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MISSOURI PUBLIC SERVICE COMMISSION

FILE NO. EF-2024-0021

SURREBUTTAL TESTIMONY

OF

JEFFREY R. HOLMSTEAD

ON

BEHALF OF

UNION ELECTRIC COMPANY

d/b/a AMEREN MISSOURI

St. Louis, Missouri
March 22, 2024

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1 **SURREBUTTAL TESTIMONY**

2 **OF**

3 **JEFFREY R. HOLMSTEAD**

4 **FILE NO. EF-2024-0021**

5 **I. INTRODUCTION**

6 **Q. Please state your name and business address.**

7 A. My name is Jeffrey R. Holmstead. My business address is 2001 M Street
8 NW, Washington, D.C., 20036.

9 **Q. Have you previously testified in this proceeding?**

10 A. Yes. My direct testimony in this matter is dated November 15, 2023, and I
11 reviewed my occupation, qualifications, and experience in that testimony.

12 **Q. Please provide a brief summary of your direct testimony.**

13 A. I testified regarding Ameren Missouri's decisions not to seek New Source
14 Review ("NSR") permits when it undertook certain projects at the Rush Island Energy
15 Center ("Rush Island"), namely, (1) projects performed during the Unit 1 outage in early
16 2007 ("2007 Projects" or "Unit 1 Projects"); and (2) projects performed during the Unit 2
17 outage in early 2010 ("2010 Projects" or "Unit 2 Projects"). As in my direct testimony, I
18 will sometimes refer to the Unit 1 Projects and the Unit 2 Projects collectively as "the Rush
19 Island Projects."

20 When Ameren Missouri determined that it did not need NSR permits for the Rush
21 Island Projects, these determinations were reasonable and prudent, given what Ameren
22 Missouri knew and should have known at the time. Ameren Missouri's understanding of
23 the law and its conclusions concerning NSR applicability were in line with the language in

1 the applicable NSR rules in the Missouri State Implementation Plan ("SIP"), the views of
2 state regulators, and public statements that EPA's program office (which issued the
3 relevant federal regulations) had made about NSR.

4 Ameren Missouri's understanding of the law and its conclusions concerning NSR
5 applicability were also in line with the views held by other electric utilities at the time.
6 Many other companies that owned or operated coal-fired power plants had done the same
7 types of projects at their plants, and none of them had ever applied for or obtained an NSR
8 permit for any of these projects. Indeed, there is evidence that hundreds of such projects
9 had been undertaken at coal-fired units throughout the country prior to the Rush Island
10 Projects, and not one company had ever sought or obtained an NSR permit for any of them.

11 Finally, the fact that a court later ruled that Ameren Missouri was legally required
12 to obtain NSR permits for the Rush Island Projects is not related to the question in this
13 proceeding—whether the Company acted reasonably and prudently based on what it knew
14 or should have known *at that time*. The District Court did not say that the Company's
15 interpretation of the relevant regulatory requirements was unreasonable— just that it was
16 incorrect. As the Court itself said, the key Ameren Missouri employees reviewing the
17 projects for NSR compliance "started with an incorrect understanding" of the relevant
18 regulations.[1]

19 **Q. What is the purpose of your surrebuttal testimony?**

20 A. The purpose of my surrebuttal testimony is to respond to the rebuttal
21 testimony offered by Missouri Public Service Commission witnesses Claire M. Eubanks

[1] District Court Liability Opinion, 229 F. Supp.3d 906 at 915-916.

1 and Keith Majors, and Office of the Public Counsel ("OPC") witness Jordan Seaver.[2] None
2 of these witnesses provide a basis to undermine my conclusion that the permitting decisions
3 made by Ameren Missouri were reasonable and prudent.

4 **II. RESPONSE TO THE TESTIMONY OF CLAIRE M. EUBANKS**

5 **Q. Does Ms. Eubanks offer an opinion on whether Ameren Missouri acted**
6 **prudently regarding the permitting of the Rush Island Projects?**

7 A. No. In her rebuttal testimony (pp. 9-12), Ms. Eubanks disagrees with the
8 assertion made by Ameren Missouri witness Mark Birk that "the retirement of Rush Island
9 is a culmination of a series of prudent and reasonable decisions by the Company," but she
10 offers no opinion on whether the Company acted prudently regarding the permitting of the
11 Rush Island Projects. In a recent deposition, she stated that she had *not* concluded that the
12 decisions were imprudent or that Ameren Missouri should have obtained NSR permits for
13 the Rush Island Projects.[3]

14 **Q. To the extent that Ms. Eubanks offers any opinions, what does she cite**
15 **as the basis for them?**

16 A. Ms. Eubanks relies primarily on Opinions that U.S. District Judge Sippel
17 issued in the NSR enforcement case over the Rush Island Projects, but she also refers twice

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[2] I will refer to their testimony as the "Eubanks Rebuttal," the "Majors Rebuttal," and the "Seaver Rebuttal."

[3] In her recent deposition, Ms. Eubanks was asked "[I]s it your opinion that the Company was unreasonable or imprudent for not getting PSD permits back then?" She answered: "I think there are elements to what the Company did that are reasonable and there are elements to what the Company did that were not reasonable or could have been better documented at least." March 12, 2024 Deposition Testimony of Claire M. Eubanks ("Eubanks Deposition") at 193-94. She was then asked a follow-up question: "So you haven't necessarily concluded that the [Company's] decision not to get the PSD permits was an imprudent decision but . . . you're bothered by the fact that there lacks certain documentation around the decision that you think should exist?" She answered "Yes." *Id.* at 195.

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1 to the Eighth Circuit's opinion upholding one of those Opinions, and, in a few instances, to
2 depositions in the enforcement case or direct testimony provided by other witnesses in this
3 proceeding.

4 **Q. Are the court decisions in the enforcement case relevant to the issues**
5 **before the Commission?**

6 A. No. The questions before the courts were entirely different from the
7 questions now before the Commission. The District Court determined that, as a legal matter,
8 Ameren Missouri violated the Clean Air Act when it failed to obtain NSR permits for the
9 Rush Island Projects, and the Circuit Court later upheld that ruling. The courts did not
10 consider the question of whether the Company had a reasonable basis for believing that it
11 was not required to obtain such permits, because, as a matter of law, that question was not
12 before them. Moreover, the Commission must determine whether the Company acted
13 reasonably and prudently based on what it knew or should have known at the time. The
14 courts considered several things that were not known or knowable when the Company made
15 its permitting decisions.

16 **Q. You make a distinction between the issues that were before the courts**
17 **and the issues that are now before the Commission. Can you explain your**
18 **understanding of the questions that are before the Commission?**

19 A. With regarding the Rush Island permitting issues, I understand that the
20 Commission is being asked to determine whether Ameren Missouri had a reasonable basis
21 for believing that it did not need NSR permits for the Rush Island Projects, based on what
22 it knew or should have known at the time. I believe that the Commission's approach for
23 making such a determination is explained well on pages 8-12 of Keith Majors's rebuttal

1 testimony, where he quotes from various decisions by the Commission, including a Kansas
2 City Power & Light rate case: "[T]he company's conduct should be judged by asking
3 whether the conduct was reasonable at the time, under all the circumstances, considering
4 that the company had to solve its problems prospectively, rather than in reliance on
5 hindsight."

6 **Q. Does Ms. Eubanks offer any opinion on whether Ameren Missouri's**
7 **permitting decisions were reasonable under this standard?**

8 A. No, she does not.

9 **Q. What then is the purpose of her rebuttal testimony?**

10 A. She does offer opinions on things other than the reasonableness of Ameren
11 Missouri's decisions regarding the need to obtain NSR permits for the Rush Island Projects.
12 With regard to the permitting issues, I think her purpose is best explained on page 12 of
13 her rebuttal testimony. She had earlier (on page 9) quoted one of Ameren Missouri's key
14 witnesses, Mark Birk, as saying that "[e]very decision we have made on Rush Island
15 incorporated the information reasonably available at the time and was guided by three
16 principles: 1) to ensure system reliability; 2) to comply with the law; and 3) to serve the
17 best interests of our customer." On page 12, she says that "Staff will address its concerns
18 with Ameren Missouri's decisions related to other influences outside the guiding principles
19 that Mr. Birk outlines, and present facts related to information Ameren had at the time the
20 decisions were made that contradict Ameren Missouri witnesses."

21 **Q. With regarding to the permitting issues, does Ms. Eubanks present**
22 **facts regarding information that Ameren Missouri had when it made its decisions that**
23 **contradict any of the Company's witnesses?**

1 A. No.

2 **Q. How does Ms. Eubanks go about raising any concerns she may have?**

3 A. For the most part, she simply quotes from the Opinions issued by the 4 District Court judge, one issued in 2017 (the "Liability Opinion") and one issued in 2019 5 (the "Remedy Opinion"). In many instances, she also highlights language in those 6 Opinions that she appears to believe is especially relevant.

7 **Q. Do you agree with her reading of the Opinions?**

8 A. No. First, as I explained above, the question of whether Ameren Missouri 9 acted reasonably and prudently when it decided that NSR permits were not required for the 10 Rush Island Projects was simply not before the District Court. Questions of reasonableness 11 and prudence were not relevant to that case. There is no court holding on these questions, 12 and even the passages that Ms. Eubanks selected from more than 300 pages of written 13 opinions in the case do not support the conclusions that she apparently draws from them. 14 Ms. Eubanks usually quotes these passages out of context, and the conclusions that she 15 draws from them are incorrect.

16 **Q. Can you walk us through these passages and explain what you mean 17 when you say that she quotes them out of context?**

18 A. Ms. Eubanks begins (on p. 10) by quoting the following language from the 19 District Court's opinion and highlighting the language that she wants to emphasize:

> 20 This standard for assessing PSD applicability was well-established when 21 Ameren planned its component replacement projects for Units 1 and 2. 22 Ameren's testifying expert conceded that the method used by the United 23 States' experts—which showed that Ameren should have expected the 24 projects to trigger PSD rules—has been ''well-known in the industry'' since 25 1999. **But Ameren did not do any quantitative PSD review for the 26 project at Unit 1 and performed a late and fundamentally flawed PSD 27 review for Unit 2.**

1 This quote deals only with the method that the government experts in the
2 enforcement case used to calculate whether a project would increase future annual
3 emissions. The PSD applicability standards as a whole (which involve the Missouri SIP,
4 RMRR, and causation issues) were not established until after the District Court ruled on
5 those issues long after the Rush Island Projects had been completed.

6 With regard to the first part of the quote, Ameren Missouri's testifying expert did
7 acknowledge that the emissions quantification method used by the government's testifying
8 experts had been "well-known in the industry" since EPA brought the first enforcement
9 actions against coal-fired power plants in 1999. Ameren Missouri was certainly aware of
10 it because it was highly contested by everyone in the power industry. This approach, known
11 as the Koppe-Sahu method after the names of EPA's testifying experts, was used *only* in
12 NSR enforcement cases and has never been established (or even mentioned as acceptable)
13 in any EPA regulations.

14 It is much disputed because, if a company replaces *any* component at a coal-fired
15 power plant that has caused any downtime during the relevant two-year period, the method
16 *always* "shows" that the replacement will cause an emissions increase. In the enforcement
17 case, Ameren Missouri argued vigorously that it was not a valid method for determining
18 whether repair and replacement projects would cause an increase in annual emissions. As
19 Karl Moor discusses in his direct testimony (pp. 15, 52), other courts have rejected this
20 method in NSR enforcement cases.

21 The District Court ultimately decided that the Koppe-Sahu method should be used
22 in the enforcement case against Ameren Missouri. But the District Court did not hold that
23 it was the only acceptable method or that Ameren Missouri lacked a reasonable basis for

not using it. I have worked with many power companies on NSR issues over the last 17 years, and, as far as I know, none of them has ever used the Koppe-Sahu method to determine whether repair and replacement projects will cause an increase in annual emissions.

The highlighted quote refers to the fact that Ameren Missouri did not do "quantitative review" or "calculations" before the projects began to determine whether either the 2007 Projects or the 2010 Projects would cause an increase in annual emissions. The quote is taken out of context here because, as I explain in my direct testimony (pp. 41-44) the Company did not believe that it was required to do a quantitative review or calculations to determine whether a project would cause an increase in annual emissions, and they clearly had a reasonable basis for this belief. As I explained in my direct testimony, emissions at a power plant can vary greatly from year to year, based on factors unrelated to the plant itself. For purposes of NSR, the question is not whether future emissions will be higher, but whether a project will "cause" future emissions to be higher. This is something that must be analyzed and, if analysis suggests that the project *will* cause an emissions increase, the amount of the increase can be estimated.

But prior to the Court's rulings on this issue, officials at Ameren Missouri believed that this was a question that did not require any calculations or quantitative analysis because they did not expect the Rush Island Projects to cause an increase in emissions. Given that they were simply replacing components with functionally equivalent components and that the plant had significant "unused capacity" before the projects were undertaken, they reasonably believed that any increase in emissions in future years would

1 be caused by demand growth, which is expressly excluded from NSR, and not by the
2 component replacements.

3 The District Court ultimately disagreed with Ameren Missouri on these issues, but
4 it never said that the Company's understanding of them was unreasonable. Rather, as the
5 Court said in another part of its 2017 Opinion, the key Ameren Missouri employees
6 reviewing the projects for NSR compliance "started with an incorrect understanding" of
7 the relevant regulations. This does not mean that their understanding was unreasonable,
8 and it was certainly in line with the understanding of other companies in the industry.

9 **Q. What about the other language from the District Court's opinion that**
10 **Ms. Eubanks has highlighted on page 10 of her rebuttal testimony?**

11 A. In this same passage, Ms. Eubanks also highlights language from the
12 District Court's opinion saying that "Ameren should have expected and did expect unit
13 availability to improve by much more than 0.3%, allowing the units to operate hundreds of
14 hours more per year after the project" and that this would allow the plant "to burn more
15 coal, generate more electricity, and emit more SO2 pollution." This is relevant under the
16 Koppe-Sahu method, but as I mentioned above (and explained more fully in my direct
17 testimony and Mr. Whitworth's direct testimony), Ameren Missouri knew, prior to the
18 project, that Rush Island had been operating well below its available capacity and had a
19 large amount of unused capacity to generate. The Company thus believed that, even if the
20 projects would improve availability, this extra availability would not actually cause an
21 increase in annual emissions because the plant could have accommodated a large increase
22 in demand even without the projects. This is the approach that other power companies often

1 took in evaluating whether repair and replacement projects would cause an emissions
2 increase, and it was certainly a reasonable approach at the time.

3 **Q. On page 11 of her rebuttal testimony, Ms. Eubanks quotes a passage**
4 **from the District Court's 2017 Liability Opinion, which says that the analyses done**
5 **by the Company employees "provide no basis for finding that Ameren could have**
6 **reasonably expected that the [Rush Island Projects] would not significantly increase**
7 **net emissions." How do you square this with your claim that Ameren Missouri acted**
8 **reasonably when it chose not to seek NSR permits for the Projects?**

9 A. This passage again deals with Ameren Missouri's failure to do a quantitative
10 analysis of future emission increases, which I discussed earlier. As quoted by Ms. Eubanks,
11 this is where the Court noted that "the employees charged with assessing [NSR]
12 applicability started with an incorrect understanding of the law"—that the regulations did
13 not require quantitative calculations of future emissions. Nowhere does the Court say that
14 their understanding was unreasonable, and this understanding was widely shared throughout
15 the industry. Having started with an incorrect (but reasonable) understanding of the law, it
16 is not a surprise that the company's analyses did not provide "a basis for finding that Ameren
17 could have reasonably expected the project would not significantly increase net emissions."

18 **Q. Also on page 11 of her rebuttal testimony, Ms. Eubanks quotes from a**
19 **passage in the District Court's 2019 Remedy Opinion which say that "that Ameren's**
20 **failure to obtain PSD permits was not reasonable." How do you square this with your**
21 **claim that the Company acted reasonably when it chose not to seek NSR permits for**
22 **the Rush Island Projects?**

1 A. This quote is not from the relevant District Court opinion – the 2017 opinion
2 in which the Court found that Ameren Missouri had violated the Clean Air Act by failing
3 to get NSR permits. The quote above is from the 2019 Remedy Opinion, which does not
4 include the Court's reasons, or any explanation, for making this statement. If the court
5 actually intended to make a finding that Ameren Missouri's failure to obtain PSD permits
6 was not reasonable, it would have needed to explain the reasons for making such a finding.
7 It was the 2017 Liability Opinion in which the Court explained its reasons for
8 finding that Ameren Missouri should have obtained NSR permits for the Rush Island
9 Projects. Nowhere in the 2017 opinion does the Court say that Ameren Missouri did not
10 have a reasonable basis for concluding that it did not need NSR permits. Ameren Missouri
11 had three independent reasons for its decision not to seek such permits, and the court, after
12 reviewing them, did not find any of them to be unreasonable. In fact, after ruling in favor
13 of EPA, the District Court later stayed its order pending a decision these issues from the
14 Eighth Circuit because the judge agreed that "the legal questions were substantial and
15 matters of first impression." Order Granting Motion to Stay (Oct. 22, 2019) at 2.
16 The above quote highlighted by Ms. Eubanks is from the 2019 Remedy Opinion,
17 which does not address these issues at all. In that context, it is simply a short-hand way of
18 saying that the Court had ruled against Ameren in the liability phase of the trial. From a
19 legal perspective, it would be considered "dicta"[4] that is not relevant to the Court's actual
20 holding, which set forth in the 2017 Liability Opinion.

[4] "Dicta is short for the Latin phrase obiter dictum, meaning 'something said in passing.' Dicta in law refers to a comment, suggestion, or observation made by a judge in an opinion that is not necessary to resolve the case." Cornell Law School, Legal Information Institute, Wex Online Dictionary.

1 **Q. What about the language from the Eighth Circuit Court of Appeals**
2 **Opinion that upheld the District Court's liability ruling? Ms. Eubanks quotes this**
3 **language and highlights the words "at the time" at the bottom of page 11 of her**
4 **rebuttal testimony.**

5 A. Ms. Eubanks does not explain the relevance of this quote, but she seems to
6 be suggesting that the Eighth Circuit ruled on whether Ameren Missouri acted reasonably
7 based on what it knew "at the time." This is not correct. Quoting from the jury instruction
8 from another NSR case, the Eighth Circuit simply said that "the district court, as the
9 factfinder, was entitled to 'consider all relevant information available to [Ameren Missouri]
10 at the time of the project'" in determining whether the Company should have predicted an
11 emissions increase. So again, to the extent this passage has any relevance, it deals only with
12 one of the three reasons why Ameren Missouri determined that NSR permits were not
13 required—that the Company did not expect the Projects to cause an increase in annual
14 emissions. It does not relate to the other two reasons. In any case, the issue involved in this
15 proceeding before the Commission—whether Ameren Missouri acted reasonably when it
16 determined not to seek NSR permits—was not before either the District Court or the Circuit
17 Court, and neither of them ruled on it.

18 **Q. Under the Missouri SIP, does any of the above discussion about Koppe-**
19 **Sahu and expectations (or lack of them) regarding whether actual emissions would**
20 **increase matter?**

21 A. No. As discussed in my direct testimony, under Ameren Missouri's and the
22 Missouri Department of Natural Resources's ("MDNR's") interpretation of the Missouri
23 SIP, if the units' potential emissions were not expected to increase, then no NSR permit

1 was required, irrespective of whether the projects would regain lost plant availability and
2 thus could generate more megawatt-hours after the projects were completed. But all the
3 District Court quotes from Ms. Eubanks I discuss above pertain only to the question of
4 projected increases in annual emissions due to improved availability; they have nothing to
5 do with whether the facility's emission rate would increase when the facility was operating
6 at its maximum capacity – i.e., its potential emissions.

7 **Q. If the Rush Island Projects had fit the RMRR exemption, would any of**
8 **the above discussion about Koppe-Sahu and expectations (or lack of them) regarding**
9 **whether actual emissions would increase matter?**

10 A. No. Even if the Koppe-Sahu method is a valid method and showed a
11 projected increase in annual emissions, this would not matter if the projects fit the RMRR
12 exemption.

13 **Q. Ms. Eubanks next moves on to talk about "the issue of over-**
14 **compartmentalization." Why is this issue relevant to the question of whether Ameren**
15 **Missouri acted reasonably when it chose not to seek NSR permits for the Rush Island**
16 **Projects?**

17 A. In this section of her rebuttal testimony, Ms. Eubanks suggests that Ameren
18 Missouri somehow acted improperly because certain officials were not involved in making
19 decisions regarding NSR permitting. She emphasizes that the Plant Manager of Rush Island
20 at the time of the 2007 Projects, Robert Meiners, did not have any discussions with anyone
21 about whether to seek an NSR permit for the 2007 Projects and that, according to his
22 testimony, he never, during his 40-year career, had a single discussion with anyone about
23 whether to seek an NSR permit for any capital project.

1 But this is neither surprising nor improper. As is clear from the testimony filed in
2 this proceeding, NSR is a complicated regulatory issue and, in my experience, companies
3 have regulatory experts who make decisions about NSR issues. As I discussed in my direct
4 testimony (pp. 30-35), it is clear that the Ameren Environmental Services Department
5 ("ESD") was very well informed about NSR issues and was responsible for making
6 decisions about NSR applicability for Ameren Missouri. Among other things, ESD
7 officials actively participated in the "Utility Air Regulatory Group" ("UARG"), which was
8 the best source in the utility industry for information about NSR requirements for coal-
9 fired power plants. It was entirely reasonable for Ameren Missouri to rely on the ESD to
10 make decisions about NSR permitting. Neither the Plant Manager nor engineers who were
11 responsible for the projects needed to make those determinations.
12 Ms. Eubanks also quotes from the District Court's findings about Michael
13 Hutcheson, who did certain emission calculations for the 2010 Projects *after* the Projects
14 had been approved and were under construction. The Court was highly critical of these
15 calculations and found fault with his lack of knowledge regarding regulatory requirements,
16 the nature of the projects involved, and the fact that he had not consulted with more
17 knowledgeable employees about them. However, as I discuss below, Ameren Missouri did
18 not rely on his calculations when they determined that the 2010 Projects would not cause
19 an emissions increase. The approach that Ameren Missouri actually used to determine
20 whether any of the Rush Island Project would cause an increase in annual emissions is
21 discussed on pages 41-44 of my direct testimony.
22 **Q. Ms. Eubanks has several pages in her rebuttal testimony claiming that**
23 **Ameren Missouri had "information that would indicate that there was a risk of**

1 **activities at coal-fired power plants triggering NSR requirements." Do you agree with**
2 **statement?**
3 A. Yes. I discuss this point on pages 30–33 of my direct testimony. I think
4 everyone in the industry was aware of the NSR enforcement initiative that EPA had
5 launched against coal-fired power plants in 1999, which created a risk of NSR enforcement.
6 Among other things, the Environmental Services Department was very involved in UARG
7 and regularly received materials from UARG that discussed all the developments related to
8 NSR, including details about each of the enforcement cases.
9 It is also clear that Ameren Missouri reasonably believed that any risk of their 2007
10 and 2010 Projects triggering NSR was very low. First, as Karl Moor discussed in his direct
11 testimony, at the time when Ameren Missouri was planning the Rush Island Projects and
12 deciding whether it needed to seek NSR permits for them, EPA had not had a great deal of
13 success in its NSR enforcement initiative. Some companies had settled their cases with
14 EPA, but largely by agreeing to install pollution controls that they already planned to install
15 anyway to meet other upcoming regulatory requirements. This was well known in the
16 industry. Moreover, in the contested cases, EPA was losing more often than winning, as
17 detailed in the documents that Ameren Missouri received from UARG.
18 But more importantly, any risks of NSR enforcement against a utility in Missouri
19 would have been even lower than in other areas of the country, as ESD was well aware.
20 As I explain in my direct testimony (pp. 11-15), the Missouri SIP, as it had always been
21 interpreted by the state permitting agency (and industrial facilities in Missouri, including
22 Ameren Missouri) included a provision saying that a project at an industrial facility did not
23 need an NSR permit unless it would cause an increase in the facility's emission rate when

1 operating at its maximum capacity—*i.e.*, its potential emissions. (Although a few other
2 states had similar provisions, none of the NSR enforcement cases involved a plant in one
3 of these states.) Because none of the Rush Island Projects would cause such an increase,
4 the regulatory experts in the Ameren Environmental Services Department reasonably
5 believed that the risk of triggering NSR was very low.

6 **Q. Ms. Eubanks discusses a study conducted by Black & Veatch ("B&V")**
7 **on behalf of Ameren Missouri, dated July 2009, and titled *Report on Life Expectancy***
8 ***of Coal-Fired Power Plants*. Is there anything in the Black & Veatch study quoted by**
9 **Ms. Eubanks that is relevant to the question of whether Ameren Missouri had a**
10 **reasonable basis for concluding that it did not need NSR permits for the Rush Island**
11 **Projects?**

12 A. No. It does not mention anything about the Rush Island Projects or say
13 anything that is relevant to the question of whether the Company might need an NSR permit
14 for them.

15 **Q. On page 25 of Ms. Eubank's testimony, there is a heading entitled**
16 **"Ameren Missouri's Arguments." This section addresses each of the Company's**
17 **three reasons for believing that it did not need NSR permits. Does anything in this**
18 **section undercut your opinion that all of these reasons were reasonable?**

19 A. No.

20 **A. <u>Missouri SIP</u>**

21 **Q. How do you address the points that Ms. Eubanks makes about the**
22 **Missouri SIP?**

1 A. Ms. Eubanks starts by quoting from the Eighth Circuit Decision upholding
2 the District Court's Liability decision. The Circuit Court, like the District Court, did not
3 consider or say anything about whether Ameren Missouri's understanding of the SIP
4 (which was MDNR's understanding, too) was reasonable or unreasonable, but it does help
5 to illustrate why it was entirely reasonable.
6 As I explained in my direct testimony (pp. 11-15), the Missouri SIP has a section
7 that deals with all types of construction permits and then separate sections dealing with
8 different types of construction permits, including NSR permits. The section dealing with
9 all types of permits says that companies do not need to get *any* type of construction permit
10 for a project unless it is a "modification," which is defined as a project that will increase a
11 facility's emission rate when the facility is operating at its "maximum design capacity"
12 (*i.e.*, will increase its potential emissions). If a project is a modification, then you look at
13 the other sections of the SIP to determine what type of permit you need to get. The NSR
14 section includes provisions for determining whether a modification is a "major
15 modification" for which you need an NSR permit—at least that was everyone's
16 understanding (including MDNR's) until EPA brought its enforcement case against
17 Ameren Missouri.
18 When "MDNR expressly incorporated the EPA's [2002 NSR] regulations into its
19 SIP," as the Circuit Court said, MDNR (and Ameren Missouri) believed it was
20 incorporating them into the NSR section of the SIP. When EPA said that this action
21 "supersede[s] the state provisions for purposes of the [NSR] program," MDNR (and
22 Ameren Missouri) believed that it superseded the provisions that had previously been set
23 forth in the NSR section of the SIP. But in the enforcement action against Ameren

1 Missouri, EPA took the position that, when MDNR had incorporated EPA's 2002 NSR
2 regulations into its SIP, it had actually superseded the general provisions too insofar as they
3 defined "modification" to mean a project that increased a facility's emission rate when
4 operating at its maximum design capacity. This meant that a project could be a "major
5 modification" for purposes of NSR even if it was not a "modification" under the general
6 rules for construction permits.

7 MDNR did not understand that its incorporation of EPA's 2002 rules to have any
8 such effect. Neither did EPA say that this would be the effect when it approved MDNR's
9 proposal to incorporate them by reference. In fact, it seemed to be saying just the opposite:
10 "This final action merely approves state law as meeting Federal requirements and imposes
11 no additional requirements beyond those imposed by state law." 71 Fed Reg. 36,486,
12 36,488 (col.3) (June 27, 2006). EPA made this point more than once: "[T]his rule approves
13 pre-existing requirements under state law and does not impose any additional enforceable
14 duty beyond that required by state law." *Id.* The incorporation of the federal NSR rules in
15 40 C.F.R. § 52.21 had been a part of state law since 2004. "In the summer of 2004,
16 Missouri revised Missouri rule 10 CSR 10-6.060, Construction Permits Required . . . to
17 incorporate the changes to the Federal NSR program. These rule revisions were adopted
18 by the Missouri Air Conservation Commission on August 26, 2004, and became effective
19 under state law on December 30, 2004." *Id.* at 36,487. Even after 2004, MDNR issued
20 "no permit required" letters that found no permits were required unless a modification (*i.e.*,
21 a project increased in potential emissions) occurs. I cite and discuss these official
22 determinations by MDNR in my direct testimony.

1 In 2016, well after the projects had been completed, the District Court reached a
2 different conclusion and found that the legal effect of the incorporation by reference was
3 to eliminate the inquiry into potential emissions as a threshold question for NSR permitting,
4 and the Eighth Circuit agreed. Because this is what the courts ruled, this is obviously the
5 legal effect of incorporating the 2002 EPA rules by reference. But it was entirely reasonable
6 for Ameren Missouri (and MDNR) to understand them differently. In my opinion, it is
7 hard to say that it was unreasonable for Ameren Missouri and MDNR officials to believe
8 that their long-standing understanding of the SIP—that a project cannot be a "major
9 modification" unless it's a "modification"— was still correct even after the 2006 approval
10 of the new incorporation by reference into Missouri SIP

11 **Q. As Ms. Eubanks states on pages 26-27 of her testimony, when Kyra**
12 **Moore from MDNR was being deposed in the enforcement case, Ms. Moore was asked**
13 **"if EPA and [MDNR] disagreed on the interpretation of the Missouri SIP, [whose]**
14 **would you say governs?" Ms. Moore answered that "I would say EPA because it is**
15 **EPA's federal rules" and "our SIP is based on the EPA's federal rules and the Clean**
16 **Air Act." What importance do you place on this exchange?**

17 A. This has nothing to do with the question of whether Ameren Missouri's
18 understanding of the Missouri SIP was reasonable when it decided that it did not need NSR
19 permits for the Rush Island Projects. When Ameren Missouri made those decision, it was
20 aware of MDNR's long-standing interpretation of the SIP *and it had no way of knowing*
21 *that EPA disagreed with this interpretation until EPA initiated the enforcement action.*
22 There was nothing in any EPA documents to explain that, when it approved the MDNR's

1 incorporation by reference of the 2002 NSR rules, this changed the legal meaning of a
2 section that was not mentioned in MDNR's proposal or EPA's approval of it.

3 I should also point out that, as a legal matter, when EPA and a state environmental
4 agency have different interpretations of the state's SIP, neither one of them "governs." This
5 is illustrated in the Ameren Missouri enforcement case. EPA's interpretation prevailed not
6 because its interpretation automatically governed but because, after extensive briefing by
7 both sides, the District Court found it to be the correct one.

8 **B. <u>Determination that Projects Would Not Cause an Emissions increase</u>**

9 **Q. Ms. Eubanks quotes your direct testimony to suggest that Ameren**
10 **Missouri did not consider whether the Projects would cause an emissions increase.**
11 **Does she characterize your testimony accurately?**

12 A. Her quote is accurate, but it certainly doesn't support the point she's trying to
13 make. I said that, for NSR applicability determinations, there

14 "are basically two questions: (1) Will a proposed project be a "physical
15 change or change in the method of operation"? and (2) will the project cause
16 an increase in emissions? You don't trigger NSR unless the answer to both
17 questions is "yes." Although you can conclude that an NSR permit is not
18 required if the answer to either question is 'no,' **sources generally examine**
19 **both questions out of an abundance of caution.**" [Emphasis in Eubank
20 Rebuttal Testimony.]

21 Ms. Eubanks apparently misunderstood my quote to mean that, to be cautious, companies
22 generally do *quantitative* emission calculations, but this is not what I said (or what I meant),
23 as my direct testimony makes clear. She quotes me, correctly, as saying that companies
24 "generally examine" whether a "project will cause an increase in emissions." It is certainly
25 possible to examine a project and conclude, as Ameren Missouri did, that it will not cause
26 an emissions increase without doing a quantitative calculation of emissions.

1 There are different ways of determining whether a project will cause an emissions
2 increase, and Ameren Missouri did it in the two ways it thought were relevant. First, as the
3 Company understood the Missouri SIP, it had to determine whether any of the Rush Island
4 Projects would cause an "increase in the emission rate" when the plant was operating "at
5 its maximum design capacity." This requires an objective engineering determination based
6 on the physical characteristics of a plant, and no one disputes Ameren Missouri's
7 determination that none of the projects would increase such emissions. You do not need
8 to perform a calculation to make this determination. All you have to do is understand, from
9 an engineering perspective, whether the projects at issue would increase the maximum
10 hourly emission rate at maximum load. The Company knew that the Rush Island Projects
11 would not do so.
12 Ameren Missouri also determined that the Projects would not cause an increase in
13 annual emissions, as I explain on pages 41 - 44 of my direct testimony. EPA did not dispute
14 that the Company made such a determination, but EPA argued (and the District Court
15 agreed), that the regulations required a "quantitative analysis" or "calculations" to make
16 such a showing. Prior to this ruling, Ameren Missouri officials did not believe such a
17 quantitative assessment was needed where the facts and circumstances made clear that
18 annual emissions would not increase over historical levels as a result of the projects. Before
19 moving forward with the Projects, Ameren Missouri officials certainly did examine
20 whether the Projects would cause an increase in emissions (both when operating at
21 maximum design capacity and based on annual emissions) and concluded that they would
22 not. They did this "out of an abundance of caution," even though they had also concluded
23 that (1) under the Missouri SIP, as they and MDNR understood it at the time, their Projects

1 would not be modifications for which an assessment of annual emissions was needed; and
2 (2) the Projects were routine in the industry and therefore excluded from NSR.

3 **Q. On pages 29-30 of her testimony, Ms. Eubanks quotes several**
4 **paragraphs from one of the District Court Opinions that are highly critical of**
5 **emissions calculations that an Ameren Missouri employee named Michael Hutcheson**
6 **did for the 2010 Projects. Does this show that Ameren Missouri didn't reasonably**
7 **consider whether those Projects would cause an increase in annual emissions?**

8 A. No. As I explained earlier, and on pages 41-44 of my direct testimony,
9 before undertaking either the 2007 Projects or the 2010 Projects, the Ameren Missouri ESD
10 determined that the projects would not cause an increase in annual emissions. However,
11 the District Court judge disregarded such qualitative determinations because, as he
12 interpreted the regulations, they required a quantitative analysis and emission calculations
13 to determine whether annual emissions will increase as a result of a project.

14 The Court went on to consider the written calculations that Mr. Hutcheson had done
15 for the 2010 Projects and determined that they were far from adequate. But as Ms. Eubanks
16 notes on p. 29 of her testimony, the head of the Ameren ESD, Steve Whitworth, stated that
17 these calculations had not even been done before the 2010 Projects were underway and that
18 the Company had *not* relied on these calculations when it determined that the 2010 Projects
19 would not cause an increase in emissions. In describing the approach that Ameren Missouri
20 had actually used to determine that the Rush Island Projects would not cause an increase
21 in annual emissions, Mr. Whitworth stated:

> 22 In addition to assessing the applicability of the Missouri SIP and
> 23 whether the 2007 Projects constituted routine maintenance repair
> 24 and replacement, Ameren also assessed any impact of the Projects
> 25 on projected actual future emissions. We had experience with and

1 knowledge of [projects similar to the Rush Island Projects] and were
2 familiar with the Rush Island units' operational characteristics. This
3 included our knowledge that Ameren's coal-fired generating units
4 operate below their available capacity and thus have a large amount
5 of unused capacity to generate. Based on these and other
6 considerations derived from our experience, knowledge and
7 judgment, and based on the judgment of Ameren's engineering
8 personnel, we in Environmental Services concluded that the [Rush
9 Island] Projects would not cause actual emissions to increase.

10 I am not asserting that Mr. Hutcheson's calculations were adequate to comply with
11 the regulations as the District Court interpreted them, but Ameren Missouri had a
12 reasonable basis for believing that its qualitative assessment was sufficient to show that the
13 Rush Island Projects would not cause an increase in annual emissions. As I explained in
14 my direct testimony, many other companies took the same approach because they did not
15 believe that the Koppe-Sahu Method was a valid approach and that the type of qualitative
16 assessment done by Ameren Missouri was the most legitimate way to determine whether a
17 particular project would actually cause an increase in annual emissions. Although the
18 District Court found that Ameren Missouri's qualitative approach did not satisfy the
19 regulatory requirements, it *did not* find that Ameren Missouri lacked a reasonable basis for
20 believing it was acceptable. And again, none of this has anything to do with the undisputed
21 fact that the Rush Island Projects would not increase potential emissions, which meant that
22 given Ameren Missouri's and MDNR's reasonable understanding of the law at the time,
23 no matter what actual annual emissions were expected to do, NSR permits were not
24 required.

25 **C. <u>Determination that the Projects Qualified as RMRR</u>**

26 **Q. Ms. Eubanks discusses Ameren Missouri's analysis of the projects as**
27 **routine maintenance, repair, and replacement (RMRR) starting on page 31 of her**

1 **rebuttal testimony. Does she offer an opinion on Ameren Missouri's interpretation**
2 **of the RMRR exemption?**
3 A. No. Ms. Eubanks quotes portions of Judge Sippel's opinion in the District
4 Court case, as well as the prior testimony of Ameren Missouri representative Mark Birk,
5 but Ms. Eubanks does not offer her own opinion as to whether Ameren Missouri was
6 reasonable when it concluded that the Rush Island Projects were excluded from permitting
7 as RMRR.
8 **Q. Is it your opinion that Ameren Missouri reasonably relied on the**
9 **RMRR exemption?**
10 A. Yes. As I stated in my direct testimony, the documents that I reviewed
11 regarding the Rush Island Projects show that, before undertaking the projects, Ameren
12 Missouri considered whether they qualified as RMRR. Ameren Missouri was aware of the
13 maintenance, repair, and replacement practices at the many different power plants they
14 operated, including those operated by their Illinois affiliate, and of those across the industry.
15 Based on the nature of the projects and the industry-wide interpretation of the NSR
16 permitting program, Ameren Missouri's determinations that the Rush Island Projects were
17 RMRR were reasonable at the time they were made.
18 **Q. With regard to the NSR permitting exemption for projects that qualify**
19 **as RMRR, Ms. Eubanks cites (on p. 32) testimony that Ameren Missouri gave to the**
20 **Commission (outside of the permitting context) that described the Unit 1 Projects as**
21 **"significant boiler modifications." Does that mean that Ameren Missouri could not**
22 **have reasonably viewed the projects as RMRR?**

1 A. No. Ameren Missouri, its affiliates, and many other companies that owned
2 or operated coal-fired power plants had done the same types of projects at their plants, and
3 none of them believed that they were "major modifications" as defined under the NSR
4 regulations. Performing this type of work was routine within the industry, as was the
5 interpretation that this type of work was RMRR and thus excluded from the regulatory
6 definition of a "major modification."
7 Regardless of how it described the Rush Island Projects outside of the permitting
8 context, Ameren Missouri was reasonable in viewing the projects as RMRR that did not
9 require NSR permitting at the time that the work was undertaken. While terms like
10 "modification" and "change" are defined terms in the NSR permitting context, the general
11 understanding of what constitutes a modification or change of an industrial source is much
12 broader (hence the need to identify specific exemptions in the NSR rules). The fact that
13 Mr. Birks described a project as a "significant modification" to the Missouri Public
14 Services Commission should not be interpreted as having any implications for NSR
15 permitting or the Company's view of whether a project met the regulatory definition of a
16 "major modification" at the time they were implemented.
17 Likewise, a project that involves the like-kind replacement of multiple boiler
18 components can reasonably be described as a "significant" project while also being
19 consistent with the scope and scale of projects that the power industry had been routinely
20 performing without seeking NSR permits for decades. Mr. Birk's statements are not at all
21 inconsistent, when viewed in the two different contexts in which they were made.
22 **Q. How does Ms. Eubanks's rebuttal testimony address Ameren**
23 **Missouri's decision to replace multiple boiler components at the same time?**

1 A. Ms. Eubanks's rebuttal testimony quotes Judge Sippel's opinion in the
2 District Court case. As she describes on pages 33-34 of her rebuttal testimony, one reason
3 that Judge Sippel concluded the Rush Island Projects did not qualify as RMRR is because
4 Ameren Missouri's witnesses in the District Court case could not identify another project
5 in which the owner or operator of a coal-fired unit had replaced, during the same outage,
6 the same group of components that Ameren Missouri replaced in the Rush Island Projects.

7 **Q. If no other company had previously replaced this same group of boiler**
8 **components at the same time, does that mean that Ameren Missouri was**
9 **unreasonable in concluding that the Rush Island Projects were RMRR?**

10 A. No. There is nothing in the regulations (or other court cases) to suggest
11 that, to qualify as RMRR, a group of components to be replaced during an outage must be
12 identical to a group of components replaced at the same time by other power plants. The
13 Rush Island Projects involved component replacements that had commonly been performed
14 in various combinations on coal-fired units without NSR permits. Even if another owner or
15 operator had not replaced the same group of components (the economizer, reheater, lower
16 slopes, and air preheater) prior to 2007, that does not mean that the components replaced in
17 the Rush Island Projects were not commonly replaced within the industry.

18 Moreover, the fact that replacing multiple components at once increased the cost of
19 the Rush Island Projects did not make Ameren Missouri's RMRR determinations
20 unreasonable. As I stated in my direct testimony, even considering all of the Rush Island
21 Projects together, they were much less extensive than the "WEPCO type" changes that
22 EPA had said were unprecedented and the type of component replacement project that
23 would trigger NSR. It was reasonable for Ameren Missouri to rely on the RMRR

1 exemption and to conclude that the Company was not required to seek NSR permits for
2 either of the Rush Island Projects.

3 **D. Other Issues Raised by Ms. Eubanks**

4 **Q. Would a reasonable operator have sought a "no permit required" letter**
5 **from MDNR or EPA for the Rush Island Projects?**

6 A. No. As I stated in my direct testimony (pp. 46-49), seeking a formal
7 permitting applicability determination from MDNR (or any state or federal permitting
8 authority) is not required under federal regulations or the Missouri SIP and is rarely done
9 for several practical reasons. When a company believes that it understands the relevant
10 regulations (especially the Missouri SIP, as Ameren Missouri did here), there is no need to
11 consult with the permitting agency about specific situations. It also would have been
12 reasonable for Ameren Missouri to rely on "no permit required" letters issued by MDNR
13 for similar projects in Missouri. Ameren Missouri reasonably relied on the Missouri SIP
14 and MDNR's long-standing interpretation of its SIP-approved NSR regulations when
15 assessing the Rush Island Projects. Moreover, because MDNR was the relevant permitting
16 authority for the Rush Island Projects, any NSR applicability guidance would have been
17 sought from MDNR and not EPA.

18 As I mentioned in that same part of my direct testimony, it is clear from (1) Ms.
19 Moore's testimony in the enforcement case and (2) prior "no permit required" letters from
20 MDNR that, if Ameren Missouri had sought such a letter, MDNR would have responded
21 by saying that the Company did not need an NSR permit for either of the Rush Island
22 Projects, since neither would cause an increase in potential emissions.

1 **Q. Does Ms. Eubanks raise any other issues that might call into question**
2 **the prudence of Ameren Missouri's Rush Island permitting decisions?**
3 A. On pages 19-20 of her testimony, Ms. Eubanks mentions two other things.
4 First, she notes that, on a form titled "Project Risk Management Plan" that was part of a
5 project justification package given to the Ameren CEO for the Unit 1 Projects, the box for
6 "Legal/Environmental" was not checked.
7 Second, she mentions that Steve Whitworth, who led Ameren Services Company's
8 Environmental Services Department from 2007 until 2018, testified in the enforcement
9 case that, "to the best of his recollection, he became aware of the 2007 Project sometime
10 in the summer of 2006, approximately a year after the 2007 Project was approved by the
11 [CEO]."
12 **Q. What importance does Ms. Eubanks ascribe to the unchecked box on**
13 **the Project Risk Management Plan and this part of Mr. Whitworth's testimony?**
14 A. Ms. Eubanks views them as evidence that Ameren Missouri "did not assess
15 legal and environmental risks during the work approval process for the 2007 and 2010
16 Projects."
17 **Q. Do you agree with Ms. Eubanks on this point?**
18 A. No. The two things mentioned by Ms. Eubanks relate only to the 2007
19 Projects, but there is abundant evidence that, before both the 2007 Projects and the 2010
20 Projects, Ameren Missouri considered whether NSR permits were needed for the Projects
21 and determined that they did not. I discuss much of this evidence in my direct testimony
22 (pp. 30-46). The two things that Ms. Eubanks mentions on pages 19-20 of her testimony
23 do nothing to rebut this part of my testimony.

1 With respect the unchecked box, there is no requirement (or any other reason) that
2 NSR permitting decisions have to be made simultaneously with the budgeting of a project.
3 There is nothing unusual or unreasonable about an environmental compliance review
4 occurring between the initial approval of the budget for a project and the actual
5 commencement of the project.

6 In my direct testimony (pp. 40, 42, 45), I quote from a sworn declaration that Mr.
7 Whitworth submitted in the enforcement case, where he makes clear that, before Ameren
8 Missouri decided to move forward with either the 2007 or the 2010 Projects, regulatory
9 experts in the ESD determined that they did not require NSR permits. Mr. Whitworth's
10 direct testimony in this proceeding elaborates on the review that he and others in ESD
11 provided of the Rush Island Projects. There is no real dispute here: ESD conducted its
12 normal review of the Rush Island Projects before they occurred and made the required pre-
13 project permitting decisions. There is simply no basis for Ms. Eubanks to claim that
14 Ameren Missouri "did not assess legal and environmental risks" for the Rush Island
15 Projects.

16 **III. RESPONSE TO THE TESTIMONY OF KEITH MAJORS**

17 **Q. Does Keith Majors offer an opinion on whether Ameren Missouri acted**
18 **prudently regarding the permitting of the Rush Island Projects?**

19 A. Yes. Mr. Majors claims (on pages 11-12 of his rebuttal testimony) that
20 Ameren Missouri's actions or inactions were imprudent based on the decisions of the
21 District Court and Circuit Court in the NSR enforcement case.

22 **Q. What does Mr. Majors cite as the basis for his opinion?**

23 A. Just the courts' opinions. Nothing else.

1 **Q. Does Keith Majors offer any independent basis for his opinion that**
2 **Ameren Missouri's Rush Island Project permitting decisions were not prudent?**
3 A. No. Mr. Majors exclusively identifies the decisions of the District Court
4 and the Eighth Circuit for the bases of his opinion.
5 **Q. What state agency was responsible for the NSR permitting of the Rush**
6 **Island Projects?**
7 A. The Missouri Department of Natural Resources, or MDNR.
8 **Q. Does Keith Majors cite the interpretation or opinion of any Missouri**
9 **Department of Natural Resources representative in support of his opinion?**
10 A. No. In fact, in a recent deposition, Mr. Majors acknowledged that MDNR
11 was the relevant permitting authority and that Ameren Missouri's actions were consistent
12 with the MDNR's interpretation of Missouri's NSR requirements:

13 Q. You understand that in Missouri, . . . the permitting authority for
14 PSD permits is the Missouri Department of Natural Resources?
15 **A. That's my understanding, yes.**[5]
16 * * *
17 Q. Do you understand that Ameren Missouri's understanding of the law
18 was consistent with that of the Missouri Department of Natural
19 Resources?
20 **A. That's my understanding, yes.**[6]

21 As I discussed in my direct testimony (pp. 11-15), it is clear that Ameren Missouri's
22 interpretation of NSR requirements and its actions relating to the permitting of the Rush
23 Island Projects were consistent with the MDNR's interpretation and application of the
24 Missouri NSR program at the time of the Rush Island Projects.

[5] March 12, 2024 Deposition Testimony of Keith Major ("Majors Deposition) at 32.

[6] Majors Deposition at 47.

1 **Q. In his rebuttal testimony (p. 4), Mr. Majors testified that, through its**
2 **witnesses, Ameren Missouri seeks to re-litigate its loss at the Court of Appeals**
3 **concerning the Clean Air Act violations associated with the Rush Island Projects. Is**
4 **it the intent of your testimony to re-litigate the federal court proceeding over the Rush**
5 **Island Projects?**

6 A. No. As I stated in my direct testimony, it is now clear that Ameren Missouri
7 violated the Clean Air Act by failing to obtain NSR permits for the Rush Island Projects.
8 The District Court made this determination, and it was upheld by the Eighth Circuit Court
9 of Appeals.

10 As I mentioned earlier, however, the question before the Commission is *not*
11 whether Ameren Missouri violated the Clean Air Act. Rather, the Commission must decide
12 whether the officials from Ameren Missouri had a reasonable basis for believing that they
13 did not need NSR permits for the Rush Island Projects, based on the facts and
14 circumstances known to them in 2005-2010. Neither the District Court nor the Eighth
15 Circuit said that the Company did not have a reasonable basis for believing that it did not
16 need NSR permits for those Projects. For the reasons I mention in my direct testimony and
17 summarized earlier in this testimony, I feel strongly that, based on what Ameren Missouri
18 knew or could have known at the time, it was reasonable for the Company officials to
19 believe that they did not need NSR permits for the Rush Island Projects. I am confident
20 that no other company in the same situation would have sought NSR permits for projects
21 like the Rush Island Projects.

22 **Q. In his rebuttal testimony (p. 13), Mr. Majors claims that you want the**
23 **Commission "set aside" the federal court rulings and find that Ameren Missouri "was**

not to blame." Do you recommend that the Commission set aside the federal court rulings and find that Ameren Missouri was not to blame for the NSR violations addressed in the court rulings?

A. I certainly do not believe that the Commission can or should set aside or ignore the federal court decisions. This is a wholly separate proceeding from the EPA enforcement case, and the question of whether Ameren Missouri's decisions were reasonable or prudent was not before the courts in the federal court proceedings.

Additionally, I am not offering an opinion about "blame" for Ameren Missouri's permitting decisions for the Rush Island Projects. The permitting decisions were made and acted upon by Ameren Missouri – that is not in question. The crux of my testimony is that, for the reasons set forth in detail in my direct testimony and elsewhere in my rebuttal testimony, it was reasonable for Ameren Missouri to believe that it did not need NSR permits for the Rush Island Projects.

Q. Mr. Majors testified (p. 13) that "[i]t is not prudent or reasonable to make decisions that lead to violations of federal law." Do you agree with this part of Mr. Majors's testimony?

A. No. The fact that EPA's enforcement office and its attorneys at the U.S. Department of Justice disagreed with a company's interpretation of the NSR program after-the-fact does not automatically make the company's decision unreasonable or imprudent – even if the courts ultimately agreed with EPA. A company's decision can be incorrect or misapply the law without being unreasonable or imprudent. What is unreasonable is Mr. Majors's sweeping position that any decision that leads to a violation of the Clean Air Act must not have been prudent or reasonable.

1 In his recent deposition, Mr. Majors acknowledges that the court opinions on which
2 his rebuttal testimony exclusively relies are not based on the prudence of Ameren
3 Missouri's permitting decisions:

4 Q. You understand that the District Court here did not evaluate the
5 prudence of Ameren Missouri's decision making around these
6 permits, correct?

7 **A. Right. Prudence isn't listed in any of the documents.**

8 Q. And you never saw anything in any of the documents where a Court
9 found Ameren Missouri's legal position to be unreasonable?

10 **A. I mean, I don't think the Court said that. Not that I can recall.**

11 Q. And you don't recall anything that a Court found anywhere that said
12 Ameren Missouri's understanding of the law was not reasonable?

13 A. **No.**[7]

14 Ameren Missouri made permitting decisions for the Rush Island Projects that were
15 ultimately found to have violated the Clean Air Act, but Ameren Missouri's interpretation
16 of the Missouri NSR requirements, and the permitting decisions that Ameren Missouri
17 made based on that interpretation, were reasonable based on what they knew or could have
18 known at the time.

19 **Q. In his rebuttal testimony (p. 15), Mr. Majors testifies that the district**
20 **court's decision should not be viewed as hindsight, based on the court's statements**
21 **that Ameren Missouri "should have expected" a significant net emissions increase**
22 **from the Rush Island Projects. Does the language in the court's decision support Mr.**
23 **Majors's opinion that Ameren Missouri's actions were imprudent?**

24 A. No. Both EPA's and the District Court's review of Ameren Missouri's
25 permitting decisions for the Rush Island Projects were unquestionably after-the-fact

[7] Majors Deposition at 47.

reviews of both the projects and the Company's interpretation of permitting requirements. EPA's enforcement arm using a different interpretation of the Missouri SIP, applying a different and more narrow interpretation of RMRR, and relying on a different method for evaluating whether a project caused an emissions increase (the Koppe-Sahu method) do not make Ameren Missouri's decisions on those same points unreasonable or imprudent at the time they were made.

As I testified above, the District Court ultimately decided that the Koppe-Sahu method, the EPA enforcement office's suggested method for determining if a project causes an emissions increase, should be used in the enforcement case over the Rush Island Projects. Applying that method led to the predictable result that the replacement of components that had experienced downtime caused an emissions increase. EPA's use of the Koppe-Sahu method is vigorously disputed by the regulated community, and federal courts have not uniformly upheld EPA's reliance on the Koppe-Sahu method in enforcement cases. The District Court's use of a different method to determine if an emissions increase resulted from the Rush Island Projects as part of its after-the-fact evaluation of the projects does not establish that Ameren Missouri was unreasonable or imprudent when it made its own NSR applicability determinations prior to proceeding with the Rush Island Projects.

IV. RESPONSE TO THE TESTIMONY OF JORDAN SEAVER

Q. Does Jordan Seaver offer an opinion on whether Ameren Missouri acted prudently regarding the permitting of the Rush Island Projects?

1 A. Yes. In his rebuttal testimony (pp. 1, 6), Mr. Seaver claims that the
2 Company acted imprudently when it decided to do the Rush Island Project without
3 obtaining NSR permits.

4 **Q. What does Mr. Seaver cite as the basis for his opinion?**

5 A. He relies primarily on the WEPCO case and claims that the Rush Island
6 Projects were "similar" to the project at issue in that case, for which EPA and the courts
7 determined that an NSR permit was necessary (p. 3). He also cites "the increasing national
8 negativity towards coal-generating facilities," the "complicated" and "uncertain" nature of
9 the NSR program, and his view that "the process of obtaining a NSR permit for the [Rush
10 Island Projects] would have been relatively cheap and short compared to what happened"
11 as a result of the Company's decision not to obtain NSR permits for the Projects. (p. 3-5).

12 **Q. Do you believe that the WEPCO case is relevant to the question of**
13 **whether Ameren Missouri acted prudently when it determined that it did not need**
14 **NSR permits for the Rush Island Projects?**

15 A. Yes, it is highly relevant. As I discussed in my direct testimony (pp. 17-21),
16 after the case was decided, the utility industry expressed concern that the WEPCO decision
17 might require power plants to obtain NSR permits for many component-replacement
18 projects that they viewed as routine and necessary to maintain the reliability of coal-fired
19 power plants. In response, members of Congress asked the General Accounting Office
20 ("GAO"), now called the Government Accountability Office, to study the issues. The GAO
21 did a study which found that the WEPCO project was highly unusual and that most power
22 plant replacement and repair projects would be less extensive. This study was based in part
23 on interviews with EPA staff. The Chairman of the congressional House Energy and

1 Commerce Committee (which was responsible for overseeing EPA) also sent a letter to
2 EPA asking the agency to explain the scope of the WEPCO applicability determination and
3 its implications for whether NSR permits would be required for maintenance and
4 component replacement projects at other power plants.

5 In his response to this letter, the then-EPA Assistant Administrator for Air and
6 Radiation, the senior EPA official in charge of implementing the CAA (and one of my
7 predecessors at EPA), reassured the Chairman and other member of Congress that the
8 WEPCO decision would not have a significant impact on other power plants. His letter
9 restated the views of EPA staff as reported in the GAO Report: "As indicated in the GAO
10 report, it is expected that most utility projects will not be similar to the WEPCO situation."
11 He went on to state that "the [WEPCO] ruling is not expected to significantly affect power
12 plant life extension projects" and that "EPA's WEPCO decision only applies to utilities
13 proposing 'WEPCO type' changes." Letter dated June 19, 1991, from EPA Assistant
14 Administrator William Rosenberg to Chairman John Dingell, attached as to my direct
15 testimony as Schedule JRH-D4. Since that time, officials in the power industry have
16 believed that, unless a component replacement project includes "WEPCO-type changes,"
17 they are exempt from NSR as "routine maintenance, repair, and replacement" (RMRR).

18 **Q. Did Mr. Seaver offer an opinion as to whether the Rush Island Projects**
19 **were similar to the WEPCO project?**

20 A. Yes. In his rebuttal testimony, he is asked "Are the circumstances
21 surrounding the Rush Island maintenance and boiler upgrades similar to those related in
22 the WEPCO case." He responds "Yes. I believe so" (p. 3).

1 **Q. In his rebuttal testimony, does Mr. Seaver offer any comparisons**
2 **between the 2007 and 2010 Rush Island Projects with the WEPCO Project?**
3 A. Only in a very general way. He simply says that "Both of the overhauls
4 allowed them to continue operating, but also increased the actual generating capacity that
5 was lost over time due to wear and tear" (p. 3).
6 **Q. Did he get a chance to provide further details in his deposition?**
7 A. Yes, but he acknowledged repeatedly that, prior to the deposition, he did
8 not know many details about the WEPCO project.[8] *Id.* at 33-72.
9 **Q. In his deposition, did he acknowledge that there might be important**
10 **differences between the WEPCO project and either of the Rush Island Projects?**
11 A. Yes, he ultimately acknowledged that there were many important
12 differences.
13 **Q. What differences does he acknowledge that you believe are relevant in**
14 **determining whether the Rush Island Projects amounted to "WEPCO-type changes"**
15 **that would require an NSR permit?**
16 A. Here is a summary of the key differences:
17 • WEPCO involved a four-year outage at a 400-megawatt power plant, during which
18 each of the five 80-megawatt boilers would be down for approximately nine months.
19 • Each of the Rush Island Projects involved a three-month outage at a 600 megawatt
20 boiler.[9]
21 **----------**
22 • In WEPCO, the company had to replace the rear steam drum on each unit, which
23 was by far the most costly component replacement. The company could not identify
24 any other utility boiler in the country on which such a replacement had ever

[8] March 14, 2024 Deposition Testimony of Jordan Seaver at 33-72

[9] *Id*. at 67- 68, 100.

occurred. After investigation, neither EPA nor GAO could find a single utility boiler in the country where this component had been replaced.[10]

- Power plants throughout the country had replaced the components that Ameren Missouri replaced at Rush Island numerous times, and none of them had ever obtained NSR permits for these projects.

- In WEPCO, for the three years prior to when the project was proposed, the overall capacity of the plant had been degraded by 40%, and one of the units was completely shut down. None of the units could be operated at their maximum design capacity, and the only way to restore the capacity was through the replacement of the rear steam drums and many other components.
- Due to ash plugging, the capacity of the Rush Island units was degraded by 5% - 8%, but the units were still capable of operating at their maximum design capacity. Ameren could have restored the 5 – 8% capacity loss by more frequent maintenance to eliminate the plugging, but the component replacement was a more cost-effective solution.[11]

- In its proposal, WEPCO acknowledged that the Project was designed to allow the units to operate beyond their planned retirement dates.
- The planned retirement date for the Rush Island units was 2042.[12]

- In terms of cost-per-kilowatt, the cost of the WEPCO project was many times higher than the total cost of both Rush Island Projects.[13]

Q. Do you believe that Ameren reasonably determined, when it was planning the Rush Island Projects, that they were not "WEPCO-type projects"?

A. Yes, I don't think that anyone who is familiar with utility boilers would believe that the WEPCO Project and the Rush Island Projects were similar in any meaningful way.

Q. Does the fact that NSR is complicated or "the increasing national negativity towards coal-generating facilities" have any bearing on whether Ameren

[10] *Id.* at 55-62, 68-69.

[11] *Id.* at 41-46, 85-92 (reduction of 30-50 megawatts at 600 megawatt unit is 5-8% of capacity).

[12] *Id.* at 65-66, 95-96.

[13] *Id.* at 102-104.

1 **Missouri acted reasonably when it determined that it did not need NSR permits for**
2 **the Rush Island Projects.**

3 A. No. Electric utilities have experts that deal with complicated regulatory
4 issues all the time. They must make reasonable and prudent decisions about these issues
5 based on what they know about the regulations and the facts and circumstances as they
6 exist at the time and are cognizable under those regulations.

7 **Q. In his rebuttal testimony (p. 5), Mr. Seaver also offers his opinion that**
8 **"the process of obtaining a NSR permit for the [Rush Island Projects] would have**
9 **been relatively cheap and short compared to what happened as a result of the**
10 **Company deciding to proceed with the projects instead of seeking a NSR permits for**
11 **the Projects." Is this relevant to the question before the Commission?**

12 A. No. In hindsight, it is easy to see that the many years of litigation were
13 costly and time consuming, but the Commission must determine whether Ameren Missouri
14 acted reasonably based on what it knew or should have known at the time. In his
15 deposition, Ms. Seaver also acknowledges that he does not have any experience or
16 expertise with the NSR program or NSR permitting.[14] He is not in a position to know how
17 costly or time-consuming it would have been for Ameren Missouri to obtain an NSR permit
18 for the Rush Island Projects.

19 **Q. Does this conclude your surrebuttal testimony?**

20 A. Yes, it does.

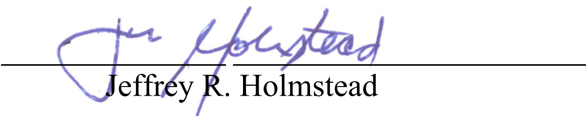
21

22

[14] *Id.* at 11.

1 **BEFORE THE PUBLIC SERVICE COMMISSION**
2 **OF THE STATE OF MISSOURI**
3

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

4
5 **AFFIDAVIT OF JEFFREY R. HOLMSTEAD**
6
7 **WASHINGTON, D.C.**
8
9 Jeffrey R. Holmstead, being first duly sworn states:
10
11 My name is Jeffrey R. Holmstead, and on my oath declare that I am of sound mind
12 and lawful age; that I have prepared the foregoing *Surrebuttal Testimony*; and further,
13 under the penalty of perjury, that the same is true and correct to the best of my knowledge
14 and belief.
15
16 
17 Jeffrey R. Holmstead
18
19
20 Sworn to me this 22nd day of March 2024.
21