at all, it being obvious to Ameren Missouri that Staff (or so it said) intended to challenge the prudence of its Rush-Island decision-making in this case, Ameren Missouri again *chose* to file extensive testimony in this case on the question of its decision-making relating to not seeking NSR permits. The Company also essentially refiled the testimony and analysis from the ER-2022-0337 case from Mr. Michels, but in doing so, did not anticipate that issues would be taken with that analysis in this docket, because no issue had been taken with it in either the notice of change in preferred resource plan docket or in the ER-2022-0337 rate case.

22. But the Company's election to file direct testimony on those issues in this docket did not eliminate the presumption of prudence, and it did not eliminate the obligation of other

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[14] Rebuttal Testimony of Claire M. Eubanks, P.E., p. 19, l. 24 to p. 20, l. 2.

parties, if they contended there was imprudence, to put on evidence in rebuttal creating a serious doubt about it.[15] Once OPC and Staff at least attempted to create that serious doubt and to prove harm arising from their claimed imprudence, the Company was still not *obligated* to respond but as earlier noted, would obviously act at its peril if it failed to do so. But the Company had a *right* to respond and did so.

E. Conclusion

23. Mr. Michels' surrebuttal testimony (page 23, l. 12 to page 28, one 10) is in direct response to OPC's disagreement with the Company's retirement versus retrofit decision, and OPC's attack on the direct case analysis, including by pointing to events occurring after the retirement decision was made. It is consequently proper surrebuttal testimony. The Company was under no obligation to file it as part of its direct case, indeed was under no obligation to file any testimony supporting that retirement at all as part of its direct case.

24. Mr. Michels' surrebuttal testimony (page 39, line 9 to page 44, line 4) is in direct response to the claims of harm – totaling approximately $86 million – raised by OPC and Staff in their rebuttal testimony. It too is consequently proper surrebuttal testimony. Similarly, the Company was under no obligation to file it as part of its direct case, indeed was under no obligation to file testimony rebutting harm (that had not been alleged) at all.[16]

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[15] And containing all of its reasons why it disagreed with or rejected the Company's direct case evidence that the Company had acted prudently.

[16] Aside from having no obligation to address harm or lack thereof in its direct case, doing so would have made no sense in any event. This is because logically, the costs at issue in this case, which reflect prior investments in Rush Island that were necessary (and no one claims otherwise now) to build, replace and repair, and generally keep it in operation while it has operated, would still be "prudently incurred costs" even if there had been imprudent decision-making (which the Company, to be clear, denies) regarding the NSR permits or the retirement versus retrofit decision that led to an early retirement. Put another way, even if a party established serious doubt about the prudence of the Company's decision-making it is not logical to conclude that any harm to ratepayers arising from those decisions would have anything to do with financing and recovering those costs via securitization in *this case*, since such recovery would simply consist of recovering past *prudently incurred* investments made in Rush Island that were not the product of those alleged imprudent decisions. Ameren Missouri did not invest in the plant over the years because it (hypothetically) imprudently failed to obtain NSR permits, or because it decided not the retrofit the

WHEREFORE, the Company prays that the Commission make and enter its order overruling Staff's Motion to Strike

Dated: April 1, 2024

Respectfully submitted,

/s/ James B. Lowery

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plant with scrubbers once it lost the NSR case. To the contrary, Ameren Missouri invested in the plant (and those are the costs at issue in *this* docket) because the investments were needed to operate the plant. So, if there were to be any harm arising out of the allegedly imprudent decisions at issue in this case, that harm would manifest itself as something entirely different, such as the example Staff gives in Ms. Eubank's rebuttal testimony – higher capacity costs that, Staff may at some point claim, would not have existed but for the (alleged) imprudence and the early retirement of Rush Island.

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing have been e-mailed to the attorneys of record for all parties to this case as specified on the certified service list for this case in EFIS, on this 1st day of April, 2024.

/s/ James B. Lowery
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