

3. In the course of discussing these issues, the District Court made certain statements which characterize the Company's filings before this Commission, suggesting that the Company's filings are inconsistent with the District Court's rulings. The Company wishes to briefly address those issues here. To repeat what the Company had repeatedly indicated in its testimony: the Company acknowledges that the District Court found it incorrect, as a matter of law, concluded that it did not need NSR permits. But the District Court did not rule on the issue before this Commission: the reasonableness of Ameren Missouri's decisions at the time based upon what it knew or reasonably should have known – and understood the law – to be.⁴

4. In the course of the Status Hearing, the District Court referenced its ruling in the 2019 remedy-phase opinion, that Ameren Missouri's permitting decision was "not reasonable," and stated that finding was "not mentioned anywhere to the PSC."⁵ Respectfully, both assertions are incorrect. Ameren Missouri specifically raised this finding in numerous submissions to the Commission. Ameren Missouri witnesses Karl Moor, Jeff Holmstead, and others discussed this finding at length.⁶ Moreover, Ameren Missouri's testimony to the Commission demonstrated that the District Court's finding in this regard was not one that Ameren Missouri's permitting decisions were unreasonable, but only that its emissions calculation process was unreasonable. Because an emissions calculation is only one part of a permitting analysis, it cannot, and does

⁴ While not relevant to an issue before the Commission, given that much of the transcript deals with a legal issue for the federal court and for completeness, we note that the District Court raised the question of the scope of the Eighth Circuit's prior consideration of the mitigation issue, in particular the legal question of whether Ameren may challenge the imposition of mitigation relief for so-called "excess emissions" under *Sierra Club v. Otter Tail Power*, 615 F.3d 1008 (8th Cir. 2010) ("*Otter Tail*"). (Hrg. Tr. at 3:19 – 11:20.) *Otter Tail* was not decided by the Eighth Circuit during the prior appeal in this case. In that appeal, Ameren raised three legal errors with respect to the mitigation injunction ordered by the Court at its Labadie plant. As its ruling makes clear, the Eighth Circuit only reached the first of these three arguments, pertaining to jurisdictional issues. The Court of Appeals did not reach, and thus did not decide, the *Otter Tail* issue, as noted by counsel for the United States: "We fought this vigorously at the trial here, and it was briefed to the Eighth Circuit. The Eighth Circuit didn't address it directly." (Hrg. Tr. at 5:20-22. Ameren Missouri has the legal right, and obligation, to preserve legal arguments for appeal.

⁵ *Id.*, p. 31, ll. 22-24.

⁶ *See, e.g.*, Holmstead Surrebuttal Testimony, p. 9, l. 3 to p. 12, l. 17.

not, mean that Ameren Missouri’s permitting decisions were unreasonable. As Ameren Missouri explained in its testimony in this case, its decisions were also based on its historical understanding of the law—in the Missouri SIP, the routine maintenance repair and replacement exception, and the causation requirements of the NSR rules. And, of course, the District Court’s conclusion came only after it had construed those legal provisions differently than had Ameren Missouri, and then heard all the evidence in two full trials. That finding doesn’t bear on the question presently before the Commission, that is, under the Commission’s prudence standards which we have addressed elsewhere, including in the Company’s Statement of Positions filed today.

5. The District Court also stated in the Status Hearing that it had found that “Ameren knew it would and did in fact violate the Clean Air Act.”⁷ Ameren Missouri respectfully submits that the Court did not accurately remember the details of its factual findings from 2017; when speaking from the bench, the Court was not reading from, or citing to, any specific findings. More to the point, the assertion is incorrect: at no point in the liability ruling (or the remedy ruling) did the Court find that Ameren Missouri knew it would violate the Clean Air Act. As Ameren Missouri’s counsel explained at the March 28 Hearing, the Court did find that Ameren Missouri actually knew and expected that the Rush Island Projects would increase the units’ availability and capacity to generate, but that is a separate question (both legally and factually) from whether Ameren Missouri knew those increases meant that a NSR permit was necessary.⁸ Ameren Missouri’s counsel reminded the Court of its rulings on the key legal issues (the Missouri SIP, the RMRR exception, and the causation/demand growth provision), and how the District Court agreed that those legal issues were ones of first impression, and had not been

⁷ *Id.*, p. 28, l. 12 – p. 29, l. 14.

⁸ *Id.*, p. 29, l. 19 – p. 31, l. 13.

decided at the time Ameren Missouri was making its permitting decisions.⁹ After Ameren's counsel concluded, the District Court did not disagree with any of these points.¹⁰

WHEREFORE, the Company submits the Status Conference hearing transcript, as requested by the District Court.

Dated: April 8, 2024

Respectfully submitted,

/s/ James B. Lowery

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⁹ *Id.*

¹⁰ *Id.*, p. 31, ll. 13 – 14.

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 8th day of April, 2024.

/s/ James B. Lowery
James B. Lowery

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 and)
)
SIERRA CLUB,)
)
 Plaintiff-Intervenor,)
)
vs.)
)
AMEREN MISSOURI,)
)
 Defendant.)

No. 4:11-cv-00077-RWS

STATUS HEARING
BEFORE THE HONORABLE JUDGE RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE
March 28, 2024

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(Proceedings commenced at 1:34 p.m.)

THE COURT: So we're here in the case of U.S. against -- et al. against Ameren, 4:11-cv-77. Would counsel make their appearances?

MR. QUINN: Elias Quinn on behalf of the United States.

MS. BOWEN: Mae Bowen on behalf of the United States.

MS. MOORE: Suzanne Moore on behalf of the United States.

MR. BLUSTEIN: Benjamin Blustein on behalf of Sierra Club.

MR. SAFER: Good afternoon, Your Honor. Ron Safer, Matt Mock, and Dave Scott on behalf of Ameren.

THE COURT: Very good. Any announcements before we proceed?

MR. SAFER: No, Your Honor.

THE COURT: All right. So I was surprised to read that we're still talking about Otter Tail and that somehow Ameren perceives that to be a barrier to their decision or obligation to mitigate the harm caused by their violations of the Clean Air Act.

Rather than make the arguments, does the EPA want to address their position that they're not somehow obligated to

1 mitigate the harm?

2 MR. QUINN: Your Honor, our understanding --

3 THE COURT: If you'd approach the podium.

4 MR. QUINN: Thank you, Your Honor.

5 On that point, our understanding -- and counsel will
6 correct me if I'm wrong -- is that they recognize that the
7 issue has been settled for this Court, and they'd like to just
8 preserve the discussion of Otter Tail for the -- any further
9 proceedings before the Appellate Court. So I think they
10 recognize that it's a dead letter now.

11 THE COURT: That's not how I read Mr. Mock's
12 briefing. He said that Otter Tail had not been addressed by
13 the Eighth Circuit; that somehow reserved it; and that they
14 were still planning to argue in the future they had no
15 obligation to mitigate the harm caused by their violations.

16 Did I misread the briefing by Ameren?

17 MR. SAFER: No. It preserves the issue, Your Honor.

18 THE COURT: What's left to be preserved?

19 MR. SAFER: Whether or not the operation -- first of
20 all, it does not get in the way of resolving this issue.

21 THE COURT: Well, you suggest that you have no duty
22 or obligation to do anything. That, in fact, if I read it
23 correctly, closing Rush Island is the end of the line. That's
24 all you have to do, is stop.

25 MR. SAFER: We believe that the operation -- that

1 Otter Tail says that the operation of the plant is not a
2 violation of the -- of the Clean Air Act. We understand that
3 Your Honor has -- Your Honor has held to the contrary. We are
4 fully engaged in trying to resolve this matter and have
5 volunteered to remediate beyond closing Rush Island.

6 **THE COURT:** But you're still holding out the
7 argument, for some reason, that you're just doing that not
8 because you have to, but because you're willing to.

9 **MR. SAFER:** We're preserving the issue, Your Honor.

10 **THE COURT:** What's left to preserve?

11 **MR. SAFER:** That whether or not the operation of the
12 plant itself, as opposed to the failure to get a permit, is a
13 violation of the statute.

14 **THE COURT:** So this is not the understanding that
15 anyone else in the room has, I believe.

16 **MR. QUINN:** So my understanding is their position on
17 the matter is that operation of the plant without a permit is
18 not a violation. It's Clean Air Act only imposes, essentially,
19 paperwork violations to get a permit on one day. It doesn't
20 say anything about pollution. We disagree. We fought this
21 vigorously at the trial here, and it was briefed to the Eighth
22 Circuit. The Eighth Circuit didn't address it directly.

23 **THE COURT:** Well, they did indirectly.

24 **MR. QUINN:** Right.

25 **THE COURT:** As I look at the opinion, "District

1 Court has the authority to order Ameren to take appropriate
2 actions that remedy, mitigate, and offset harms to the public
3 and the environment caused by the violations of the Clean Air
4 Act."

5 And I expressly rejected Otter Tail on my opinion,
6 and the last paragraph of the Eighth Circuit opinion said "We
7 affirm the judgment of the District Court in all respects."
8 They didn't say "except for Otter Tail." And you can't go to
9 the Eighth Circuit and say, "Oh, we're going to argue this
10 today. We may be back later on some other issue." You know
11 you have a legal duty to raise all the issues you want to raise
12 then and then, not later. You can't bifurcate your appeal.
13 And they affirmed my decision in all respects except for the
14 Labadie remedy which rested on the failure to follow a notice
15 requirements under the regulations.

16 If they wanted to say what you're saying today, they
17 could have said, "We affirm the Court. There's nothing left to
18 do except put scrubbers on or close the plant." And we'd be
19 done. They didn't say that. They said, "We affirm the Court
20 in all respects and remand for further proceedings consistent
21 with their opinion that the Court has the authority to take
22 appropriate action to remedy, mitigate, and offset the harms,"
23 not just the failure to get a permit, but offset the harms
24 caused by Ameren's violation of the Clean Air Act.

25 So why are we talking about Otter Tail and going to

1 the Eighth Circuit to talk about the remedy and that I don't
2 have jurisdiction to do anything?

3 MR. SAFER: Yeah, Your Honor, we -- we -- I hear
4 everything you said. The -- we -- the Court did not directly
5 address the Otter Tail argument on either --

6 THE COURT: what about the word "all" doesn't
7 include Otter Tail? I expressly rejected your argument on
8 Otter Tail, and the Eighth Circuit said they affirm me in all
9 respects.

10 MR. SAFER: Yes, Your Honor.

11 THE COURT: I need to understand why you're still
12 telling us you don't have -- I don't have the authority to
13 order you to do exactly what the Eighth Circuit said I did.

14 MR. SAFER: They did not -- they said what Your
15 Honor just said. They affirmed in all respects. They did not
16 discuss either way the argument that I -- or the issue at Otter
17 Tail.

18 THE COURT: You briefed Otter Tail.

19 MR. SAFER: we did.

20 THE COURT: And they have an entire section on
21 injunctive relief in their opinion. They didn't say I couldn't
22 impose any injunctive relief. In fact, they said what I've
23 already read to you; that I could order Ameren to offset the
24 harm that is caused by violating the Clean Air Act. And then
25 they went on to say, "well, they never mention Otter Tail."

1 They talk about the Court -- the District Court's authority and
2 found that I had the authority and then affirmed the decision
3 in all respects.

4 Now, I can -- I will give you that whatever the
5 ultimate mitigation order is may be the method like Labadie
6 might be an issue, but I don't see how you're arguing that this
7 Court lacks the jurisdiction to impose a remedy. Maybe argue
8 about the remedy, but you can't prevent -- I think that this is
9 a barrier to success in this case. You're continuing -- either
10 you or your client have concluded that they have no obligation
11 to do anything except close the plant, and that's just step
12 one, because the Court of Appeals has said -- and the Supreme
13 Court didn't take this case -- that I have the jurisdiction to
14 impose remedies to offset the harm caused. And that's not just
15 not getting a permit.

16 **MR. SAFER:** Yes, Your Honor.

17 **THE COURT:** And you're still arguing in your
18 briefing the only harm is not getting a permit, and you're
19 going to take that back up -- you've already gone up on appeal.

20 **MR. SAFER:** Your Honor --

21 **THE COURT:** You're done.

22 **MR. SAFER:** I have nothing to add on the legal -- on
23 the legal argument. What I would say is, it is not a barrier
24 to success here, Your Honor. Indeed, if our position were
25 there -- you know, we're doing nothing, we want to go back to

1 the Eighth Circuit, we would not have said that Ameren is
2 willing and will go above and beyond.

3 **THE COURT:** I read what you just filed.
4 "Respectfully, Ameren submits that under the Clean Air Act,
5 mitigation of excess emissions from operation of nonpermitted
6 unit is unavailable as a matter of law." How do I reconcile
7 that statement with what the Court of Appeals has said? You're
8 still saying that to this Court. "Unavailable as a matter of
9 law" when you went up and argued this case to the Court of
10 Appeals, and they said I had jurisdiction to impose remedies,
11 and you just filed a brief with this Court that said it's
12 "unavailable as a matter of law." Where does that come from?
13 I haven't misread it.

14 **MR. SAFER:** No.

15 **THE COURT:** Mr. Mock, I think you wrote this. Did I
16 misread that sentence?

17 **MR. MOCK:** You did not, Your Honor.

18 **THE COURT:** At what point are we in vexatious
19 multiplication or proceedings? You appealed this case. The
20 Eighth Circuit pronounced its decision on the injunctive relief
21 that was available, and you're still filing memorandums that
22 say I have no legal authority to do anything. Where did --
23 Mr. Mock, explain that to me. You wrote it.

24 **MR. MOCK:** Your Honor, the -- I think what you said
25 a moment ago is about the scope of any mitigation relief.

1 **THE COURT:** It doesn't say that. Read the sentence.
2 "The Clean Air Act" -- "this submits under the Clean Air Act
3 mitigation of excess emissions for nonpermitted unit is
4 unavailable as a matter of law." You're not parsing possible
5 remedies. You're telling me that absolutely there's no remedy,
6 not we don't like that one; we prefer this one. But there's --
7 as a matter of law, there's nothing to be done.

8 where in that sentence is there a place to parse it?
9 "Unavailable as a matter of law."

10 **MR. MOCK:** The point that we were making, Your
11 Honor, in that sentence and in our briefing on Otter Tail is
12 that unpermitted operations and the emissions that follow from
13 those operations are not deemed to be a violation of the Clean
14 Air Act. As to the scope of any remedial relief, our argument
15 to the Eighth Circuit would be that as to remediating the
16 unpermitted operations, those emissions, the two --

17 **THE COURT:** You've already gone to the Eighth
18 Circuit, all right? You don't get to go back and say, "We want
19 a do-over." You've already been up to the Eighth Circuit. And
20 what did they say?

21 **MR. MOCK:** Your Honor, characterize --

22 **THE COURT:** Eighth Circuit -- you tell me. Having
23 this written that it's a matter of law I can't do anything,
24 what did the Eighth Circuit say?

25 **MR. MOCK:** Your Honor, we understand your position.

1 **THE COURT:** No, I'm asking you a question. I'm not
2 asking you to understand me. I'm asking, "what did the Eighth
3 Circuit say?"

4 **MR. MOCK:** They agreed that Your Honor could order
5 mitigation relief. They did not reach the question under Otter
6 Tail as to whether that mitigation relief could extend to the
7 consequences of unpermitted operations. That's our position.
8 That's a scope issue.

9 **THE COURT:** Did you brief Otter Tail for the Eighth
10 Circuit?

11 **MR. MOCK:** We did.

12 **THE COURT:** And when they affirm me in all respects,
13 having drafted Otter Tail, having rejected your position on
14 Otter Tail, what did you understand that to mean?

15 **MR. MOCK:** We understand the Eighth Circuit's
16 opinion to say that mitigation relief is possible. It was not
17 in that instance because of the jurisdictional issue with
18 respect to Labadie, and so it did not reach the question that
19 we believe is still live as to whether mitigation is
20 permissible for unpermitted operations.

21 **THE COURT:** I need you to explain to me where we are
22 and why we're here, then.

23 **MR. QUINN:** I think there are a couple reasons. As
24 to that specific point, we have a disagreement about what the
25 Eighth Circuit said and what it reached. It was briefed; it

1 was fully briefed; and as Your Honor has already recognized,
2 the Court retains jurisdiction to craft remedies that right
3 wrongs.

4 I think part of why we're here is actually glimpsed
5 in the filings that Ameren has provided regarding testimony of
6 corporate officers to the Missouri Public Service Commission,
7 or MPSC.

8 **THE COURT:** we'll get to that later, because there's
9 issues with what's been represented to the PSC about what this
10 Court did, mainly by omission, but there are issues.

11 what I want to do is get this case to its logical
12 conclusion, and that is how we remediate the harm caused by --
13 how many tons of SO₂ a year?

14 **MR. QUINN:** 270,000.

15 **THE COURT:** Over the last 14 years?

16 **MR. QUINN:** 16,000 tons a year.

17 **THE COURT:** And we need to craft a remedy for the
18 harm occasioned by the Rush Island plant for the last 14 years,
19 and the Eighth Circuit Court clearly said I had jurisdiction to
20 reach that, even though you're continuing to tell me that that
21 remedy is not available as a matter of law. And Otter Tail was
22 just limited to one statute. The EPA sued under others and
23 you've already briefed Otter Tail.

24 I'm convinced that part of the reason we've been
25 talking about this for 2 years is that, for whatever reason,

1 there's been a hope that somehow, even though this is set of
2 law in this case, it is the law of the case, having briefed
3 Otter Tail and having been rebuffed by the Court of Appeals,
4 that there isn't going to be a remediation of the harm done.
5 But -- because you're -- I don't know.

6 Tell me where we are and what we should do next.

7 **MR. QUINN:** There are -- there is -- with the
8 Labadie remedy off the table, there is a logistical problem,
9 right? There's a 270,000-ton debt to the public and to
10 downwind communities, and there are very few ways of finding
11 that kind of volume of excess emissions to fully remediate the
12 harm. At this point, frankly, we don't see a way to get
13 ton-for-ton mitigation. And so that, in part, I think, is what
14 has drug this out. It's a logistical problem of finding good
15 remedies that can mitigate the harm, the ongoing harm, to
16 downwind communities. Many of those good remedies options
17 involve Ameren partnering with other entities, and we haven't
18 seen that willingness yet.

19 And so what we have now is a proposal, two prongs,
20 both of which Ameren can do by itself. And if they want to do
21 something else, they can find partners to do it. But the two
22 prongs we have right now are high-efficiency particulate air
23 filtration devices, residential HEPA filter systems, that they
24 can distribute directly to the disadvantaged households that
25 suffered most that are burdened with the highest risks of lung

1 disease, heart disease, premature death. Ameren can afford
2 them. We already have agreement on how much this costs.
3 150,000 filters for downwind households in the St. Louis area,
4 about \$75 million. We have agreement. They can afford it. We
5 know that they reduce PM_{2.5} pollution which is exactly what the
6 harm was proven in court. And we know they know how to do it
7 because they already have a distribution network set up with
8 their Illinois sister company. They can copy and paste and
9 start today.

10 The other part is a generation component, a clean
11 generation component: 300 megawatts of wind or solar or
12 200 megawatts of battery storage. That's about 25 percent --
13 300 megawatts is about a quarter of the generating capacity of
14 Rush Island. So it's nothing close to a penalty. We're
15 offsetting their old generation with clean generation to
16 displace SO₂ and PM_{2.5} emitting sources.

17 Now, they've argued that they can't do that for a
18 lot of reasons. We can go into those if they want to go
19 through them, but we know that they can. That's in their
20 business model. We know that it's effective displacing clean
21 energy -- or new clean energy displaces dirtier energy can
22 accelerate the benefits to downwind communities. Battery
23 storage is dispatchable, which they've complained about but
24 never answered why they couldn't just do batteries. And all
25 told, even though they're concerned about the megawatt size --

1 I mean, 25 percent replacement of the megawatts also recognizes
2 that their retirement does accomplish some limited mitigation.
3 It's about a thousand tons a year times 15 years, about
4 15,000 tons of mitigation, is what we're getting with
5 retirement as opposed to the old original remedy order. Again,
6 that's a drop in the bucket to the 270,000 tons, but it's
7 something and we're recognizing that.

8 Overall, the cost of this -- now, Ameren has its own
9 secret cost numbers that it gives to the MPSC. We don't see
10 those. But public numbers by the Energy Information
11 Administration, EIA, or NREL suggests that the development of
12 300 megawatts of green energy or 200 megawatts of battery
13 storage would be about \$200 million. That's \$200 million for
14 energy systems, 75 million for the HEPA filtration, and still
15 we're under the \$300 million in social harms caused by single
16 years' delay in their retirement. And that's not just delayed
17 compliance with the Clean Air Act. That's delayed compliance
18 with this Court's remedy order.

19 They can afford it. We know they can do it, and we
20 know it's -- it is effective at remediating the harm. Will it
21 remediate every ton of harm? No. We don't see a way to do
22 that, unfortunately. But this is the best option forward, and
23 we provided options, if they would like to partner with schools
24 and community centers for other ways that they could accomplish
25 this, but that needs to come from them at this point.

1 **THE COURT:** Mr. Safer?

2 **MR. SAFER:** Your Honor, we have -- we've detailed
3 some of the issues with regard to those proposed of
4 remediations. The issue -- the power plant issue, the
5 regulatory commission in Missouri has opposed the last five
6 solar projects that Ameren has proposed, saying that Missouri
7 does not need nondispatchable -- more nondispatchable energy.
8 Ameren has launched, as we described for Your Honor, renewable
9 energy and significant capacity and Missouri has accepted those
10 plans.

11 with regard to the filters, the -- the -- there are
12 many issues with those. First of all, the numb -- we disagree
13 with the numbers. We set that forth in writing.

14 One of the issues regards the -- the inability to
15 provide some people with rebates and not others, with regard to
16 the operation of those. It remediates indoor pollution which
17 is not caused largely by any emissions, but rather by cooking,
18 et cetera.

19 Ameren has proposed electric buses, which with
20 regard -- and has proposed that Ameren build the infrastructure
21 for schools that want to participate in that program and
22 provide electric buses which would address outdoor emissions,
23 because buses are an emitter of pollution.

24 **THE COURT:** So if we use -- what's our baseline, the
25 amount of surplus pollution? How many hundreds of thousands of

1 tons?

2 MR. SAFER: I think they say 275,000.

3 THE COURT: And so for each electric bus, what do we
4 offset? That's the question.

5 MR. QUINN: I believe it's in the hundreds of tons,
6 unfortunately. Although, I would note that you're offsetting
7 tailpipe emissions down where people breathe in urban centers
8 as opposed to smokestack emissions. So it might be --

9 THE COURT: It's not going to go downwind as much.

10 MR. QUINN: Right. And it may be better than it
11 looks.

12 THE COURT: 20 buses is going to get us to what?

13 MR. QUINN: I would submit if they put zero on the
14 end of it, 200 buses, plus the infrastructure, we'd be at
15 something more appropriately scaled to the generation that we
16 have talked about.

17 THE COURT: We've been at this for 2 years. We need
18 to have concrete ideas about what we're going to do, not just
19 what we can't do.

20 MR. SAFER: Right. Agreed.

21 THE COURT: I wrote the liability opinion more than
22 7 years ago, and Rush Island is still operating, and we still
23 don't have a plan to offset the harm caused to the St. Louis
24 community and downwind communities from 270,000 tons of
25 pollution.

1 **MR. SAFER:** Yeah. The -- as FEP --

2 **THE COURT:** 20 buses is not the answer. So what is
3 it? Or do I need to set a hearing and bring this to closure?
4 When you come in, both put on evidence about what we should do
5 to offset the harm caused to the community, and I stop waiting
6 for Ameren to negotiate a resolution? That's always the best
7 answer. Your client knows what it can and cannot do, who it
8 can and cannot work with. And candidly, I'm not a solar plant
9 regulator, and I can't make all that happen. That's part of
10 what got -- Labadie was the perfect solution. The zone of
11 contamination was literally identical, but the Eighth Circuit
12 said, because of the notice requirements, it was an innocent
13 plant and that remedy was the nonstarter. So for 2 years,
14 we've been talking about an alternative, and your last filing
15 was maybe 20 buses. And the last time we got together, I said
16 it was time to get serious, and you agreed and said, "We are
17 serious." But 20 buses is not serious, given the amount of
18 pollution over the last 14 years and certainly a delay in the
19 last 7. So what do we need to do to bring this to closure?

20 **MR. SAFER:** Well, Your Honor --

21 **THE COURT:** I can set it for hearing in 6 weeks.
22 You put on evidence about what you think the mitigation should
23 be, and I'll decide? Because that's where we are. Unless --
24 we're not going to do discovery for years. You've been talking
25 about it for years. Whatever is going on with the HEPA

1 filters, your sister subsidiary is already distributing them.
2 You don't need to do discovery from the EPA about what they can
3 and can't do. Your client's already figured out what they can
4 or can't do because they're distributing them. So tell me what
5 we should do to get to mitigation for the harm caused by Ameren
6 since 2010, which is now measured in 270,000 tons of pollution
7 emitted in violation of the law?

8 **MR. SAFER:** Right. And now, as I would note, that
9 as EPA just said, there is a societal benefit to closing the
10 plant early.

11 **THE COURT:** well, it should have never operated at
12 all, but there is a benefit to it closing, which it still
13 hasn't closed.

14 **MR. SAFER:** It hasn't.

15 **THE COURT:** Reduced capacity but it is not closed.

16 **MR. SAFER:** Yes. It's at -- it's -- it does not
17 operate at all during most of the months of the year.

18 **THE COURT:** Anything above 5 percent continues to
19 violate the Clean Air Act.

20 **MR. SAFER:** Yes. But the impacts, the savings, the
21 societal benefit to closing it and not only for SO₂ but for all
22 of the other chemicals, that is a benefit and that -- that we
23 believe has to be weighed.

24 **THE COURT:** But just stopping committing a crime is
25 not -- and it's not a crime. Stopping violating the law is not

1 the solution offsetting the harm done.

2 MR. SAFER: But, Your Honor, if we had put scrubbers
3 on the plant and it continued to run for -- until 2039 and
4 beyond, it would have emitted a whole host of other chemicals
5 that would have been lawful but now will not that provides a
6 societal benefit.

7 THE COURT: Okay.

8 MR. SAFER: And that's what we're talking about.

9 THE COURT: It doesn't offset the harm done. That's
10 looking forward and there is value to it. I get it.

11 MR. SAFER: Okay.

12 THE COURT: So back to my question.

13 MR. SAFER: Yes. We are -- we are certainly -- I
14 think 200 buses is not reasonable. We are certainly willing to
15 talk about expanding this. I don't know exactly how to get to
16 "yes" here. We've been trying. But now at least we're talking
17 about the same, no pun intended, vehicle. You know, if we're
18 not talking about power plants, we can talk about the same
19 vehicle and try to --

20 THE COURT: Why don't you approach the podium.
21 We need a path to bring this to closure.

22 MR. SAFER: Agreed.

23 THE COURT: So tell me what it is.

24 MR. QUINN: I agree, Your Honor. The difficult
25 thing for us is -- I'm glad to hear that they're willing to do

1 buses. This is like a plan to make a plan. A plan to find
2 people that might be interested --

3 **THE COURT:** Past planning to plan. I want a date
4 and manner and method to get to a conclusion. How do we do it?

5 **MR. QUINN:** I think from our perspective, what's
6 orderable now are the options we've laid on the table. We
7 respect that the Court isn't a power plant overseer, and there
8 are ways of addressing the questions of "would the MPSC approve
9 it?" Of course, part of the issue here is that the MPSC
10 actually answers the question "who pays?" not "should we do
11 it?" And they're usually asking, "Can we get money for this?"
12 They don't have to ask, "Can we get money for this?" It would
13 be interesting to see what the MPSC said. If they said, "we
14 need to go build 200 more megawatts of solar or batteries, not
15 on the ratepayers' dime, but because of our wrongful acts and
16 emissions, we're not going to ask for rate recovery," would
17 they agree to that? I think that's a wholly different
18 question, one that they haven't entertained so far.

19 So at this moment, I think directing them to do HEPA
20 filters and generation planning, which they can do solely by
21 themselves -- because without -- without -- they could set up a
22 program to distribute buses, but whether or not those -- where
23 those buses are going to go, who's going to oversee them,
24 that's going to be a difficult thing to craft. We can try to
25 do that and put on evidence of that. I do think we need maybe

1 one more hearing. Some deadline, I do believe, needs to be
2 set. It's time to bring this to an end. The United States is
3 in agreement with that.

4 **THE COURT:** Mr. Safer, what do you think?

5 **MR. SAFER:** I think -- I think we -- we can continue
6 to work on it in the interim but having a hearing that draws it
7 to a close.

8 **THE COURT:** So what's an intermediate hearing look
9 like?

10 **MR. QUINN:** well, we had kind of hoped Your Honor
11 would just sign our proposed order.

12 **THE COURT:** well, I thought about it, and it'd be
13 the path of least resistance. But I'm not there yet.

14 Ameren can do more if it wants to. And just
15 imposing that -- I mean, if all else fails, that's where we end
16 up. I keep hoping for Ameren to sit down with the EPA and
17 craft a more comprehensive solution. But if that's where we
18 end up, that's where we end up.

19 **MR. QUINN:** we'd like to --

20 **THE COURT:** This is just an intermediate hearing
21 before the final hearing.

22 **MR. QUINN:** No, I think -- I think we'd be ready for
23 one more -- whatever you need -- whatever this Court feels it
24 needs in order to put sort of things to rest, we'll come
25 prepared to present whatever evidence seems necessary. We can

1 put on Dr. Anenberg or discuss other options.

2 MR. SAFER: I think that that makes sense, and in
3 the interim, we -- we can be talking.

4 THE COURT: So what I'm hearing is a period to
5 prepare proposed orders, a deadline for that; and then within a
6 month after that, a hearing on how to proceed, whether to adopt
7 one or both or a, you know, hybrid of the proposed orders and
8 bring this to conclusion.

9 MR. QUINN: And would that be an evidentiary hearing
10 with witnesses at that time?

11 THE COURT: I would limit it. I mean, if you feel
12 that that would -- because you're going to end up with the
13 Eighth Circuit defending this, I think, somehow, unless you
14 reach a compromise and a settlement, which is always the best.
15 But after 2 years, I no longer assume that's going to happen
16 here. So whatever evidence either party thinks it needs to put
17 on about what I should do to offset the harm caused by the
18 improper, unlawful operation of Rush Island, then we'll do it.
19 And we'll probably need to get together before that, because if
20 you are going to have witnesses, I want both parties to know
21 who, you know, exhibit lists, and that sort of thing so you can
22 fully participate. I don't want people claiming that they had
23 no idea and then we would have brought this person in or we
24 can't get ready. So we'll do it like a nonjury trial, but I
25 leave it to you to work out the format.

1 MR. QUINN: Okay.

2 THE COURT: I know you can do that.

3 MR. QUINN: we've done that before.

4 THE COURT: How long to prepare your proposed
5 orders?

6 MR. QUINN: I'm not sure we have much to edit from
7 our proposal. But we could do it in --

8 THE COURT: Okay. So, Mr. Safer, how long for you
9 to prepare a proposed order?

10 MR. SAFER: within 30 days, Your Honor.

11 THE COURT: Okay. So we'll do 30 days, which takes
12 us to -- I think May starts on a Wednesday, does it, off the
13 top of my head?

14 THE CLERK: May 1st is a Wednesday.

15 THE COURT: why don't we have proposed orders filed
16 by the parties on May 1 and a notice if you intend to call
17 witnesses or present evidence. And if so, could you identify
18 the witnesses and the documents on the 1st? And then I'll set
19 our prehearing, depending how complicated that is, a prehearing
20 conference, and then set a hearing date from there, based on --
21 and that's not an invitation for a hundred witnesses and a
22 million documents just to make -- take the rest of the year or
23 anything. You understand that?

24 MR. SAFER: Yes, Your Honor.

25 THE COURT: we'll deal with that if that's what we

1 get.

2 Anything else on the remedy discussion?

3 **MR. SAFER:** No, Your Honor.

4 **THE COURT:** So we turn our attention to the
5 representations made by Ameren to the Missouri Public Service
6 Commission.

7 Anything on behalf of the United States in that
8 regard, having read what they told the PSC?

9 **MR. QUINN:** I do have a couple notes, Your Honor. I
10 have also taken the liberty of collecting a few of the
11 quotes -- a few of the quotes from their testimony as filed
12 juxtaposed with this Court's testimony, if you'd like copies.
13 There's nothing in here -- he has them.

14 **THE COURT:** Has Mr. Safer -- has he seen them?

15 **MR. QUINN:** He has them.

16 **THE COURT:** All right. Very good. Thank you.

17 **MR. QUINN:** I think it's evident from the filings
18 that Ameren has struggled to accurately convey these
19 proceedings to the MPSC and has now also struggled to fully
20 wrestle with that failure before this Court. I believe the
21 examples I just provided to the Court speak for themselves.
22 But I think it -- suffice it to say, contradictions abound
23 between what's been said to the MPSC and what this Court has
24 said. As you'll see, Ameren has sort of painted itself into a
25 corner to the MPSC. The company is committed to maintaining

1 its position that it's never done anything wrong. But in these
2 proceedings, of course, we know that this Court and the Eighth
3 Circuit have said Ameren did make a big mistake, one that cost
4 people their lives. But I think what's important about this
5 isn't just the overreach in what they've said, but it's why
6 they've done that.

7 The question before the MPSC as I alluded to earlier
8 is, "who pays?" Specifically, should electricity consumers,
9 the ratepayers, pay for what Ameren is doing? Now, as Ameren
10 describes in its memo, that depends on whether or not the costs
11 it incurs are prudent. Prudence isn't the standard that we
12 usually use in this courtroom, but it's pretty clear the
13 compliance costs are prudent. You have to comply with the law
14 in order to do the generation safely and effectively. And of
15 course, retirement was always a compliance option. We know
16 that because other companies chose compliance as retirement
17 when faced with the same decision.

18 So Ameren could have gone to the PSC and said,
19 "Retirement is the cheapest option to comply. Compliance
20 automatically prudent. Please let us recover. Case over." I
21 think.

22 But they went further and the question is why. It's
23 not because they're worried about recovering the costs of the
24 retirement. It's about the costs of what this Court may order
25 on mitigation. Their concern is what happens next, because

1 costs incurred because of their wrongful acts or omissions are
2 not prudent. So anything they have to do to fix the delayed
3 compliance with the law or the delayed compliance with this
4 Court's orders may not be recoverable, which has put them in
5 this position that we've now found ourselves in. They have to
6 say they were always right, always reasonable, always prudent
7 to hedge their bets against the next time they're at the PSC
8 asking for rate recovery related to this Court's orders.

9 At some point Ameren is going to have to face the
10 fact that its violations have had and continue to have
11 consequences. Its delays have consequences. Downwind
12 communities have already been picking up the tab for that with
13 increases in risks of health disease -- of heart disease, lung
14 disease, and premature death. That, I think, is what's going
15 on with the PSC and it's -- in part informs the posturing and
16 the difficulties we have here, because they're not just hedging
17 against the risks of what they're going to have to do, but
18 who's going to have to pay for it at the end.

19 Thank you.

20 **MR. SAFER:** Your Honor, it's simply not correct to
21 say that Ameren had maintained that it never did anything wrong
22 or was always right. Indeed, time after time in that
23 testimony, Ameren said that it was wrong under the law; that
24 that was not what the issue was.

25 In direct response to what the United States just

1 said, when they said they could get -- go in front of the
2 commission and say retirement is -- is compliance, that's
3 exactly what Ameren did. The staff directed Ameren to answer
4 questions as to why they did not get the permits. The question
5 before the regulatory commission is not whether or not Ameren
6 was right. It was not as it said repeatedly, expressly in its
7 testimony. The question is whether the positions taken by
8 Ameren were unreasonable, and with regard to that, Ameren
9 submitted testimony saying that they believed it is not -- the
10 positions they took were not unreasonable at the time, not with
11 hindsight.

12 **THE COURT:** Okay. But how do you reconcile that
13 with my finding that Ameren should have expected -- we know --
14 so far we're together. Not only should have but I found they
15 did expect -- they knew -- unit availability would improve by
16 more than .3 percent, allowing the units to operate hundreds of
17 hours more per year after the project and after -- and Ameren
18 should have expected and did expect -- they knew -- to use the
19 increased availability and for Unit 2 increase capacity to burn
20 more coal, generate more electricity, and emit SO₂ pollution.

21 I found and I concluded that Ameren should have
22 expected and did expect the project at Rush Island to increase
23 unit availability, emit significantly more pollution, and that
24 the EPA had then -- therefore, by a preponderance of the
25 evidence that Ameren knew it would and did in fact violate the

1 Clean Air Act -- Title 5 of the Clean Air Act. And when I read
2 the testimony of your folks, they say that it's unfair to judge
3 them based on what happened when they didn't expect it. They
4 couldn't have reasonably anticipated it; that their decisions
5 were reasonable and prudent given what they knew at the time,
6 to go to your point.

7 But I found that they did know, based on the
8 evidence before the Court, that these projects would trigger
9 the requirements of the Clean Air Act. And nowhere do I see
10 you -- they acknowledge that I did find that what happened
11 triggered the permitting requirements. Nowhere in this
12 material do I see that they told the PSC that they, in fact,
13 had found as a matter of fact that Ameren knew it was going to
14 violate the Clean Air Act.

15 MR. SAFER: There are -- there are two different
16 things there, Your Honor. One is that you found, as a matter
17 of fact, that Ameren --

18 THE COURT: Should have and did know.

19 MR. SAFER: And did know that it would increase the
20 availability of the units and increase the capacity to emit.
21 And Your Honor found that and there is nothing in that
22 testimony that gainsays that. What that testimony does say,
23 Your Honor, is that in -- with regard to different things, for
24 example, what the testimony says is that Ameren believed and
25 they believed -- we believe reasonably that because of the

1 definition of modification in the -- in the state SIP that
2 unless it was an increase in the nominal capacity of the unit,
3 not whether or not it would increase emissions, then it was not
4 a modification under that SIP, which is a question of first
5 impression and a difficult question and one that you held
6 against Ameren's understanding of the law and the Eighth
7 Circuit did. But I do not believe Your Honor found that
8 that -- that that understanding was not held.

9 Second, with regard to increased availability, an
10 increased capacity to emit, yes, that was what Your Honor
11 found, and there's nothing in that testimony that says to the
12 contrary. What it does say is that Ameren believed that
13 because there was excess capacity in the units that the -- that
14 the demand growth exception applied and that, therefore, the
15 permit requirements were not triggered. That's what Ameren had
16 said and that Ameren believed that under the industry -- the
17 routine in the industry standard that this was routine
18 maintenance and repair and replacement under the statute.

19 All of those accept and agree with Your Honor's
20 finding that -- or does not gainsay Your Honor's finding that
21 they knew that emissions would increase -- that that
22 availability would increase in the unit and that emissions
23 would increase as a result. What Ameren said to the commission
24 and to this Court was that they believed that the demand growth
25 exception was what explained that and, therefore, that the

1 requirements for permitting were not triggered. They were
2 wrong. And they said repeatedly to the commission that they
3 were wrong about that, as Your Honor found.

4 What they said to the commission was they were not
5 unreasonable in reading the demand growth exception that way,
6 which had never been interpreted, and in reading the SIP
7 requirement definition of modification which had never been
8 interpreted, and in applying the industry routine -- routine in
9 the industry standard. That's what they said.

10 They repeatedly said to the commission Your Honor
11 has found that Ameren violated the statute and that -- and that
12 is the law and that the Eighth Circuit affirmed Your Honor
13 repeatedly.

14 **MR. QUINN:** Not much, Your Honor.

15 But on the leaflet that I just passed out, the
16 bottom right corner, one up, is a remedy -- a quote from this
17 Court's remedy order at page 104. "A reasonable power plant
18 operator would have known that the modifications undertaken at
19 Rush Island's Units 1 and 2 would trigger PSD requirements.
20 Ameren's failure to obtain PSD permits was not reasonable." It
21 says what it says. But I think we're -- I don't need further.

22 **THE COURT:** I mean, it is what I said in my opinion;
23 that a decision was not reasonable. And that's not mentioned
24 anywhere to the PSC. In fact, Ameren continues to take the
25 position that despite this Court's findings and its findings be

1 affirmed in all respects by the U.S. Court of Appeals the
2 decision was not reasonable, you went to the PSC and told them
3 that it was. That's fine.

4 What I'm going to ask you to do is to order a copy
5 of today's transcript and send that to the Public Service
6 Commission for them to evaluate it, however they see fit, based
7 upon their standards. And they'll make their own decision on
8 that basis.

9 **MR. SAFER:** We will do that, Your Honor.

10 **THE COURT:** So anything else on behalf of the United
11 States?

12 **MR. QUINN:** Nothing, Your Honor.

13 **THE COURT:** Anything else on behalf of Ameren?

14 **MR. SAFER:** No, Your Honor. I may have said factual
15 standards when I meant legal standards.

16 **THE COURT:** Yeah, there are no different standards
17 for facts.

18 **MR. SAFER:** Yeah, yeah.

19 **THE COURT:** Certainly not after we've had a trial --

20 **MR. SAFER:** Right.

21 **THE COURT:** -- where we've -- I don't know how many
22 pages were my findings of fact.

23 **MR. SAFER:** Right. I meant legal standards.

24 **THE COURT:** Yeah.

25 **MR. SAFER:** So nothing else.

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THE COURT: Legal standard doesn't change the facts. It may have -- the facts may affect the legal standard, but not the other way around.

MR. SAFER: Yes, Your Honor.

THE COURT: All right. Thank you all very much.

MR. SAFER: Thank you, Your Honor.

MR. QUINN: Thank you, Your Honor.

(Off the record at 2:29 p.m.)

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CERTIFICATE

I, Pamela Harrison, Registered Professional Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 33 inclusive and was delivered electronically and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, April 5, 2024.

/s/ Pamela Harrison
Pamela Harrison, RPR, CRR, CCR, CSR
Official Court Reporter