Exhibit No. 13

Ameren – Exhibit 13
Moor
Surrebuttal
File No. EF-2024-0021

Exhibit No.:
Issue(s): Reasonableness of Rush Island Permitting Decisions
Witness: Karl R. Moor
Type of Exhibit: Surrebuttal Testimony
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MISSOURI PUBLIC SERVICE COMMISSION

FILE NO. EF-2024-0021

SURREBUTTAL TESTIMONY

OF

KARL R. MOOR

ON

BEHALF OF

UNION ELECTRIC COMPANY

D/B/A AMEREN MISSOURI

St. Louis, Missouri
March 22, 2024

TABLE OF CONTENTS

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KARL R. MOOR

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I. INTRODUCTION

Q. Please state your name and where you live.

A. Karl R. Moor. I live in Washington, DC.

Q. Are you the same Karl R. Moor who previously provided testimony in this case?

A. Yes.

Q. What is the purpose of your surrebuttal testimony?

A. The purpose of my surrebuttal testimony is to respond to the Rebuttal Testimony of Staff witnesses Claire M. Eubanks and Keith Majors and Office of Public Counsel ("OPC") witness Jordan Seaver on the issue of the prudence of Ameren Missouri's permitting decisions for the Rush Island Projects.[1]

II. SUMMARY OF RESPONSE TO STAFF AND OPC WITNESSES

Q. Can you summarize your responses to these witnesses?

A. Ameren Missouri acted in good faith and strove to comply with the law.[2] Nobody disputes this. Despite what she wrote in her Rebuttal Testimony, Staff witness Claire Eubanks acknowledged she cannot dispute Ameren Missouri's good faith efforts at compliance:

Q. You noted in your rebuttal testimony

[1] Capitalized terms used herein will have the same meaning as set forth in my Direct Testimony in this File.
[2] Birk Direct, p. 2, ll. 18-22.

the testimony of Mark Birk where he said it was the Company's intention to comply with the law. Do you recall that testimony by Mr. Birk?

A. I do recall that testimony.

Q. Okay. Do you dispute that testimony that it was the intention of the Company to comply with the law?

A. **I don't have any facts to support one way or the other whether that was their intention or not.** I understand that that's his testimony.

Q. Right. So as you sit here today you're not disputing his testimony that the Company intended to comply with the law?

A. **I'm not disputing that.**[3]

Ameren Missouri acknowledges that it did not get permits from MDNR[4] for the Rush Island Projects, and that the courts interpreted the law contrary to Ameren Missouri's understanding of it at the time and held the Company liable.[5] As a result of the orders entered in that litigation, the Company has decided to retire the plant.

The Commission now faces a different issue, left unresolved by the courts: <u>why</u> didn't Ameren Missouri get the permits from MDNR that the courts found it should have obtained and was that reasoning reasonable and prudent? Despite understanding the importance of this question, Staff has not attempted to address it:

Q. …One of the issues that are in contention here in this proceeding is why Ameren Missouri did not get the required Clean

[3] Deposition of Claire M. Eubanks, File No. EF-2024-0021, p. 17, l. 1-15 (Mar. 11, 2024) (emphasis added). Unless otherwise stated, all later references to Eubanks' Deposition are to this deposition.
[4] It is undisputed that in Missouri the NSR permits that the District Court found were required—and that it ordered Ameren Missouri to get as part of its remedy decision—are issued by MDNR under its authority to administer the approved State Implementation Plan ("SIP"). Deposition of Keith Majors, File No. EF-2024-001, p. 32, ll. 16-21 (Mar. 12, 2024) ("Q. . . You understand that in Missouri, [for]sources in Missouri that the permitting authority for PSD permits is the Missouri Department of Natural Resources? A. That's my understanding, yes.").
[5] Birk Direct, p. 5, ll. 15-17.

Air Act permits, do you understand that?

A. I think that is an issue that has been brought forth in this case, yes.

Q. And have you drawn any conclusions as to why Ameren Missouri did not get the required Clean Air Act permits?

A. I don't believe that I have drawn that conclusion, a conclusion on that, no.[6]

To answer the question the courts left unresolved and that Staff leaves unaddressed, the Commission needs to look at the actual decisions that Ameren Missouri made on whether permitting requirements applied, and the context in which those decisions occurred.

Ameren Missouri's Environmental Services Department had the responsibility to screen upcoming projects for NSR permitting requirements, as the District Court found. Schedule KM-r2 at 115, ¶ 385. Company witnesses, including the former head of ESD Steven Whitworth, have testified that the projects were reviewed by ESD following the normal process, and determined not to require NSR permits under the Missouri SIP. That is why the Company did not seek NSR permits from MDNR.

Q. But the District Court found them liable anyway?

A. Yes. Years after ESD made its permitting decisions, the District Court looked at the same Rush Island Projects and reached the conclusion that the Rush Island Projects did trigger NSR. The reason why the Company and the District Court reviewed the same projects and reached different conclusions is obvious from the record of that litigation: Ameren Missouri used different tests to evaluate the Rush Island Projects than

[6] Eubanks Deposition, supra, p. 15, l. 23 to p. 16, l. 8.

the District Court applied to the projects years later. There is no dispute about that fact, as Ms. Eubanks confirmed:

> Q. As you sit here today, is it your understanding that that approach that Ameren Missouri had was different from the determinations of law that Judge Sippel made for the legal standards applicable to permitting?
>
> A. The testimony Ameren Missouri has provided in this case as to what their understanding of the law was at the time of the projects is different than what the judge found, yes.[7]

Thus, to determine whether Ameren Missouri made a reasonable decision in concluding that the Rush Island Projects did not trigger permitting requirements, the Commission needs to ask whether Ameren Missouri's understanding of those permitting requirements at that time was reasonable. Staff agrees:

> Q. And to determine whether the Environmental Services Department made a reasonable Decision whether permitting was required or not for a project in Missouri, you need to understand whether their legal understanding of the permitting requirement was a reasonable understanding, correct?
>
> A. That is one of the things—one of the elements that you might want to know, yes.[8]

Mr. Holmstead and I have explained in our Direct Testimonies why Ameren Missouri's understanding of the permitting requirements was reasonable at the time ESD made its permitting decisions on the Rush Island Projects. We elaborate on this now in our Surrebuttal Testimonies. And our Direct Testimonies are entirely unrebutted: Staff does not offer any opinions on this critical subject. For example, Ms. Eubanks, an

[7] Eubanks Deposition, supra, p. 21, ll. 10-18.
[8] Id. at p. 19, ll. 11-18.

environmental engineer, disclaimed any intent of opining on whether Ameren Missouri's understanding of the law, when it made its permitting decisions, was a reasonable one:

> Q. Are your offering any opinions in this matter as to what any Ameren Missouri employee thought or why their understandings of the legal requirements were unreasonable?
>
> A. I'm not offering a legal opinion, if that was the question. Maybe restate it again.
>
> Q. No, that was not my question. My question was whether you are offering any opinion on whether the understanding of Ameren Missouri of the legal requirements was an unreasonable understanding?
>
> A. I certainly discuss in my testimony the risks associated with – let's see. So your question was specifically the individual's understandings of –
>
> Q. The legal requirements?
>
> A. The legal requirements. I don't believe that I'm discussing that in my testimony.[9]

Nor did Ms. Eubanks attempt to determine whether Ameren Missouri's understanding of the law was the majority or the minority view at the time that the relevant permitting decisions were made.

> Q. Did you evaluate the legal landscape that existed at the time in the context that these permitting decisions were made about the legal standards for routine maintenance, repair and replacement?
>
> A. I'm not an attorney.
>
> Q. That wasn't my question. My question was whether you attempted to evaluate the legal landscape –

[9] Id. at p. 16, ll.9-25.

A. No.

Q. -- at the time? Did you look at other courts to decide what was the majority rule on the legal standards for New Source Review?

A. No.

Q. So you're not saying whether the decisions by Ameren were consistent with or inconsistent with the majority view of New Source Review that existed at the time?

A. I am not making an opinion on that.[10]

Q. Can you summarize why you believe Ameren Missouri's understanding of the legal requirements was reasonable?

A. Yes. ESD performed the requisite due diligence to gain an understanding of the legal requirements. It considered the appropriate sources and appropriately relied upon them. On the basis of these sources, it developed an understanding of the legal requirements that was consistent with the text of the law, consistent with the regulators' interpretation and application of the law, consistent with the understanding of industry in Missouri and across the county, consistent with the legal advice provided by national experts, and consistent with how most courts were interpreting the law in this time period (2005-2010). Having worked in the utility industry at the relevant time, in a position of responsibility for compliance with NSR, I can state without hesitation that Ameren Missouri's understanding of the legal requirements at the time of the Rush Island Projects was reasonable, irrespective of the fact that the courts later determined that the law was different than that understanding at the time.

[10] Id. at p. 171, ll. 1-19.

Q. Can you summarize why you believe Ameren Missouri's application of those legal requirements to the Rush Island Projects was reasonable?

A. Ameren Missouri's review of the Rush Island Projects followed its normal course, and complied with all elements of the law as it was understood at the time of the projects. Specifically, no additional calculations, analyses or paperwork was required to determine if NSR permits were required.

Q. Can you summarize why it was reasonable to proceed with the projects on the basis of ESD's pre-project permitting decisions?

A. As I described in my Direct Testimony, I spent several years (including the years relevant here, 2005-2010), working in the in-house legal department for a large electric utility where I dealt extensively with NSR compliance.[11] The decisions that ESD made are just like the decisions made by the electric utilities I have worked for and been associated with over the decades. That no utility in Missouri (or anywhere else in the country) sought NSR permits for such projects confirms my opinion and puts the reasonableness of Ameren Missouri's permitting decisions beyond question.

The NSR program does not require pre-approval of projects by the regulators. Once a decision is made, the general practice in the industry is for the utility to proceed with the project without seeking an applicability determination from the regulators—particularly where, as here the position of state permitting authority on the legal standards is so clear and well-known.

Q. So why does Staff claim that the permitting decisions were imprudent?

[11] Moor Direct, p. 2, l. 20 to p. 3, l. 4.

A. Actually, Staff's environmental engineer, Claire Eubanks, does not claim that Ameren Missouri's permitting decisions were unreasonable or imprudent. Nor does she claim that the Company should have obtained NSR permits from MDNR before undertaking the Rush Island Projects. Instead, she takes issue with the lack of documentation around ESD's permitting decisions:

> Q. . . . The question of whether a decision is well documented is different than the question of whether the decision itself was a good or a bad decision; isn't that fair?
>
> A. Yes, I agree with that. I mean, that's why I'm struggling to answer your question directly is because there's not a lot of documentation about what Environmental Services did or didn't do in specific relation to the 2007 and 2010 projects to refer back to.
>
> Q. So you haven't necessarily concluded that the decision not to get the PSD permits was an imprudent decision but – and you can use a different word if you don't like this word – you're bothered by the fact that there lacks certain documentation around the decision that you think should exist?
>
> THE WITNESS: Can you read back the question?
>
> (WHEREIN, the requested portion of the record was read by the court reporter.)
>
> THE WITNESS: Yes.[12]

Although Staff's environmental engineer does not argue Ameren Missouri made a bad permitting decision, another one of its witnesses (Mr. Majors) does. But his rebuttal testimony took an unsupportable absolutist position that "[i]t is not prudent or reasonable

[12] Eubanks Deposition, supra, p. 194, l. 17 to p. 195, l. 12.

to make decisions that lead to violations of federal law,"[13] he quickly backed away from that in his deposition:

> Q. Okay. Is it your position that if a company is found liable for violating any federal law that its actions will always be imprudent?
>
> A. No, I think that's somewhat of an absolute statement. I mean, I couldn't comment on every violation of federal law in the possibilities of violations of federal law.
>
> Q. Well, let's narrow it down. Is it your position that if a company is found liable for violating the federal Clean Air Act, then its actions will always be imprudent?
>
> A. I don't think you can make an absolute statement on every case like that.
>
> Q. Let's narrow it down further. Is it your position that if a company is found liable for violating the federal PSD, that is Prevention of Significant Deterioration program under the Clean air Act, that its actions will always be imprudent?
>
> A. Well, again, your qualifying that statement with an always. I don't think I'm addressing every possible violation of the Clean Air Act and PSD requirements.
>
> …
>
> Q. Okay. And what are some of the circumstances in your mind in which a company violates the federal PSD program but still may have acted prudently?
>
> A. I mean, no clear examples come to mind right now. I mean, you'd have to take the facts and circumstances of each violation and the outcome of the litigation. You would have to examine those when evaluating whether or not the company made reasonable decisions.
>
> Q. The outcome of the litigation is something that arises after the fact, correct?
>
> A. Right.

[13] Majors Rebuttal, p. 13, ll. 22-23.

Q. Right. So is it possible in your mind for a utility to be found in violation of the federal PSD program and still to have acted prudently at the time it made its permitting decisions?

A. Sure.

Q. And in order to make the determination whether the company in making its permitting decisions acted prudently, you have to focus on the facts and circumstances that were known or knowable to the utility at the time, correct?

A. Right.

…

Q. Prudence would not turn on the question of whether the company had subsequently been found in violation of the federal PSD program, would it?

A. Not in isolation, no.

. . .

Q. … How the decision turned out down the road is not part of what the company knew or should have known at the time, correct?

A. Right, right. No one would have – if I understand your question correctly, no one would have a foresight or crystal ball to see what the actual outcome would be.[14]

Over the years—particularly in the 2005-2010 period at issue—EPA lost more often than it won in the NSR cases it brought. Given that well-known fact, Ameren Missouri would not reasonably expect that if EPA came after the Company, the Company would come out on the wrong side of such a fight.

Q. So, if not for the after-the-fact result of the court case against Ameren Missouri, then on what basis does Mr. Majors assert that the Company acted imprudently in making the relevant permitting decisions?

[14] Majors Deposition, supra,. p. 7, l. 8 to p. 11, l. 11.

A. At bottom, Mr. Majors rests his charge on his reading of three decisions in Ameren Missouri's NSR case—principally the District Court's 2017 decision on liability.[15] Majors has no other evidence to offer, as he confirmed in response to questioning about the District Court 2017 decision on liability (Majors Schedule KM-r2, marked as Eubanks Deposition Exhibit 11):

> Q. Are you basing your claim of fault or imprudence in this case on the District Court's findings in Exhibit 11?
>
> A. I think I also reference the [remedy] phase ruling, which I don't have with me today.
>
> Q. Outside of those two rulings, are you prepared to offer to the Commission any evidence of fault or imprudence by Ameren Missouri in its permitting decisions?
>
> A. Other than the fact that it was upheld by the –
>
> Q. The Eighth Circuit Court of Appeals?
>
> A. You got it.
>
> Q. Outside of those Court opinions, are you prepared to offer to the Commission any evidence that Ameren Missouri in its permitting decisions was imprudent?
>
> A. No.[16]
>
> …
>
> Q. If the Commission agrees with Ameren Missouri that the issue of prudence was not resolved by the Courts, do you have any evidence to offer that suggests imprudence by Ameren Missouri in its permitting decisions?
>
> A. No.[17]

[15] Majors Rebuttal, p. 4.
[16] Majors Deposition, supra, p. 30, l. 20 to p. 31, l. 12.
[17] Majors Deposition, supra, p. 48, ll. 9-14.

The problem that Mr. Majors has is that the District Court's decisions did not (and could not) establish that Ameren Missouri acted imprudently. And no finding made by the District Court, or evidence submitted in that litigation, can be plucked out of the court record and relied upon here to assert that Ameren Missouri's permitting decisions were unreasonable or imprudent.

Q. Does Mr. Seaver make a similar claim of imprudence?

A. No. Mr. Seaver does not rely on the NSR litigation at all. Instead, he claims that a decision EPA made in 1988 concerning the Wisconsin Electric Company's Port Washington plant, and other statements and actions by EPA, suggest that Ameren Missouri made a bad decision and it would have been better for Ameren Missouri to just go ahead and seek NSR permits. I understand that other witnesses are addressing whether it would have been better to seek NSR permits for the Rush Island Projects, and I do not address that topic here. But with respect to Mr. Seaver's claim that WEPCo and other statements by EPA mean Ameren Missouri made an unreasonable decision, the facts—which Mr. Seaver did not bother to investigate—do not bear that out.

Q. How is the remainder of your Surrebuttal Testimony organized?

A. First, I respond in greater detail to Staff's claims of imprudence, explaining why they rest on legal and logical errors, unsupported inferences, and some basic misreading of the record. Second, I respond to OPC's witness Jordan Seaver, concerning the history of EPA regulations of the electric utility sector—something of which I have deep personal knowledge going back decades—and explain why Mr. Seaver's opinion are uninformed, misleading, and lacking in any credibility. Finally, I look at the record as a whole, and point out why the undisputed facts lead inexorably to

the conclusion that Ameren Missouri acted reasonably (and therefore prudently) in making its permitting and compliance decisions.

III. RESPONSE TO STAFF'S CLAIM OF IMPRUDENCE

Q. Staff relies on three opinions from the NSR litigation for the discussion of imprudence. Do any of these opinions—individually or collectively—demonstrate imprudence?

A. No. As Mr. Majors agrees, it cannot be that Ameren Missouri's loss in the case means its permitting decisions were imprudent. So, the use of the three court opinions raises three questions for the Commission. First, did the courts purport to resolve the issue of prudence? Second, should the Commission read the decisions as having silently done so? And third, does any evidence or findings from that litigation establish imprudence?

Q. Moving to the first question: Did the courts purport to resolve the issue of prudence?

A. No. Neither "prudent" nor "prudence" (or the converse thereof)—appears anywhere in the opinions cited by Staff, as Majors agrees:

> Q. You understand that the District Court here did not evaluate the prudence of Ameren Missouri's decision making around these permits, correct?
>
> A. Right. Prudence isn't listed in any of the documents.[18]

That is not surprising, because the courts were applying a very different test to establish liability than does this Commission in evaluating the prudence or reasonableness of a decision. Page 133-134 of the District Court's liability opinion (Majors Schedule KM-r2) lays out the elements of proof for the CAA violation. Liability applies where: (1)

[18] Majors Deposition, supra, p. 47, ll. 6-10.

Ameren is a person under the applicable law and the owner and operator of the Rush Island facility; (2) Rush Island Units 1 and 2 are each a "major emitting facility," a "major stationary source," and an "electric steam generating unit" under the applicable PSD and Title V provisions; (3) EPA provided sufficient pre-filing notice of the violations to Ameren and the State of Missouri and provided notice of the filing of this case to the State; (4) at the time of the projects, Rush Island was in an area designated as attainment for SO2. All of these elements were undisputed. The last element of proof—the only disputed element and therefore the focus of the liability decision—was "whether the projects were major modifications under the law." And a "major modification" as defined in the PSD rules is a "physical change or change in the method of operation" that "would result" in a "significant net emissions increase" (here, 40 tons per year of SO^2).[19] Prudence, on the other hand, requires an examination by the Commission of what a reasonable person would do given all the facts and circumstances known at the time that the decisions were made—set forth on page 9 of Mr. Majors' rebuttal testimony. These are plainly different tests, as Mr. Majors acknowledges:

> Q. So what the Cort is doing here is setting out what are the elements of proof for the Clean Air Act violation. Do you understand that?
>
> A. Yes.

[19] Under the Missouri SIP as both Ameren Missouri read it at the time of the Rush Island Projects, one would first have to have a "modification" in the form of an increase in potential emissions before getting to the question of whether there was a "major modification" under the NSR rules. Given that there was no increase in potential emissions at Rush Island, and based on the Company's and the Missouri regulator's understanding of the Missouri SIP at the time, there would not have been a was not "modification" to begin with, meaning the question of "major modification" under the EPA's PSD rules did not matter. In 2016, however, the District Court had rejected this settled understanding of the way the Missouri SIP applied and held that a "major modification" could occur and require permitting even in the absence of a "modification." The liability trial held by the District Court, after making that ruling in 2016, therefore focused only on the question of whether the Rush Island Projects met the definition of "major modification" set forth in the federal NSR rules found at 40 C.F.R. § 52.21.

Q. And you understand that that is a different test than the prudence test that you laid out on page 9 of your rebuttal testimony?

A. I don't know that those are two completely separate tests.

Q. Well, let's go back to your testimony page 9.

A. Okay.

Q. And you've got both page 9 of your testimony and the elements of proof as laid out by the District Court on page 134.

A. Uh-huh.

Q. And you recognize that there are differences between the prudence test that you laid out and the elements of proof for the Clean Air Act violation that the District Court laid out. You recognize there are differences there, correct?

A. I think there's differences, but it's not an apples-to-apples comparison but sure.

Q. It's not the same test, sir, is it?

A. As it's written, no.[20]

As the elements of proof laid out by the District Court make plain, the CAA is a strict liability statute. Liability does not turn on negligence or whether a person made reasonable efforts to comply with the CAA, as I explained in my Direct Testimony.[21] Therefore, there was no evidence presented by EPA on any standard of care or whether Ameren Missouri made reasonable efforts at compliance with NSR requirements. *Id.* The opinions in the NSR case cited by Staff do not, therefore, purport to resolve the question of prudence raised in this proceeding.

Q. If the court opinions did not resolve the issue of prudence explicitly, do they do so silently or by implication?

[20] Majors Deposition, supra, p. 14, l. 23 to p. 15, l. 21.
[21] Moor Direct, p. 64, l. 10 to p. 65, l. 2.

A. No. By their own terms, the District Court opinions could not possibly have done so, and the Commission cannot find that they did so without twisting the prudence standard beyond all recognition. The District Court's liability decision rested on case law, including that Court's own interpretations of both the Missouri SIP and the federal PSD regulations, issued *after* Ameren Missouri made its permitting decisions and that therefore was obviously not available at the time. What is more, the District Court's liability decision (the one Mr. Majors says is most important for evaluating prudence) explicitly relied upon analyses and data developed by EPA after the permitting decisions at issue. The Court did consider some information that had been available when the permitting decisions were made. But the Court rested its finding that the projects would have been expected to produce a significant net emissions increase (i.e., over 40 tons per year of SO2) and therefore met the definition of "major modification" (the only disputed element of the claim for relief on trial) on evidence that post-dated the permitting decisions by ESD.

Q. Okay, and so the three things that the Court said establish that there was a significant net SO2 increase of more than 40 tons that was caused by the projects are the number one, the Koppe-Sahu results, number two, the Dr. Hausman analyses and number three, the actual post-project data, right?

A. Right.

Q. All three of those postdate the permitting decisions by Ameren Missouri for those projects, correct?

A. Yes.

Q. It's clear when you read that sentence and when you look at the Order as a whole that the Court is not limiting its decision on whether there's liability to what the company had or knew at the time it made its permitting decisions, correct?

A. I think it's using additional information that was prepared after the decisions were made and analysis, but it includes data that was pre and post-project.[22]

Basing a finding of imprudence on the District Court decisions (or the appellate decision affirming them) would impermissibly bootstrap hindsight into a prudence evaluation. The heavy reliance placed by the District Court's liability decision on post-decisional data and analyses, not to mention post-decisional case law and court decisions, means two things fatal to Mr. Majors' claim of imprudence. First, it underscores (as noted above) that the District Court was not doing a prudence analysis. Second, and more fundamentally, the reliance that the District Court placed on post-decisional data, analyses and caselaw means that the Commission cannot translate that decision's finding of liability into a finding of imprudence without also disregarding the established prudence standard that excludes considerations of hindsight.

Q. Are there other aspects of the court opinions that lead you to conclude that they do not implicitly find Ameren Missouri to have been imprudent?

A. Yes. First, there is no finding (or suggestion) that the Company acted in bad faith in its permitting decisions for the Rush Island Projects or in its compliance program in general. Nor is there any suggestion that the Company was not attuned to the necessity of evaluating the Rush Island Projects their permitting implications. Mr. Birk testified that the Company intended to comply with the law.[23] Mr. Whitworth testified that the Company believed it had complied with the law. [24] Staff does not contest either of these points, as I note above in my quotation of Ms. Eubanks in her deposition.

[22] Majors Deposition, supra, p. 28, l. 9 to p. 29, l. 1.
[23] Birk Direct, p. 2, ll. 19-22.
[24] Whitworth Direct, pp. 27-28.

Unfortunately, Ameren Missouri in its good faith compliance efforts did not interpret the law the same way the District Court did years after the Rush Island Projects. The District Court noted that Ameren Missouri's compliance process employed the wrong legal standards, and this is what drove the Company's permitting decisions. Majors Schedule KM-r2 at 179 ("the employees charged with assessing applicability started with an incorrect understanding of the law"). The District Court did not attempt to make any findings on the question of whether ESD's understanding of the law, which ESD employed in its review of the Rush Island Projects, was a reasonable one. And Staff does not read the Court's opinions to have done so:

> Q. And you never saw anything in any of the documents where a Court found Ameren Missouri's legal position to be unreasonable?
>
> A. I mean, I don't think the Court said that. Not that I recall.
>
> Q. And you don't recall anything that a Court found anywhere that said Ameren Missouri's understanding of the law was not reasonable?
>
> A. No.[25]

Q. Is that the only reason you find the court opinions do not implicitly find Ameren Missouri to have been imprudent?

A. No. The way the District Court managed the litigation demonstrates that the Company's legal position on the standard for permitting was reasonable. Two episodes in particular make this plain to me, based on my extensive experience managing CAA litigation on behalf of an electric utility.

First, after all the facts were produced and discovered by both sides, each side made a pitch to the Court that the facts and the law were so clearly on its side that the

[25] Majors Deposition, supra, p. 47, ll. 11-19.

Court does not need to hold a trial, but could instead just enter a "summary judgment" deciding the issue of liability. These "summary judgment" motions included extensive briefing, arguments, and explanations by each side why the relevant facts were "undisputed." But the District Court did not agree with either side. In particular, the District Court rejected EPA's motion asking the Court to find that the work at Unit 2 in 2010 was a "major modification" under the CAA.[26] The District Court concluded that a neutral factfinder could reasonably find for Ameren Missouri and reject EPA's "major modification" claim.[27] In other words, the Court recognized that on the question of which side wins reasonable minds could differ. The case then went on to trial.

Second, after both the liability trial and the remedy trial—in other words, after the Court issued the two decisions that Staff rely on here—the Court entered a ruling that implicitly acknowledged that Ameren Missouri's conclusions at the time it made its decision of the applicable legal standards was not unreasonable.. Specifically, the District Court stayed entry of its remedy order to allow Ameren Missouri to appeal to the U.S. Court of Appeals for the Eighth Circuit. In doing so, the Court acknowledged that the dispute between Ameren Missouri and EPA over the right legal standards (concerning permitting requirements) was a close one over which reasonable minds could differ. To avoid the inequity of forcing Ameren Missouri to comply with his remedy order given the very real possibility that the 8th Circuit could later reverse his decision on the legal standards, the District Court agreed to stay the effect of the order under this legal dispute reached a final resolution. Again, in my extensive experience with managing Clean Air

[26] Moor Direct, p. 62, ll. 2-10.
[27] United States v. Ameren Missouri, 4:11-cv-77-RWS, (E.D. Mo. Feb. 24, 2016), ECF No. 724 at 16.

Act litigation like Ameren Missouri's, this is an unmistakable signal that the defendant's position is reasonable.

Q. So, if the decisions did not purport to resolve the issue of prudence, and cannot implicitly resolve the issue either, what relevance do those decisions possibly have for the Commission?

A. The only possible way that those opinions can be relevant to the prudence question pending before this Commission is if they contain some factual determination that in and of itself establishes imprudence. And that seems to be what Mr. Majors suggests in page 4 of his rebuttal testimony: ("the Commission is bound by the determinations of the federal courts"). But Mr. Majors proceeds to identify in his rebuttal testimony only two factual findings that he says "show imprudent decision making": (1) the failure to consider availability or capability improvements in evaluating projects and (2) failure to communicate with EPA about the projects.

When pressed in his deposition, Mr. Majors could identify no other specific facts he claimed showed imprudent decision making.

Q. Okay. Let's just start with the specific fact that you identified because this is your testimony, the rebuttal testimony, right?

A. Yes, sir.

Q. The first specific fact that you point to is the failure to consider availability increase and you rely on the District Court liability opinion for that. Am I right?

A. Yes.

Q. Okay. And so then the second fact that you point to, which is in the same answer on line 23, you say the District Court noted that Ameren Missouri failed to communicate with EPA concerning the improvements. Do you see that?

A. Yes.

Q. And those are the only two specific facts you identify anywhere in your testimony that you say show imprudent decision making, correct?

A. In the testimony. I mean, I attached the entire document.

Q. As you sit here today, are you able to point to any specific things that they got wrong other than, number one, the failure to consider availability and number two, the failure to communicate with EPA?

A. I don't think it should be limited to just that. I think you would read the Orders in total.

Q. I'm asking you as you sit here today, what specific facts are you prepared to offer? You've given us two in your rebuttal testimony. I just want to know if there are any other specific facts that you're able to identify show imprudent decision making?

A. I think the Commission should rely on my testimony and the three documents I've identified at a minimum.

Q. Okay. So building all of that together, as you sit here today are you prepared to offer any other specific things that you consider Ameren got wrong?

A. No.[28]

Q. Do either of these two specific facts identified by Mr. Majors from the court opinions show imprudent decision making?

A. No. Neither of the two specific facts that Mr. Majors relies on actually show imprudent decision making by the Company.

Let me start with the finding that Ameren Missouri, in determining that permitting requirements did not apply to the Rush Island Projects, failed to consider any expected availability improvements or capability improvements. That is true—ESD did not consider any such expected improvements in making its pre-project permitting decisions. But Mr. Majors fails to acknowledge why that was the case: neither availability nor

[28] Majors Deposition, supra, p. 39, l. 6 to p. 40, l. 18.

capability improvements had anything to do with potential emissions, which ESD (in line with the Missouri SIP) considered the trigger for permitting. Neither availability improvement nor capacity increase were relevant under ESD's understanding of the legal requirements. The finding that ESD failed to consider this information in making its permitting decision means nothing. The Staff has to show that ESD's understanding that availability and capacity information was irrelevant to its decision was itself an unreasonable decision. That would be like someone criticizing a finding by this Commission for rejecting the testimony of a witness because, the critic says, in doing so the Commission did not consider what the witness had for breakfast before taking the stand. And as I demonstrated above, Staff does not attempt to tackle the question of whether Ameren Missouri's legal understanding was unreasonable. Mr. Majors' citation of this finding from the District Court as a basis for a finding of imprudence suffers from that critical logical error: it is a non-sequitur.

Q. What about the second fact that Mr. Majors points to in his rebuttal testimony[29]: Ameren Missouri's failure to communicate with the EPA about the projects?

A. This is true, but also of no consequence. There was never any permit that Ameren Missouri could seek or obtain from EPA for the Rush Island Projects, because in Missouri, MDNR is the permitting authority with the delegated responsibility to issue PSD permits under the Missouri SIP. As Mr. Majors admitted at his deposition, sources in Missouri are not expected to ask EPA for when permitting requirements might apply.

[29] Majors Rebuttal, p. 14, ll. 29-30.

Q. Do you understand that there is nothing in the Missouri regulations or in the federal PSD rules that required Ameren Missouri to ask EPA to confirm its interpretation of the rules?

A. I'm not aware of a requirement, no.

…

Q. Well, do you read the PSD requirements as requiring a source to ask the agency to confirm its understanding that permitting doesn't apply.

A. I suppose they do.

MS. SCURLOCK: Objection. Calls for a legal conclusion.

MR. LONG: You can answer.

THE WITNESS: I suppose I could have asked separately.

Q. But that's not my question. My question is not whether they could have but whether they were required to. Do you have an understanding as to whether they were required to ask EPA to confirm the decisions they made that the Rush island projects were not going to trigger new source review or PSD?

A. No, I think they work with the DNR with the state implementation plan and so that's the primary rules and regs that the EPA has delegated to the state. So I think that they – that would be the primary factor if you will for determining the PSD requirements under the air permit.[30]

In any event, for the Commission to say such communication is required in order to make a prudent permitting decision would turn the federal program on its head. The Sixth Circuit Court of Appeals—the first appellate courts to considered a case brought under the 2002 PSD Rules—specifically rejected that notion in 2013. The NSR program "does not contemplate approval of the [utility's emissions] projections to prior to construction." United States v. DTE Energy Co., 711 F.3d 643, 649 (6th Cir. 2013). The NSR program requires that the utility "make a projection in compliance with how the

[30] Majors Deposition, supra, p. 43, l. 16 to p. 44, l. 22.

projections are to be made." Id. "But this does not mean that the agency gets in effect to require prior approval of the projections." Id.

Mr. Majors points to only these two specific findings in the District Court litigation and says they show faulty and imprudent decision making. As I have explained, neither finding can support such a claim.

Q. But don't both Ms. Eubanks and Mr. Majors quote language from the District Court remedy decision stating that Ameren Missouri "failure to obtain permits was not reasonable"?

A. Yes, and the remedy decision does contain that language. But when seen in context, this is not a factual finding. Instead, it is what lawyers call "*obiter dictum*," which is Latin for "something said in passing." It is quite common, and is defined as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." Black's Law Dictionary (7th ed. 1999). The context in which the District Court uses the phrase in the remedy opinion makes clear that it is not necessary to the remedy opinion and therefore not precedential or binding in any way. The court uses this only as a short-hand way of referring back to the liability opinion. It does not form any part of the reasoning or holding of the remedy opinion. This is the classic example of *obiter dicta*, which does not bind anyone.

And neither is it persuasive, for the following reasons. First, when one looks back at the liability opinion (i.e., following to where the remedy decision pointed), one goes back to the fundamental point that neither "prudence" nor "reasonableness" nor "negligence" had anything to do with the sole issue for decision in that opinion: whether

a "major modification" occurred. One does not see in the liability decision any findings to show Ameren Missouri had been unreasonable on the key issue: its understanding of the legal standards for permitting. Instead, the District Court liability opinion found that the analyses Ameren Missouri presented at trial were "unreasonable under the law"—that is, it did not match the legal requirements declared by the District Court several years after Ameren Missouri's pre-project permitting decisions were made for the Rush Island Projects. The District Court did not say that Ameren Missouri had made unreasonable permitting decisions or had an unreasonable understanding of the law *at the time* it made those decisions. Although the District Court plainly found the emissions calculations developed after the Company's original permitting decisions and presented at trial to be "unreasonable under the law," that does not refer to the Company's original pre-project permitting analyses by ESD.

There is a difference between the qualitative evaluation of the Rush Island Projects described by Mr. Whitworth in his Direct Testimony, which attended the permitting decisions made prior to the Rush Island Projects, and the after-the-fact quantitative analyses offered at trial by Mr. Hutcheson and criticized by the Court as not reasonable. Staff acknowledges this distinction:

> Q. Okay. But as you sit here today, you're not going to dispute any testimony that Mr. Whitworth has offered that there was a review prior to the 2010 outage of the projects?
>
> A. So specifically a review and not a quantitative kind of analysis that Mr. Hutcheson did that did – that my understanding at least is after the project had commenced.
>
> Q. Right.
>
> A. So you're saying a qualitative review?
>
> Q. Correct.

A. I don't have any information to, you know, state one way or the other.

Q. And you understand that there was a difference between Mr. Hutcheson's calculations that occurred after the project began on Unit 2 and the pre-project review that occurred for Unit's 2 scope through the Environmental Services Department, that qualitative review?

A. I have not seen any documentation of their qualitative review so I can't speak to whether his quantitative analysis was different that the qualitative analysis they may or may not have done.

Q. So we're really talking about two different things, the qualitative analysis that you say may or may not have been done and then the Mike Hutcheson's calculations which came after the fact, those are two different things you understand?

A. Those are two different things, yes.[31]

Staff also understands that the Court's criticism of the post-decisional emissions calculations presented at trial does not apply to the pre-project evaluations by ESD that are the subject of this proceeding:

Q. Well, you understand that Mr. Hutcheson was doing an actual to projected actual calculation, right?

A. Yes.

Q. Which is an evaluation of annual emissions before the project and expected annual emissions after the project?

A. Yes, that's correct.

Q. Okay. Mr. Hutcheson was not doing a calculation to demonstrate whether potential emissions would increase, was he?

A. That is correct.

Q. So when the District Court says that Mr. Hutcheson's projections of annual emissions were not reasonable calculations, that doesn't mean anything for whether the potential emissions calculations or evaluations were reasonable, correct?

[31] Eubanks Deposition, supra, p. 26, l. 19 to p. 27, l. 23.

A. This is specific to what he did not the court case –

Q. Correct.

A. --is my understanding, yes.

Q. Right. Which is the actual to projected actual calculation, right?

A. That is my understanding of what he did, yes?

Q. And Judge Sippel rejected that, right?

A. Yes.[32]

The second reason that the remedy decision's dicta is not persuasive here is that the referenced liability decision incorporated and relied upon post-decisional legal developments, post-decisional data, and post-decisional analyses created by EPA's experts for the purpose of litigation. The District Court's decision that a "major modification" occurred therefore was not based upon only what Ameren Missouri could have known at the time. A short reference in the remedy decision that characterizes and references the liability decision cannot wipe away all the reliance in the liability decision on post-decisional analyses, data and case law that were not available to Ameren Missouri at the time it made its permitting decisions.

The third reason why the remedy decision dicta is not persuasive here is that the District Court's liability decision did not find or state that it was unreasonable for Ameren Missouri to believe that only potential emissions increases (as provided for in the Missouri SIP) would trigger permitting. And Staff does not interpret the decision to say so:

Q. And you've read the opinions by the District Court and the Eighth Circuit Court of Appeals. You mentioned that a few times today, right?

A. Yes, sir.

[32] Eubanks Deposition, supra, p. 46, l. 9 to p. 47, l. 11.

Q. Read them all?

A. Of those documents?

Q. Yes.

A. Yeah, I've read the entire document.

Q. Read them thoroughly?

A. I would say thoroughly at least three or four times. They're quite lengthy but yes.

Q. Did any of those Courts make any finding it was unreasonable for the environmental services department to look for potential emissions as the trigger for PSD permitting?

A. I don't recall that as I sit here.

Q. Do you recall anything of that sort in anything that you read in preparation for your testimony?

A. That it was unreasonable for them to not consider availability?

Q. That it was unreasonable for the environmental services department to believe that it was only potential emissions increase that would trigger permitting.

A. I just don't recall right now.[33]

None of those decisions make such a finding.

Finally, the District Court's *obiter dicta* from its remedy decision has no persuasive force here for one additional reason: actions speak louder than words. Even after making the "not reasonable" reference in the remedy decision, the District Court stayed implementation of its remedy order to allow Ameren Missouri to appeal. As I have explained, this is powerful evidence that the District Court's decisions against Ameren Missouri presented close legal questions that reasonably could have gone Ameren Missouri's way on appeal.

[33] Majors Deposition, supra, p. 42, ll. 2-25.

IV. RESPONSE TO THE REBUTTAL OF MR. SEAVER

Q. What do you make of the rebuttal testimony of Mr. Seaver?

A. It is hard to make sense of Mr. Seaver's testimony. Mr. Seaver seems to be saying three things, none of which has any basis. First, he contends that WEPCo's Port Washington project is "similar" to the Rush Island Projects, so if EPA required permitting for the former Ameren Missouri should have known permitting would apply to the latter.[34] Second, EPA was known to be unpredictable, Mr. Seaver claims, so it was imprudent to proceed without getting permits.[35] Third, quoting the testimony of Mr. Birk in which Mr. Birk described EPA to be "flip-flopping" on the claims it was asserting against Ameren Missouri, he suggests on that this quote shows that the Company's prior decisions to proceed are imprudent.[36]

Mr. Seaver is confused and the positions he takes are nonsensical. His testimony lacks any credibility and should be given no weight whatsoever.

Q. What does Mr. Seaver do with the WEPCo Port Washington determination made by EPA?

A. Mr. Seaver seizes upon Mr. Holmstead's two sentence description of the WEPCo case "was the first time that an existing power plant was required to get an NSR permit," as if it is some type of important admission.[37] What the OPC witness gleaned from this quote was "that the entire electricity industry knew about this particular case" and that "it should have been aware that prior cases, like the WEPC[o] case, were affecting how large maintenance projects … were being measured according to the

[34] Seaver Rebuttal, p. 3, ll. 15-22.
[35] Id., p. 3, ll. 20-26.
[36] Id. p. 3, l. 27 to p. 4, l. 2.
[37] Id., p. 4, ll. 17-18.

CAA."[38] Although all of industry was aware of the WEPCo Port Washington Project and EPA's decisions and statements about it, that knowledge actually supports Ameren Missouri's view that the Rush Island Projects did not trigger any permitting requirements. Mr. Seaver cannot use WEPCo to establish imprudence by Ameren Missouri in its permitting decisions.

Q. Why not?

A. First of all, from a review of Mr. Seaver's deposition, it is plain that he does not know the first thing about WEPCo. He did not bother to educate himself on the WEPCo Port Washington project and how it was analyzed by EPA. There were a series of memoranda issued by EPA in 1988 and 1989 that comprise EPA's permitting decision, which Mr. Seaver never bothered to read. This is particularly problematic because Mr. Seaver's background discloses no basis for him to opine on these issues in the first place. Lacking necessary knowledge and experience, Mr. Seaver was unable to provide any comparisons (or contrasts) between WEPCo's work at Port Washington and the Ameren Missouri's work at Rush Island. Mr. Seaver simply asserts, without evidence, the proposition that the Rush Island maintenance projects were "similar to those related in the WEPCo case."[39] When painstakingly confronted with the salient facts of the WEPCo project in deposition, Mr. Seaver recognized and admitted that, as a matter of fact, there were major differences in the age, operational status, cost, length of outage, size, purpose, scope, number of components and emissions impacts of WEPCo's Port Washington project when compared to the Ameren Missouri's Rush Island RMRR projects.[40] After

[38] Id., p. 4, ll. 8-12.
[39] Id., p. 3, ll. 16-17.
[40] Deposition of Jordan Seaver, File No. EF-2024-0021, pp. 16-129 (Mar. 14, 2024).

being forced to walk through the evidence demonstrating the significant differences between the Port Washington Project and the Rush Island Projects, Mr. Seaver was asked the following:

> Q. My question though, sir, is whether, based upon what we've talked about for the last few minutes and these distinguishing factors including but not limited to the fact that the Port Washington project increased the potential emissions, would it have been reasonable at the time for the Environmental Services Department in making it permitting decisions to consider the WEPCO Port Washington project distinguishable from what was being planned for Rush Island?
>
> **A. I think in the respects that we said they were different, yes, it would be reasonable to distinguish the two.[41]**

By acknowledging that Ameren Missouri could reasonably distinguish the Port Washington Project from the Rush Island Projects, Mr. Seaver contradicted his rebuttal testimony that they were "similar" projects and that, by inference, EPA's decision to require CAA permits for the earlier WEPCo project signaled permitting requirements for the later Rush Island Projects.

Mr. Seaver's inability to speak with any authority about WEPCo was not limited to the Port Washington Project itself. He also knows next to nothing about EPA's actual decision. What little Mr. Seaver did read about EPA's applicability decisions concerning the Port Washington Project—the Seventh Circuit opinion in 1990 that upheld the determination in part and remanded it in part—he failed to understand. That decision considered two EPA decisions concerning the same Port Washington project: (1) the decision that the Port Washington Project triggered permitting under the New Source Performance Standards ("NSPS") because it increased the potential hourly rate of

[41] Seaver Deposition, supra, p.106, l. 24 to p. 107, l. 11.

emissions; and (2) the decision that the Port Washington Project triggered permitting under the PSD rules because it would cause a significant net increase in annual emissions (i.e., more than 40 tons per year of SO^2). Mr. Seaver contends that this should have put Ameren Missouri on notice that the Rush Island Projects would trigger PSD as well. What Mr. Seaver fails to appreciate, however, is that the Seventh Circuit rejected EPA's application of PSD to the Port Washington project (while upholding the NSPS determination).

So, it is not just that Mr. Seaver is wrong about whether the WEPCo project is comparable to those at Rush Island. He is also wrong about what precedent was actually set in WEPCo concerning when permitting would apply. As a result of the Seventh Circuit litigation and the remand instructions to EPA—which required EPA to evaluate the increases in hourly potential emissions to see if that would translate into a "significant net emissions increase"—the industry broadly understood that there was a two-step test for emissions increase under NSR. Step one: look for an increase in potential emissions. If no, then stop because no permitting applies. But if in step one there is an increase in potential emissions, then proceed to step two: see if that increase amounts to anything over the significance level when annualized. This is the same sort of two-step emissions test that MDNR was applying under the Missouri SIP, the same test ESD applied to the Rush Island Projects during their permitting review, and as I explained in my Direct Testimony, the same test that was widely applied across the country at the state level.[42] And between 2003 and 2007, many courts read the WEPCo decision and concluded, as the utility industry had already concluded, that only an increase in hourly potential

[42] Moor Direct, p. 26, ll. 7-19

emissions could trigger NSR—the same test employed by MDNR and Ameren Missouri to the Rush Island Projects. Finally, unlike the Rush Island Projects, the WEPCo project did increase potential emissions, a fact that all by itself makes those project much different than the Rush Island Projects.[43]

Q. Is that the only mishandling of WEPCo by Mr. Seaver?

A. No. Mr. Seaver also ignores everything that happened after the Seventh Circuit's WEPCO decision over the rest of the decade of the 1990s. Ameren Missouri, the courts, the EPA, the Congress and the industry were aware of the WEPCo case.

WEPCo was studied and discussed by the EPA, the General Accounting Office (GAO) and Congress in the 1988 to 1991 timeframe and became the basis for EPA rulemakings (the so-called 1992 WEPCo Rule) to satisfy the Congress' concern that the case could be misused as precedent to prevent utilities from performing RMRR projects like those performed at Rush Island. The results of this analysis that led to the WEPCo Rule were described in a 1990 GAO study provided to Congress:

> EPA officials do not consider WEPCo's project typical of most utility life extension projects, and they expect that the ruling will not significantly affect utilities' decisions to undertake power plant life extension projects.
>
> * * *
>
> . . . concerns that the agency will broadly apply the ruling it applied to WEPCO's project are unfounded. The officials noted that many life extension projects do not result in increased emissions, while other activities are routine in nature and thus exempt from the modification rule.[44]

Q. What are the consequences for Mr. Seaver's "notice" argument of his failure to consider any of EPA's post-WEPCo statements and actions?

[43] Moreover, regardless of whether a potential emissions test must first be applied in a state that did not have an SIP like Missouri's, under the Missouri SIP potential emissions *was the test*.
[44] U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-90-200, ELECTRICITY SUPPLY; OLDER PLANTS' IMPACT ON RELIABILITY AND AIR QUALITY 2 (Sept. 1990) ("GAO Report"), pp 29, 30-31.

A. Mr. Seaver compounds all his misunderstandings about WEPCo by undertaking precisely the sort of superficial, ahistorical analysis that was rejected time and again by the federal courts in the NSR enforcement initiative.

> This court believes it is superficial and insufficient to quote the Clay Memorandum [finding the WEPCo Port Washington Project to trigger PSD] and say it forecloses all further discussion. The EPA continued to publish statements about enforcement and RMRR after the Clay Memorandum. Those statements did not occur in a vacuum; the court believes the EPA meant what it said when it called the modifications in WEPCo extraordinary and that the EPA did not anticipate bringing additional enforcement actions because of WEPCo. The fact that years passed before it did so speaks for itself. The electric utility industry was reading what the EPA was publishing, e.g., EPA's response to Congressman Dingell's "inquiry."
> …
> [T]he EPA's freedom to adopt new interpretations of RMRR could cut both ways; it could not tell Congress it envisioned very few future WEPCO-type enforcement actions on the one hand, and then argue in subsequent enforcement actions that the utility industry was unreasonable in relying on those, or similar, EPA statements.

U.S. v. Alabama Power Co., 681 F. Supp. 2d 1292, 1309, 1310 (N.D. Ala. 2008).

The bottom line is that WEPCo *supports* Ameren Missouri's permitting decisions and in no way does it show them to be imprudent.

Q. This takes us to Mr. Seaver's testimony regarding EPA's unpredictability. It appears that he is asserting that Ameren Missouri acted imprudently because it knew the "risks" that "EPA can be unpredictable with regard to its application of the rules and standards of the Clean Air Act." What do you make of that?

A. I cannot see how this has anything to do with whether Ameren Missouri made a reasonable permitting decision. If EPA acts unpredictably and inconsistently, then the risks of a hypothetical enforcement action actually decrease because if EPA does

file any such action, unpredictable and inconsistent agency behavior will mean the agency does not get any deference for its litigation positions. This is something I observed both in litigation matters I managed for Southern Company against EPA and in litigation matters when I worked at EPA in the Office of Air & Radiation (the program office for the NSR Rules). For example, I am familiar with one such matter dating from the timeframe in which Ameren Missouri made the relevant permitting decisions. In 2007, the U.S. District Court for the Eastern District of Kentucky held that EPA's NSR enforcement interpretations deserve no deference because the agency "takes an inconsistent view of the regulations, makes inconsistent statements with respect to the regulation, and also enforces the regulation with no discernible consistency." United States v. E. Ky. Power Co-op., 498 F. Supp. 2d 976, 993 (E.D. Ky. 2007). And this decision by the Eastern District of Kentucky was no outlier. Similar decisions were made in Alabama and elsewhere.[45] Where an agency (including EPA) announces new policies for the first time in the context of an enforcement action, it receives careful scrutiny by the federal courts. Christopher v. SmithKline Beecham Corp. 567 U.S. 142, 156 (2012).

Q. Finally, what do you make of Mr. Seaver's misquoting of Mr. Birk?

A. Mr. Seaver identifies one sentence, in which Mr. Birk states that "EPA kept flip-flopping on what was or was not an NSR violation."[46] Here, Mr. Seaver asserts that this shows that Ameren Missouri, at the time it was considering the projects, knew

[45] Similarly, the U.S. District Court for the Northern District of Alabama criticized EPA for the "zigs and zags represented by its contradictory . . . statements and rules" and its failure to speak "with one voice, or a consistent voice, or even a clear voice" on the application of the NSR program. United States v. Ala. Power Co. 372 F. Supp. 2d 1283, 1306 (N.D. Ala. 2005), *order vacated in part*, No. 2:01-cv-00152-VEH, 2008 WL 11383702 (N.D. Ala. Feb. 25, 2008). The same court characterized EPA's enforcement initiative as "sport, which is not exactly what one would expect to find in a national regulatory enforcement program." Id. at 1306 n.44

[46] Seaver Rebuttal, p. 4, ll. 1-2.

the risk that EPA's views and interpretations of its statutes and standards "was changing according to the change in Presidential administration." (Id.)

Here again, Mr. Seaver gets his facts wrong. Mr. Birk's statement dealt only with allegations that EPA raised and dropped during litigation (thus the "flip-flopping"), which occurred after the permitting decisions were made, as Mr. Birk's Surrebuttal Testimony explains. The statement Mr. Seaver cites is unrelated to the projects or anything that was known or knowable at the time of the projects. It therefore can have nothing to do with a prudence case.

Q. What is your overall conclusion with respect to Mr. Seaver's rebuttal testimony?

A. Mr. Seaver has nothing useful to offer the Commission and his testimony should receive no weight.

V. OVERALL REVIEW OF REBUTTAL TESTIMONY

Q. What is your overall takeaway from the review of the rebuttal testimony and what useful facts does it help produce for the Commission?

A. Nothing offered in the rebuttal testimony I reviewed alters my conclusions that ESD, and therefore Ameren Missouri, made reasonable permitting decisions and took logical and prudent steps in its due diligence process. Even when one stacks up all the rebuttal testimony and considers it against the record evidence, the following facts are undisputed:

Undisputed Fact No. 1: ESD evaluated the projects for permitting requirements prior to Ameren Missouri undertaking them.[47] Staff does not contend otherwise.

[47] Whitworth Direct, p. 25, l. 9 to p. 47, l. 6; Schedule SCW-D21.

> Q. So you know that Mr. Whitworth testified that the environmental services department reviewed these projects before the outages commenced, right?
>
> A. Yes.
>
> Q. You also are aware that he testified that they were looking for whether the project would increase the potential emissions rate of the unit and that that was the trigger for PSD permitting they had in mind?
>
> A. I think if that's his testimony I have no reason to dispute that.[48]
>
> …
>
> Q. Are you prepared to offer any testimony on what the Ameren environmental services department did or did not consider in making those permitting decisions?
>
> Ms. Scurlock. I'm going to object. We're asking about trial strategy at this point.
>
> Mr. Long: No, we're not. You can answer the question.
>
> THE WITNESS: I think you would rely on Mr. Whitworth's testimony to determine what the ESD department evaluated prior to the projects. He worked in the ESD department.[49]

The Court stated that Ameren Missouri failed to evaluate the projects "with the NSR and PSD requirements in mind," Majors Rebuttal, p. 8, ll. 5-7, but that in no way contradicts Mr. Whitworth's unrebutted testimony. There is a distinction between (a) failing to perform an evaluation and (b) performing an evaluation using different criteria established by the District Court. The District Court order described the latter, not the former, as Staff agrees:

> Q. Now, do you recognize that there is a distinction between failing to evaluate a project on the one hand and evaluating the project using the wrong legal standards?

[48] Majors Deposition, supra, p. 34, l. 18 to p. 35, l. 2.
[49] Majors Deposition, supra, p. 41, ll. 3-13.

A. I think that's a fair difference, sure.

Q. And you recognize that the District Court never found that Ameren Missouri failed to evaluate the projects before they occurred, correct?

A. I think they failed to evaluate them in the right way. That's kind of the summation of the whole Order.

Q. Right but you never say anything in the District Court decision that said the projects had not been evaluated prior to them occurring?

A. Not that I recall.[50]

Undisputed Fact No. 2: ESD did reasonable due diligence on the legal requirements.[51] Staff does not dispute any of this. When asked whether he had done any independent investigation of what ESD considered or what they relied on to formulate their understanding of the law, Mr. Majors answered: "No."[52] The first step in that due diligence was ESD's review of the regulations: the Missouri SIP and the federal PSD regulations.[53] This was a reasonable first step, as staff agrees:

Q. Would it have been reasonable, in making the permitting decisions for Rush Island, for the Environmental Services Department to consider the language of the Missouri SIP?

A. Not in just – not solely that isolation of that. But that as a component of other things, yes.

Q. And would it have been reasonable for the Environmental Services Department in doing that work, determining whether the Rush Island projects triggered permitting, to consider, among other things, the language of the federal PSD rules?

A. Yes.[54]

[50] Majors Deposition, supra, p. 35, l. 23 to p. 36, l. 12.
[51] Whitworth Direct, p. 5, l. 15 to p. 11, l. 13; p. 12, l. 15 to p. 14, l. 20.
[52] Majors Deposition, supra, p. 43, ll. 12-15.
[53] Whitworth Direct, p. 5, ll. 16-21.
[54] Eubanks Deposition, supra, p. 164, ll. 3-15.

Second, ESD followed MDNR's decisions applying the Missouri SIP, and followed MDNR guidance.[55] ESD did the same with EPA's decisions and guidance on the federal PSD rules.[56] And that was reasonable as well:

> Q. The interpretation that MDNR had of the construction permitting requirements under the Missouri SIP would be a thing that a reasonable utility would take into account in its compliance program, correct?
>
> Ms. Scurlock: Objection. I don't think the witness would under – would necessarily have knowledge of what a utility would take into consideration.
>
> Q. You can answer as an environmental engineer.
>
> A. I think it is a reasonable thing to consider among other things that should be considered as well.[57]
>
> …
>
> Q. And would it have been reasonable for them to consider the interpretations of the Missouri SIP provided previously by MDNR?
>
> A Not in isolation but with other things. To the extent that they're able to draw an inference between what DNR's no permit required letters are saying and the specific projects that they're addressing because those are really like case by case analysis. And so they would need to have an understanding of how that permit letter ties to their specific project and the whole scope of their project.
>
> Q. So in that circumstance it would be reasonable for the Environmental Services Department to consider the – those interpretations, among other things, in making the decisions whether to give permits?
>
> A. Yes.[58]

[55] Whitworth Direct, p. 5, l. 21 to p. 7, l. 11; p. 13, l. 11 to p. 14, l. 6.
[56] Whitworth Direct, p. 16, l. 7 to p. 17, l. 27.
[57] Eubanks Deposition, supra, p. 72, l. 20 to p. 73, l. 9.
[58] Eubanks Deposition, supra, p. 164, l. 16 to p. 165, l. 8.

ESD also followed what EPA was doing, through UARG. For example, EPA stated that its emissions increase test operated like the NSPS hourly rate test if the unit had untapped availability or capability to operate. This was communicated to Ameren, and it was reasonable for Ameren to rely on these statements from the program office. Staff agrees:

> Q. Would it be reasonable for Ameren to have considered what EPA says the existing rule means?
>
> A. Yes.
>
> Q. Okay. And to the extent that EPA is characterizing the existing rule in a proposal, it would be reasonable for Ameren to rely on that to understand the existing rule?
>
> A. So you're saying that EPA – hypnotically [sic] that in a rule making proposal of some sort where other documentation outlined its interpretation of its existing rules. Hypothetically I think that's a reasonable thing for Ameren Missouri to consider, among other things.
>
> Q. So if this is an accurate representation of what EPA said about the existing rule's scope here in Exhibit 14, it would have been reasonable for Ameren to rely upon that?
>
> A. In isolation, no. But in part, yes.
>
> Q. It would have been part of the relevant facts and circumstances, it would have been reasonable for them to consider?
>
> A. Yes.[59]

Third, ESD talked to the regulators about how the rules would apply: both MDNR and EPA.[60] Doing so was a reasonable means of confirming how the rules should apply, and it was reasonable for ESD to rely on the results of these conversations.

[59] Eubanks Deposition, supra, p. 130, ll. 2-24. Exhibit 14 to Ms. Eubanks' deposition are pages from Mr. Whitworth's Schedule SCW-D9.
[60] Whitworth Direct, p. 6, l. 4 to p. 7, l. 11; p. 8, ll. 10-18; p. 9, ll. 24-28; and Schedule SCW-D8.

Fourth, ESD consulted with legal counsel on the meaning and application of the rules.[61] Some of these consultations are documents, in the form of the UARG memoranda and meeting materials attached to Mr. Whitworth's Direct Testimony. See Schedules SCW-D2 through SCW-D18. Through such consultations, ESD received guidance on the rules, on the progress of litigation over the rules and on the developments in EPA's NSR enforcement initiative.[62] This was not only a reasonable thing to do, it was considered "best practice" within the utility industry at the time. And it was reasonable for ESD to rely upon what they learned, as Staff admits:

> Q. Would it have been reasonable for the Environmental Services Department, in making its permitting decisions, to consider, among other things, the interpretations that have previously been given by EPA to the federal PSD rules?
>
> A. I think that would be reasonable to consider among other elements.[63]
>
> …
>
> Q. I mean, you would expect the Company to keep track of what's going on in the New Source Review enforcement initiative, would you not?
>
> A. Yes.
>
> Q. And you would expect the Company to be aware of who's winning and who's losing those cases, right?
>
> A. I would expect that the Company's paying attention to what is – both what EPA's position is in those cases, what's maybe winning or losing, as you say, and also the results. Or did I already say that?
>
> Q. So you agree they ought to be paying attention to the results of those court cases?

[61] Whitworth Direct, p. 7, l. 12 to p. 10, l. 35; p. 16, l. 7 to p. 17, l. 27.
[62] Whitworth Direct, p. 16, l. 7 to p. 19, l. 37.
[63] Eubanks Deposition, supra, p. 165, ll. 9-15.

A. Yes.[64]

Q. And would it be reasonable, among other things, for the Environmental Services Department to consider what the other courts in the New Source Review initiative were deciding with respect to the legal standards?

A. Yes.[65]

Fifth, ESD consulted with others in industry – at the state level and at the national level – on the meaning and application of the rules.[66] Staff does not dispute that utilities share information in this manner and therefore keep each other apprised on developments on common issues such as permitting requirements:

Q. Do you know whether Ameren Missouri's understanding of the law was consistent with others in Missouri, that is, other utilities in Missouri regarding the permitting requirements?

A. I mean, I'm going to make the assumption they communicate with one another. There's nothing that I can recall in the record that they communicated with Evergy or Empire or any co-ops on the state implementation plan requirements, but I don't dispute that they – I would assume that they did.[67]

Staff also agrees this was reasonable, and that ESD would be entitled to rely upon what they learn in industry meetings about the scope and application of the permitting rules. Mr. Majors reviewed the Schedules to Steve Whitworth's Direct Testimony, then stated the following:

Q. You're talking about the folks at Ameren having communicated with others in the industry about what the PSD requirements were?

A. Yes.

Q. Was that a reasonable thing for Ameren to do?

[64] Eubanks Deposition, supra, p. 153, l. 14 to p. 154, l. 3.
[65] Eubanks Deposition, supra, 166, l. 21 to p. 167, l. 1.
[66] Whitworth Direct, p. 6, l. 4 to p. 8, l. 18; p. 13, l. 17 to p. 14, l. 3.
[67] Majors Deposition, supra, p. 47, l. 24 to p. 48, l. 8.

A. Sure.

Q. Was it reasonable for Ameren to rely upon the information they received in those communications?

A. Sure, yes.[68]

In taking these five steps, ESD did the necessary due diligence to understand the requirements of the law, and nobody seriously suggests otherwise.

Undisputed Fact No. 3: Ameren Missouri had a reasonable understanding of the law. Ameren Missouri's understanding was consistent with the text of the Missouri SIP and the text of the PSD regulations.[69] Ameren Missouri had the same understanding as MDNR, as Staff agrees:

Q. Do you understand that Ameren Missouri's understanding of the law was consistent with that of the Missouri Department of Natural Resources?

A. That's my understanding, yes.[70]

MDNR is the relevant authority on the Missouri SIP, not EPA, as Mr. Majors concedes as I describe above. Ms. Eubanks cites an answer Kyra Moore gave at her deposition testimony to a hypothetical question of whose interpretation would control between EPA and MDNR, in case of a dispute. But that is not correct as a matter of law.

Moreover, the Ameren Missouri and MDNR interpretations were consistent with those of EPA's program office in the 2005-2010 timeframe. Ameren Missouri's understanding of how the federal PSD rules works were the same as mine, and in my experience the electric utility industry. These views were supported by most of the cases

[68] Majors Deposition, supra, p. 46, l. 22 to p. 47, l. 5.
[69] Moor Direct, p. 21, l. 9 to p. 23, l. 4; Holmstead Direct, p. 11, l. 12 to p. 13, l. 18.
[70] Majors Deposition, supra,, p. 47, ll. 20-23.

in the NSR enforcement initiative at the time, which further supports the reasonableness of Ameren Missouri's legal position.

Q. Wait. Didn't the District Court in its 2017 liability decision state that the standards for assessing PSD applicability were "well established" by the time that ESD made these permitting decisions?

A. That is what the Court wrote. It is certainly true that EPA started filing lawsuits against utilities in 1999 and 2000, attempting to use the "Koppe-Sahu" formula to establish the projected emissions increases necessary for a "major modification" to occur under the PSD provisions of the Clean Air Act. And it is true that EPA had a "well established" pattern of attempting to use the Koppe-Sahu formula in every case it filed. And the Koppe-Sahu formula had received severe treatment because it's outcome-determinative result—always predicting an increase—was also "well established." As a result, as the briefing materials UARG and its lawyers provided to ESD and attached as Schedules to Mr. Whitworth's Direct Testimony show, most times the courts rejected EPA's arguments. And one court, in particular, held that the "well established" formula would not be enough to hold a company liable for an NSR violation. Instead, because the PSD rules do not specify a formula or approach to projecting emissions increase, all reasonable methodologies would have to answer the question in the same way (i.e., predicting a significant net emissions increase) before a defendant could be held liable. In other words, any reasonable emissions calculation methodology would defeat the "well-established" Koppe Sahu formula EPA preferred in its litigation efforts.[71]

[71] As discussed below, this formula has nothing to do with potential emissions but dealt solely with increases in actual, annual emissions which, if potential emissions did not increase, didn't matter.

But what is more, the theory behind the Koppe-Sahu formula—that component replacement leads to availability improvement which leads to generation increases which leads to more emissions—used by EPA in the PSD enforcement cases had no prior application in Missouri, because of the established understanding about the meaning and application of the Missouri SIP, which was understood by utilities and MDNR to trigger the need for NSR permits only if projects would increase potential emissions; the Rush Island Projects did not do so. Because of the specific provisions of the Missouri SIP, it was not "well-established" that availability improvement triggered permitting requirements. A review of the Kyra Moore deposition and the "no permit required" letters that MDNR produced plainly shows nothing about availability increase as a trigger for PSD permitting. Neither do the guidance documents issued by MDNR on how it would apply the rules. See Schedule SCW-D20. Nobody reading the exhibits to the Kyra Moore deposition can seriously contend that that it was "well-established under the Missouri SIP" that projects like Rush Island – which do not increase potential emissions – would trigger PSD permitting. Staff certainly does not try to make such outlandish claims.

> Q. . . . Was it unreasonable in the determination in Exhibit 4 for the state and the applicant to focus on potential emissions as the trigger?
>
> A. I'm not authoring [sic] an opinion specifically on that.
>
> Q. Is it your testimony that it was well established at the time of the Rush island projects that the trigger for permitting under the Missouri SIP was availability increases and not potential emissions?
>
> THE WITNESS: Can you read back the question?
>
> (WHEREIN, the requested portion of the record was read by the court reporter.)

A. No.[72]

Q. What other undisputed facts remain untouched by the rebuttal testimony?

A. Three more.

Undisputed Fact No. 4: Under Ameren Missouri's interpretation of the law at the time of the Rush Island Projects, the projects wouldn't have required permitting, for at least two reasons. First, it is undisputed that the projects did not cause potential emissions to increase, so had the Missouri SIP been interpreted by the District Court as MDNR had always applied it, Ameren Missouri would have won the case. Second, courts that have found the RMRR standard to be routine in the industry (not trivial or de minimis activities at the unit, as the District Court did here). Other courts have also applied the RMRR exclusion on a component-by-component basis (as specified by EPA in the 1992 WEPCo Rule preamble and as was done by ESD) and found similar projects to be excluded from permitting as RMRR. These include the economizer replacements by TVA and the reheater replacements and lower slope replacements by Allegheny Energy. See National Parks Conservation Association v. TVA, No. 3:01-cv-71, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010) (finding economizer replacement and superheater replacement RMRR); Pennsylvania DEP v. Allegheny Energy, Inc., No. 05-885, 2014 WL 494574 (W.D. Pa. Feb. 6, 2014) (finding lower slope replacement and reheater replacement RMRR).

Undisputed Fact No. 5: There was nothing wrong or unreasonable about ESD's process for applying its understanding of the law to the facts of the Rush Island Projects.

[72] Eubanks Deposition, supra, p. 68, ll. 6-21.

Having more information about availability, something suggested by Ms. Eubanks, would not have made a difference to ESD's decision because the trigger for permitting was potential emissions. Potential emissions are the maximum rate that a unit can emit under its design.

Q. And do you know what potential emissions are? Do you recognize potential emissions is the maximum rate that the unit can emit under its operating design?

A. I think that's a fair definition of potential emissions.[73]

Because potential emissions are a function of design, they do not change based on the availability of the unit or how many hours the unit may operate in a given period:

Q. Now, as an environmental engineer you understand that the potential emissions from a unit has nothing to do with availability, correct?

A. Potential emissions has nothing to do with availability, that is correct.[74]

…

Q. So there [Eubanks Rebuttal Test. p. 10] you have a block quote from the liability opinion from the District Court, right?

A. Yes.

Q. Basically his statement, which you've got there, quoted – some of which you've got bolded – is that the Company should have expected availability to improve and should have expected to use that increased availability to emit more sulfur dioxide. Was that the finding?

A. That was the finding.

Q. Okay. But you realize that increasing the hours of operation for a unit is not relevant if the trigger for permitting is potential emissions, right?

[73] Deposition of Claire Eubanks, File No. ER-2022-0337, p. 32, ll. 7-12 (Mar. 24. 2023).
[74] Eubanks Deposition, supra, p. 40, ll. 17-21.

A. If the trigger for permitting is potential emissions, I agree.[75]

And the same is true regarding the relationship between potential emissions and megawatt capacity. Megawatt capacity is a function of the turbine and generator and the conditions of operation. Changes in megawatt capacity do not portend changes in potential emissions.

Q. …Now, as an environmental engineer you understand that megawatt capacity is not the same thing as the maximum hourly emissions rate for the unit, correct?

A. Yes.[76]

Q. Does Taum Sauk suggest a problem in how ESD performed its compliance review?

A. No. Taum Sauk is a red herring. The driver in ESD's review of projects was the criteria that it believed would apply to trigger permitting, focused on whether potential emissions would increase. There is no evidence that ESD's legal understanding was the product of "overcompartmentalization."

Q. And the focus that Ameen Missouri witnesses testified they had was on potential emissions as the trigger for permitting requirements under the Missouri SIP, correct?

A. That is what Ameren Missouri witnesses are representing in this case, correct.

Q. Now, if that's true, that has nothing to do with the issue of compartmentalization you testified about in your rebuttal testimony, does it?

A. That's correct.[77]

[75] Eubanks Deposition, supra, p. 116, ll. 3-18.
[76] Eubanks Deposition, supra, p. 163, ll. 3-7.
[77] Eubanks Deposition, supra, p. 40, l. 22 to p. 41, l. 6.

Because ESD had that approach on potential emissions, it did not consider availability improvement relevant (since it has nothing to do with potential emissions), as District Court notes and Eubanks quotes twice. If the information was considered irrelevant, then the absence of it would not have changed the decision. Eubanks cannot say that had information been given to ESD about availability improvement, it would have made a different decision:

> Q. So you're not saying that Ameren's Environmental Services Department would have made a different decision about whether the Rush Island projects triggered permitting if it had been given information about availability improvement?
>
> A. I don't know if they would have or not. But it may have changed their opinion.
>
> Q. But you can't say that their opinions would or would not have changed if they had availability information?
>
> A. I don't know.[78]

Moreover, there is no evidence to suggest that ESD's permitting decisions were the product of financial pressure--the other factor cited in the Taum Sauk report—as Ms. Eubanks intimated in her Rebuttal Testimony:

> Q. In any of your review of the case materials or the submissions in this case, did anybody in the Environmental Services Department indicate that they were under financial pressure?
>
> A. No.
>
> Q. Did anybody in the Environmental Services Department indicate that the reason that no permitting was required by that department for the Rush Island projects had anything to do with money?
>
> A. No.
>
> Q. Did Judge Sippel or any of the court opinions suggest that the reasons why Environmental Services Department concluded that

[78] Eubanks Deposition, supra, p. 118, ll. 12-22.

no permits were required for these projects had anything to do with money?

A. No.[79]

There was nothing unreasonable or inherently wrong about how and on what basis ESD conducted its analysis. Sources were not required to document their decisions under the Missouri SIP at the time, either for the regulators to review or for their own recordkeeping purposes. In 2009, MDNR was not requiring emissions calculations to be done and was issuing the "no permit required" letters without them. Eubanks Ex. 3.[80] Staff does not dispute that is what this 2009 MDNR letter shows:

Q. Okay. And this two page letter – it continues onto the next page – is what has been referred to as the no permit required letters from MDNR, it's in that category?

A. Yeah. That's my understanding of what this letter is.

Q. Okay, in fact, that's what it says in bold in the first paragraph, no construction permit is required, do you see that?

A. I do see that.

…

Q. Okay. So let's just look at the language of the letter itself which says that City Utilities was unable to provide calculations to show that the change will not result in a net increase in emissions from the boiler. In looking at this no permit required letter would it be reasonable to understand that MNDR made the determination without any calculation submitted by the utility?

A. With an understanding of the specifics of the construction project, that would be my inference from this letter.[81]

[79] Eubanks Deposition, supra, p. 119, ll. 6-21.
[80] Eubanks Deposition, supra, Ex. 3 was an exhibit to the deposition (in the NSR litigation) of MDNR employee Kyra Moore, and is a no permit required letter issued by MDNR to City Utilities of Springfield.
[81] Eubanks Deposition, supra, p. 31, l. 21 to p. 32, l. 5; id. p. 33, ll. 2-12.

Staff could identify no instance in this timeframe in which MDNR required the submission of calculations to conclude that emissions would not increase and that no permitting was required:

> Q. So you're not going – you're not sitting here today saying that MDNR required emissions calculations in order to justify a no permit required letter, are you?
>
> A. Specifically – well, I don't know I guess is the appropriate answer.[82]

It was readily determined from these projects that they would not increase the maximum hourly designed steam flow, and from that one could easily conclude (without calculations) that potential emissions would not increase:

> Q. Now, you're an environmental engineer, right?
>
> A. I am.
>
> Q. Okay. So if there was no increase in the maximum hourly designed steam flow, would it be a reasonable assumption that there's no increase in the maximum hourly emissions rate?
>
> A. Yes.
>
> Q. And by the same token, would it be a reasonable assumption then that there would be no increase in the potential emissions either?
>
> A. Yes.[83]
>
> …
>
> Q. We're talking about the Rush Island projects again. And there was some discussion in the testimony you provided citing findings from the District Court case about changes in megawatt capacity at Unit 2. Do you recall that topic?
>
> A. I do, yes.

[82] Eubanks Deposition, supra, p. 35, l. 22 to p. 36, l. 2.
[83] Eubanks Deposition, supra, p. 38, l. 17 to p. 39, l. 3.

Q. Okay. Now, as an environmental engineer you understand that megawatt capacity is not the same thing as the maximum hourly emissions rate for the unit, correct?

A. Yes.[84]

Nobody has criticized how ESD went about evaluating potential emissions:

Q. Do you interpret any part of the orders and decisions from the Court, which you quote extensively, do you interpret any part of those orders and decisions from the District Court to be a criticism of how the Company went about evaluating whether potential emissions would increase?

A. Specifically potential emissions, no.[85]

The same is true of ESD's evaluation of the projects for the RMRR exclusion. Nothing in the rules required them to do any surveys, count up similar projects and document how they compared, or anything of the sort.

Q. . . . So if I could just refer you back to that third point about the exclusion for routine maintenance, repair and replacement.

A. Yes.

Q. There's no calculation of that analysis that's required by MDNR, is there?

A. I'm not aware of a calculation for that.[86]

…

Q. Are you aware of any part of the federal regulations under PSD that specifies any kind of quantitative analysis for the routine maintenance, repair and replacement decision?

A. I'm not recalling anything specifically, no.[87]

[84] Eubanks Deposition, supra, p. 162, l. 22 to p. 163, l. 7.
[85] Eubanks Deposition, supra, p. 49, ll. 14-20.
[86] Eubanks Deposition, supra, p. 36, ll. 11-18.
[87] Eubanks Deposition, supra, p. 37, ll. 15-20.

Nor was ESD required to consult with legal or with anyone else on its applicability determinations. But even if they had, there is no reason to expect that it would have produced a different result. ESD's understanding of the legal requirements were firmly within the mainstream of the utility industry and were longstanding in Missouri. And Staff does not suggest that ESD was out of alignment with Legal and UARG on the legal requirements.

Q. Is there any evidence you can provide to the Commission that Mr. Whitworth had a different legal understanding than Ameren Services Legal Department?

A. No, I don't have any evidence. I wouldn't say that.

Q. Is there any evidence that you're able to offer the Commission that Mr. Whitworth had a different understanding of the legal requirements than the Utility Air Regulatory Group?

A. I don't have any evidence to say that, no.[88]

The bottom line is there was nothing unreasonable or wrong about how and on what basis ESD went about its pre-project review, and staff does present any evidence to the contrary.

Q. You have one more?

A. Yes, there is one more very significant and undisputed fact that shows the reasonableness of ESD's pre-project permitting decisions.

Undisputed Fact No 6: All utilities were doing projects like this, and none were getting permits for them. It was reasonable for Ameren Missouri to consider this, as Staff agrees.

Q. Would it be reasonable for the Environmental Services Department, in making its permitting decisions for Rush Island, to

[88] Eubanks Deposition, supra, p. 43, l. 15 to p. 44, l. 1.

consider, among other things whether similar projects received PSD permits?

A. Yes.[89]

Q. Does this conclude your direct testimony?

A. Yes, it does.

[89] Eubanks Deposition, supra, p. 166, ll. 15-20.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of Union Electric Company d/b/a Ameren Missouri For a Financing Order Authorizing the Issue Of Securitization Utility Tariff Bonds for Energy Transition Costs related to Rush Island Energy Center.	)))))))	EF-2024-0021

AFFIDAVIT OF KARL R. MOOR)
) **ss** District of Columbia
WASHINGTON, D.C.)

Karl R. Moor, being first duly sworn on his oath, states:

My name is Karl R. Moor, and hereby declare on oath that I am of sound mind and lawful age; that I have prepared the foregoing *Surrebuttal Testimony*; and further, under the penalty of perjury, that the same is true and correct to the best of my knowledge and belief.

Karl R. Moor

Karl R. Moor

Subscribed and sworn to before me this 22 day of March, 2024.

Rhonda M McDonald

Notary Public

My commission expires: October 14, 2027

RHONDA M. MCDONALD
NOTARY PUBLIC
10-14-27
DISTRICT OF COLUMBIA