IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

The Empire District Electric Company, d/b/a Liberty, Appellant, v. Public Service Commission of the State of Missouri, and The Office of the Public Counsel, Respondents.	Case No. WD85800

BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

This case is before the Court on the appeal of The Empire District Electric Company d/b/a Liberty (Liberty) of an amended report and order (Amended Order) entered by the Public Service Commission of the State of Missouri (Commission). The case is properly before this Court under Section 386.510, RSMo (2016)(Supp. 2019). This case is not within the exclusive appellate jurisdiction of the Supreme Court of Missouri under Article V, Sec. 3 of the Missouri Constitution.

INTRODUCTION

In the Amended Order (LF 1290)(A1), the Commission approved Liberty's recovery of approximately $290 million through the issuance of securitized utility tariff bonds pursuant to Section 393.1700, RSMo (Supp. 2021)(A153). The Amended Order is the first financing order issued by the Commission under this new statute.

Liberty petitioned the Commission for financing orders to recover costs associated with two events. In Commission Case No. EO-2022-0193, Liberty sought cost recovery for the early retirement of its Asbury coal plant. In Commission Case No. EO-2022-0040, Liberty sought cost recovery for fuel and power it purchased during Winter Storm Uri. The Commission issued a single financing order in the consolidated case[1] approving Liberty's petitions, with modifications to the amount of Liberty's requested recovery.

[1] All references are to the Legal File and Exhibits for EO-2022-0040.

STATEMENT OF FACTS

The Commission includes this statement of facts pursuant to Rule 84.04(f).

Parties

Appellant Liberty is an operating subsidiary of Algonquin Power and Utilities Corporation. (Ex. 1686). Formerly known as Empire, Liberty is a Kansas corporation and public utility that generates, purchases, distributes and sells electricity in portions of Missouri, Arkansas, Kansas and Oklahoma. (LF 9). Liberty's customers include people living in Barton, Jasper, McDonald and 13 other counties in southwest Missouri. (Ex. 1712).

Respondent Public Service Commission is the state agency authorized to regulate public utilities in Missouri. (LF 9). Liberty's Missouri operations fall under the Commission's jurisdiction. (LF 9). The Commission employs a staff of experts (Staff). Staff participates in cases before the Commission. (Tr. Vol. 2 pg. 14). Staff does not participate in appeals.

Respondent Office of the Public Counsel represents the public before the Commission and on appeal of Commission orders. (Tr. Vol. 2 pg. 14).

Background

Asbury Coal Plant

Liberty (then known as Empire) built Asbury, a 200-MW coal plant, in 1970. (LF 1304). Asbury was the only coal plant wholly owned by Liberty. (Ex. 1717). Liberty invested about $113 million to build and maintain Asbury between 1970 and 2008. (Ex. 1703).

In 2008, Liberty installed a $33 million selective catalytic reduction system to reduce Asbury's nitrogen oxide emissions. (LF 1331). In 2014, Liberty retrofitted Asbury with a $141 million Air Quality Control System (AQCS) to comply with federal environmental regulations. (LF 1331). Liberty said these upgrades would extend Asbury's life through 2035. (Ex. 1704).

Asbury qualified for accelerated depreciation. (Tr. Vol. 5 pg. 405). Accelerated depreciation is a tax break that allows companies to deduct large amounts of depreciation expense from taxable income in the early years of an asset's life. (Tr. Vol. 3 pg. 243-44). For ratemaking purposes, Liberty collects an allowance for income tax expenses in its general rates that assumes deductions based on straight-line, or "book" depreciation, which depreciates plant items at a uniform rate. (Tr. Vol. 3 pgs. 232, 243-44).

Early in the life of a plant, the accelerated depreciation used for tax purposes is higher than the book depreciation used for ratemaking purposes. (Tr. Vol. 3 pg. 243). As a result, customers pay more for taxes in rates than the utility actually pays to the Internal Revenue Service (IRS). (Tr. Vol. 3 pg. 243). The difference between the taxes paid under accelerated depreciation and the taxes assumed under book depreciation collects in a regulatory account as accumulated deferred income taxes (ADIT). (Tr. Vol. 3 pg. 243-44).

Later in the life of a plant, accelerated depreciation reverses and becomes less than book depreciation. (Tr. Vol. 3 pg. 243-44). The utility claims smaller tax depreciation deductions than is assumed in ratemaking. (Tr. Vol. 3 pg. 243-44). The utility pays more in taxes than customers provide through rates. (Tr. Vol. 3 pg. 243). The difference is deducted from the ADIT balance. (Tr. Vol. 3 pg. 243-44).

An ADIT balance represents cost-free capital for the utility to use. (Tr. Vol. 3 pg. 243). The cost-free nature of ADIT is recognized in ratemaking by including the ADIT balance as a deduction from rate base. (Tr. Vol. 3 pg. 243). This rate base deduction prevents customers from paying a return on the cost-free capital provided to the utility as a result of the tax timing differences. (Tr. Vol. 3 pg. 243). In theory, the ADIT balance for a plant item reaches zero as the effects of accelerated and book depreciation converge at the end of the plant's depreciable life. (Tr. Vol. 3 pg. 243-44).

Liberty participates in the Southwest Power Pool's (SPP) wholesale electricity market. (LF 1332; Ex. 1293). Between 2010 and 2019, Asbury's position in SPP worsened, primarily due to decreasing natural gas prices and the declining cost and increased penetration of wind resources. (LF 1333). These market forces rendered

Asbury uneconomic for Liberty to run most of the time. (LF 1333). In the past decade, a third of the U.S. coal fleet retired under such market pressure. (LF 1334). Asbury burned the last of its coal on December 12, 2019, and stopped generating power for Liberty's customers. (LF 1358).

Asbury is no longer an electric plant. (Ex. 425). Asbury is being decommissioned: cleaned up, torn down and sold for scrap. (LF 1305; Ex. 423). Nothing will remain but a parking lot and a few buildings, like the old break room, that Liberty plans to repurpose for its new renewable energy investments. (Ex. 433-35).

For tax purposes, Liberty wrote off Asbury. (LF 1352; Ex. 1852). Liberty claimed Asbury's remaining accelerated depreciation as abandonment loss deductions in 2019 and 2020. (Conf. Ex. 1159-60). Liberty reaped a $16.5 million tax benefit on the deductions. (LF 1352).

For ratemaking purposes, Liberty abandoned Asbury during a 2019 general rate case, Commission Case No. ER-2019-0374 (2019 rate case). (LF 1344). The rates established in the 2019 rate case included Asbury. (LF 1344). At that time, all the financial impacts of the abandonment could not be ascertained. (LF 1344).

The parties in the 2019 rate case agreed the Commission should establish an Accounting Authority Order (AAO) for Asbury. (LF 1344). An AAO is a form of Commission-approved deferral accounting where specific costs are recorded as regulatory assets (for possible recovery from customers) or regulatory liabilities (for possible credit to customers) and held for final Commission determination in a future rate proceeding. (LF 1344; Ex. 183-84).

The Commission approved the Asbury AAO in Liberty's 2019 rate case. (LF 1344). The Asbury AAO established a regulatory liability for various rate base and expense components, like rate of return on the Asbury plant, depreciation expense, operating and maintenance expenses, and property taxes. (Ex. 183, 1877). At the same time, Liberty established a regulatory asset that included Asbury's remaining book depreciation, plus other retirement costs. (Ex. 184).

The Commission set a 6.77 percent rate of return for Liberty in the 2019 case. (LF 1359). This represented Liberty's weighted average cost of capital (WACC). (LF 1359). The WACC reflects the company's weighted blend of debt and shareholder equity. (Tr. Vol. 7 pg. 537 lns. 1-3). Liberty's 2019 rates included this rate of return applied to Liberty's rate base, including Asbury. (LF 1344, 1359; Tr. Vol. 3 pg. 221).

Asbury was not included in the rates established in Liberty's next rate case, Commission Case No. ER-2021-0312 (2021 rate case). (LF 1361; Ex. 1078). Initially, Liberty requested final rate treatment of the Asbury AAO in the rate case. (Ex. 1088). Liberty sought recovery of all its Asbury costs, including a full return on the retired plant. (Ex. 1089 lns. 3-6). Staff recommended a sharing of Asbury's costs between Liberty's shareholders and customers. (Ex. 1088).

Late in the case, Liberty abandoned its request for rate treatment of the Asbury AAO. (Ex. 1907). Instead, Liberty decided to seek rate treatment for Asbury through this securitization case. (Ex. 1907). Liberty's new 2021 rates took effect June 1, 2022. (LF 1361; Ex. 1147 fn. 1).

Algonquin acquired Empire in 2016. (Ex. 1686). Since then, Liberty invested more than $1 billion of ratepayer-backed shareholder capital in three wind farms. (Ex. 1290, 1682-1723). These investments increased Liberty's Missouri rate base by 45 percent. (Ex. 1711).

Winter Storm Uri

Between February 13 and 20, 2021, three severe winter storms known as Winter Storm Uri struck portions of the United States, including Liberty's service area. (LF 1302). Much of the Midwest experienced unseasonably cold temperatures, rolling electrical blackouts and extreme natural gas price spikes. (LF 1302). The SPP's grid nearly collapsed. (Tr. Vol. 5 pg. 482). Liberty shed load. (Ex. 279). Wholesale electricity prices surged. (LF 1302). The SPP's on-peak day-ahead locational marginal prices for February 15 through 19 averaged 11,280 percent higher than the five-year average for the

period, hitting $3,821.05 per megawatt hour (MWh) for February 18 delivery. (LF 1302-03).

Liberty incurred approximately $193 million in extraordinary fuel and purchased power costs to serve Missouri customers during the storm. (LF 1303). Due to the abnormal cold, Liberty sold more electricity than usual. (LF 1311). Liberty's actual revenues during February 2021 were $2.76 million higher than expected. (LF 1311).

Liberty recovers its fuel and purchased power costs through a combination of general rates and a mechanism called a Fuel Adjustment Clause (FAC) established in Liberty's tariff. (LF 1306; Ex. 1164-67). Through the FAC, fuel and purchased power costs above or below a base amount in general rates are either recovered by the utility or returned to customers over a subsequent six-month period. (LF 1306-07).

Liberty's FAC includes a sharing mechanism by which the company passes on 95 percent of over- or under-recoveries to its customers. (LF 1306-07). If actual fuel costs exceed the general rate amount, Liberty recovers 95 percent of the difference through the FAC and absorbs 5 percent. (Ex. 1163-64). If actual fuel costs drop below the amount in rates, Liberty's FAC credits customers with 95 percent of the difference and retains 5 percent for the utility. (Ex. 1163-64). The Commission approves FAC sharing mechanisms to provide companies an incentive to operate at optimal efficiency while still providing companies an opportunity to earn a fair return on their investment. (LF 1307).

Liberty's FAC has included this sharing mechanism since the Commission first approved it in a 2008 rate case. (Ex. 1164). Had Liberty recovered its Winter Storm Uri costs through the FAC, the FAC's six-month recovery period would cause extreme rate impacts. (LF 1303). Liberty requested an AAO to recover all its costs related to Winter Storm Uri. (LF 1307). The AAO case is being held in abeyance pending resolution of this case. (LF 1307).

Securitization

Securitization refers to a legislatively authorized financing technique Missouri enacted in 2021. (LF 1298). Utilities may petition the Commission for a "financing order" approving recovery of "energy transition costs" or "qualified extraordinary costs." (LF 1299). Energy transition costs relate to a retired or abandoned power plant. (LF 1299). Qualified extraordinary costs include purchases of fuel or power during anomalous weather events. (LF 1230).

A financing order allows a utility to create a legally isolated, bankruptcy-remote special-purpose entity to issue bonds backed by the right to receive "securitized utility tariff charges" collected through customer bills. (LF 1298, 1383). The utility creates and sells the right to receive the securitized utility tariff charges to the special purpose entity. (LF 1298). The special purpose entity pays the utility for the right to impose, bill and receive the securitized utility tariff charges by issuing bonds, thereby acquiring all of the utility's right to collect the securitized utility tariff charges from the utility's ratepayers. (LF 1298). The right to receive revenues from the securitized utility tariff charges is called "securitized utility tariff property." (LF 1380). The utility uses the proceeds from the sale of the securitized utility tariff property to recover the energy transition costs and/or qualified extraordinary costs. (LF 1379).

The goal of securitization is to structure the securities in a way that will achieve the highest bond rating possible. (LF 1298). A high bond rating allows the issuer to set the price for the bonds at the lowest interest rate possible. (LF 1298). Securitization can save ratepayers money compared to the amount they would pay if traditional financing at higher interest rates were used to recover these significant costs. (LF 1298).

The cash the utility immediately receives in exchange for the securitized utility tariff property is not taxable. (Ex. 1148; Tr. Vol. 3 pg. 242). The securitized utility tariff charges paid by customers over the life of the bonds are treated as gross income to the utility, recognized under the utility's usual method of accounting. (Ex. 1148). The utility is taxed on this gross income. (LF 1323; Ex. 1148; Tr. Vol. 2 pg. 242).

Generally, if the utility incurs tax expenses, the tax expenses can be considered for recovery in general rates. (Ex. 1855 lns. 14-17). The securitization statute also includes various taxes within the definition of "financing costs" that may be recovered through the securitized utility tariff charge. (LF 1324). The statute requires the Commission to include a "true-up mechanism" to make periodic adjustments in the securitized utility tariff charges necessary to ensure the timely payment of the securitized utility tariff bonds, financing costs, and other required amounts. (LF 1365).

Missouri's securitization statute refers to a corporate financing concept called net present value (NPV). (LF 1309, 1326-29, 1341-43). In general, an NPV analysis expresses the value of a stream of future revenues as a single lump sum of today's dollars. (Ex. 1807). The statute uses NPV in the calculation of a customer credit related to accumulated and excess deferred income taxes (ADIT and Excess ADIT) connected with a retired or abandoned electric plant. (LF 1341-43).

Calculating NPV involves estimating potential cash flows associated with an investment over time. (Ex. 1807). These cash flows are netted over the investment period. (Ex. 1807). Then, the net sum of future dollars is discounted back to present dollars to determine NPV. (Ex. 1807). NPV can be calculated using a formula embedded in Excel software. (Tr. Vol. 2, pg. 141-144 ln. 7).

Proceedings Before The Commission

On January 19, 2022, Liberty petitioned for a financing order to recover extraordinary costs incurred during Winter Storm Uri in Commission File No. EO-2022-0040. (LF 1296). On March 21, 2022, Liberty petitioned for a financing order to recover energy transition costs associated with the retirement of Asbury in Commission File No. EO-2022-0193. (LF 1296). Liberty said securitization presented an alternative to carrying the costs on its own books and amortizing them over time. (Ex. 184). The Commission consolidated the two cases. (LF 1296).

Liberty filed supporting testimony. (LF 1296). Liberty requested $221.6 million for Uri and $140.7 million for Asbury, for a total of approximately $362 million. (LF

286-87). Liberty sought full recovery from ratepayers of all its claimed costs. (Tr. Vol. 3 pg. 222). Liberty argued its shareholders should not bear any cost associated with Uri or Asbury's early retirement. (Tr. Vol. 3 pg. 222).

Liberty calculated Asbury's total ADIT balance as $35.6 million, but proposed to credit customers with only $4.7 million of that balance. (Ex. 1055). Liberty estimated a bond yield of 2.47 percent and a term of 13 years. (Ex. 155). The final interest rate will depend on market conditions at the time of the offering. (Ex. 155). Liberty planned for the bonds to be issued in December 2022. (Tr. Vol. 7 pg. 511).

The Commission's Staff filed responsive testimony. (LF 1296). Staff agreed that Liberty should recover costs for Uri and Asbury through securitization. (Ex. 1070-79). Staff proposed some adjustments to Liberty's amounts. (Ex. 1070-79). Staff proposed Liberty should recover $193.4 million for Uri and $68.9 million for Asbury, a total of $262 million. (LF 257-58).

Among its proposed adjustments to Liberty's amounts, Staff provided a different calculation of the statutory ADIT customer credit. (LF 1341). From an estimated Asbury ADIT balance of $22.3 million, Staff calculated a customer credit of $17.1 million. (Ex. 1126-27). Staff also assumed a 13-year bond period, but used an expected bond yield of 4 percent. (Ex. 1407; Tr. Vol. 3 pg. 234 lns. 7-9). Staff argued Liberty's ADIT method could lead to a double recovery of tax expenses. (EO-2022-0193 LF 1265).

Staff testified that "acts of God" and the risk of shifting market forces should not fall on customers alone. (Ex. 1089-90, 1120). Staff recommended Liberty's customers pay 95 percent of the Uri storm costs, and shareholders absorb 5 percent. (LF 260). Staff calculated this adjustment as $9.67 million. (LF 260).

Staff recommended Liberty recover its undepreciated investment in Asbury plus other retirement costs. (LF 265; Ex. 2199). Staff credited customers with amounts held in the Asbury AAO regulatory liability account. (Ex. 1074, 2199-2200). Staff's regulatory liability credit included the return on Asbury that Liberty collected and tracked in Asbury's AAO after Liberty abandoned the plant in December 2019 but before Asbury was removed from rates beginning June 1, 2022. (Ex. 1074-79, 2199-2200; Tr. Vol. 3

pgs. 220-22). Staff recommended Liberty's energy transition costs include carrying charges at Liberty's long-term debt rate of 4.65 percent on the plant balance, beginning when Asbury was removed from rates in June 2022 until the securitized bonds are issued. (LF 269; Ex. 1075-76).

The Commission held an evidentiary hearing on June 13 through June 16, 2022. (LF 1296). The parties filed post-hearing and reply briefs. (LF 1296). The Commission issued a Report and Order on August 18. (LF 1297). Various parties sought rehearing or clarification. (LF 1178-1289). After reviewing the filings, the Commission decided that the calculated total of Liberty's energy transition costs should be amended, and issued an Amended Report and Order (Amended Order). (LF 1297).

The Commission's Amended Report and Order

The Commission issued its Amended Order on September 22, 2022. (LF 1290). The Amended Order is a single financing order authorizing Liberty to recover Uri-related "qualified extraordinary costs" costs of $199.5 million and Asbury-related "energy transition costs" of $82.9 million. (LF 1304-06). The Amended Order awarded Liberty a total of about $290 million, including up-front financing costs. (LF 1302).

The Commission agreed with Staff's method to calculate Asbury's ADIT credit. (LF 1341-43). The Commission found the statute requires the net present value of the full amount of Asbury's ADIT to be credited to customers. (LF 1343). The statute requires Asbury's ADIT to be excluded from Liberty's rate base calculation in future general rate cases. (LF 1343). This exclusion means Liberty's ratepayers no longer benefit from Asbury's ADIT balance in future rate cases after receiving a credit for that balance in this securitization case. (LF 1343). The Commission found that Liberty's proposed method inappropriately discounted Asbury's ADIT balance twice by discounting the yearly amounts of the remaining ADIT balance, then discounting the sum of the yearly amounts again. (LF 1341-42).

The Commission applied a 95/5 percent sharing to Liberty's Uri-related qualified extraordinary costs. (LF 1310). The Commission found this percentage works in the FAC

context to protect utilities from extreme fluctuations in fuel and purchased power costs while incentivizing efficient management. (LF 1307). The Commission found that applying a 95/5 percent sharing for extraordinary fuel and power costs would provide similar benefits. (LF 1307). The Commission found a 95/5 percent sharing of Uri costs will provide Liberty an opportunity to earn a fair return. (LF 1307).

The Commission allowed Liberty to recoup all its undepreciated investment in Asbury, plus other retirement costs. (LF 1305-06). The recently-installed catalytic reduction system and the AQCS together account for 73 percent of Liberty's total undepreciated investment in Asbury. (LF 1332). The Commission credited customers with the return on Asbury that Liberty collected while the plant was retired but still included in rates, from December 2019 through May 2022. (LF 1344, 1359-61). The Commission allowed Liberty to apply carrying charges of 4.65 percent for the time period after Asbury was removed from rates, beginning June 1, 2022, through the issuance of the securitized bonds. (LF 1361).

Public Counsel, Evergy and Liberty filed applications for rehearing of the Amended Order. (LF 1428, 1438). The Commission denied them. (LF 1508). This appeal[2] followed.

[2] Public Counsel dismissed its appeal on March 3.

STANDARD OF REVIEW

Judicial review of a financing order may be had only in accordance with Sections 386.500, RSMo (2016) and 386.510, RSMo (2016)(Supp. 2019). Section 393.1700.2(3)(a)c, RSMo (Supp. 2021).

Under Section 386.510, the Commission's orders will be affirmed if they are lawful and reasonable. *Mo. Am. Water Co. v. Pub. Counsel*, 516 S.W.3d 823, 827 (Mo.banc 2017). The Commission's orders are presumptively valid. *Id*. The appellant has the burden of proving that the order is unlawful or unreasonable. Section 386.430, RSMo (2016).

The lawfulness of a Commission order depends on whether statutory authority for its issuance exists. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo.banc 2003). Legal issues are reviewed de novo. *Id*.

An order is reasonable if it is supported by competent and substantial evidence on the whole record. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo.banc 2011). The Commission's orders are reasonable if they are not arbitrary or capricious or an abuse of the Commission's discretion. *Id.*

"The Commission's factual findings are presumptively correct, and if substantial evidence supports either of two conflicting factual conclusions, 'the Court is bound by the findings of the administrative tribunal.'" *AG Processing, Inc.*, 120 S.W.3d at 735. The reviewing court does not reweigh the evidence. *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. Ct. App. W.D. 2005). If the facts in the record support either of two conflicting conclusions, the reviewing court will defer to the Commission's resolution of the conflict. *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 356 S.W.3d 293, 297 (Mo. Ct. App. S.D. 2011). The Commission's decision will be overturned only if it is "clearly contrary to the overwhelming weight of the evidence." *Id*.

This standard of review applies to each of Appellant's points relied on.

ARGUMENT

I.A. The Amended Order should be affirmed because it is lawful and reasonable under Section 386.510 in that the Commission is authorized to interpret and apply Section 393.1700, and the Amended Order adopted an interpretation of the statutory phrase "tax benefits of accumulated…. deferred income taxes" as the full amount of Asbury's ADIT balance that is reasonable and consistent with the language and statutory scheme. [Responds to Liberty's Point I.A.]

1. The Commission is authorized to interpret and apply Section 393.1700 in order to resolve the competing calculations of the Asbury ADIT customer credit presented by Staff and Liberty.

The Commission's statutory authority over regulated public utilities in the first instance includes the authority to interpret statutes in the administration of its charge. *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 317-18 (Mo. Ct. App. W.D. 2011). The Commission must apply the meaning of new statutes to the facts at hand. *Id*. at 318. The Commission's interpretation of its statutes is entitled to "great weight." *Id.* Section 393.140(8), RSMo (2016) specifically delegates public utility accounting to the Commission's expertise.

Missouri's new securitization statute authorizes the Commission to hear and evaluate a petition for securitized financing. Section 393.1700.2(3)(c), RSMo. (Supp. 2021). The Commission may approve, approve with conditions or reject the petition. Section 393.1700.2(3)(a)b. In a financing order, the Commission must find a utility's recovery of securitized costs and imposition of a securitized utility tariff charge is just, reasonable, and in the public interest. Section 393.1700.2(3)(c)a and b. (A156-57). The Commission must also find securitization is expected to provide quantifiable net present value benefits to customers as compared to traditional rate recovery. *Id.* at b.

The "energy transition costs" a utility recovers for a plant's early retirement include the undepreciated investment, which shall be reduced by "applicable tax benefits of accumulated and excess deferred income taxes…". (ADIT and Excess ADIT). Section

393.1700.1(7)(a). (A153). A financing order that includes retired or abandoned facility costs must include a procedure for the treatment of "accumulated and excess deferred income taxes connected with the retired or abandoned facility." Section 393.1700.2(3)(c)m. (A158).

The accumulated and excess deferred income taxes shall be excluded from rate base in future general rate cases. *Id.* And, "the net tax benefits relating to amounts that will be recovered through the issuance of securitized utility tariff bonds shall be credited to retail customers...". *Id.* The ADIT customer credit shall reduce the amount of such securitized utility tariff bonds that would otherwise be issued. *Id*.

Liberty and Staff disagreed about the calculation of the statutory ADIT customer credit. (LF 1341). Liberty proposed to credit customers with the net present value of only a small fraction of Asbury's total ADIT balance. (Ex. 1055). From its estimated Asbury ADIT balance of about $35.6 million,[3] Liberty calculated the customer credit to its energy transition costs as only $4.72 million. (Ex. 1055).

Staff argued that the credit must include the net present value of Asbury's total estimated ADIT balance. (Ex. 1126-27). From its total estimated Asbury ADIT balance of $22.3 million, Staff calculated a customer credit to Liberty's energy transition costs worth $17.1 million.[4] (Ex. 1126-27, 1407).

The Commission had to apply the statutory language to Liberty's petition. After weighing the methods presented by Liberty and Staff, the Commission adopted Staff's calculation. (LF 1343). The language of Sections 393.1700.1(7)(a) and 393.1700.2(3)(c)m can be reasonably interpreted as meaning that the ADIT customer credit should be calculated as the net present value of Asbury's total ADIT balance, as

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[3] The precise ADIT balance for Asbury is not at issue in this appeal. The parties disagree about the method to calculate the statutory customer credit. *The Empire District Electric Company d/b/a Liberty's Appellant's Brief* (Liberty Br.) pg. 29 fn. 10.

[4] Using Liberty's estimated ADIT balance, Staff calculated an NPV of about $30.8 million. (Ex. 1126).

described in Staff's testimony and calculation. (LF 1343). The Amended Order notes that Section 393.1700.2(3)(c)m requires that "the net tax benefits relating to amounts that will be recovered through the issuance of securitized utility tariff bonds shall be credited to retail customers...". The Amended Order notes that, in the same sentence, the statute requires that "the accumulated deferred income taxes… shall be excluded from rate base in future general rate cases." (LF 1343). That is, Asbury's full ADIT balance will not be credited to customers as a rate base deduction in any future rate case, because customers receive an immediate and permanent credit for the net present value of that full ADIT balance in this securitization case. (LF 1343).

The Commission applied the statutory language to resolve the different calculations presented by competing experts. The Court should afford great weight to the reasonable interpretation of this technical language in the Amended Order, because it pertains to regulatory accounting matters specifically delegated to the Commission's expertise. The Amended Order is lawful and reasonable and should be affirmed.

2. The Amended Order lawfully and reasonably adopted Staff's method because the "tax benefits of accumulated…. deferred income taxes" are the full amount of Asbury's ADIT balance, so Staff's method is reasonable and consistent with the statutory language of Section 393.1700.

"The primary responsibility in statutory construction is to ascertain the intent of the General Assembly from the language used and to give effect to that intent." *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 873 (Mo.banc 2006). Undefined words are given their plain and ordinary meaning. *Id.* Courts will give "considerable deference" to an agency's interpretation if it is reasonable and consistent with the language of the statute. *State ex rel. Webster v. Mo. Resource Recovery, Inc.* 825 S.W.2d 916, 931 (Mo. Ct. App. S.D. 1992). Courts cannot add statutory language where it does not exist. *Li Lin v. Ellis*, 594 S.W.3d 238, 244 (Mo.banc 2020).

Asbury's entire ADIT balance is a "tax benefit." Congress allows accelerated depreciation to provide an "acceleration in the speed of tax-free recovery of costs" that

encourages producers to take the risk of plant investment. *Panhandle Eastern Pipe Line Co. v. Fed. Power Comm'n*, 316 F.2d 659, 662 (D.C. Cir. 1963). Accelerated depreciation allows a utility to deduct a larger amount of a plant's depreciation expense from the utility's taxable income than is assumed for ratemaking purposes. These large deductions mean customers pay more for taxes in rates than the utility actually pays in taxes to the IRS. The difference accrues to the utility as ADIT. See *State ex rel. Utility Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 606 S.W.2d 222, 223-24 (Mo. Ct. App. W.D. 1980); *Mo. Am. Water Co. v. Pub. Serv. Comm'n*, 591 S.W.3d 465, 470-71 (Mo. Ct. App. W.D. 2019).

Early in the life of a plant, the ADIT balance represents "the substantial *tax benefits* of accelerated depreciation" to the utility as cost-free capital. *State ex rel. Utility Consumers Council*, 606 S.W.2d at 224 (emphasis added). The utility can use and invest this cost-free capital. *S. Cal. Edison Co. v. Pub. Utilities Comm'n*., 576 P.2d 945, 953 (Cal.banc 1978). ADIT is not just held aside. (Liberty Br. pgs. 13, 22). The value of ADIT is the entire ADIT balance, not merely the time value. (Liberty Br. pg. 22).

Staff's method recognizes that a plant's entire ADIT balance eventually credits customers. As the plant continues to depreciate, accelerated depreciation gets smaller than straight-line book depreciation. 606 S.W.2d at 223. The utility's deductions are lower than those assumed in ratemaking, but customer rates do not increase. *Id.* at 224. Instead, the tax timing differences are reflected as deductions to the ADIT account. *Id.* In theory, the ADIT balance connected to a particular plant item will reach zero at the end of the plant item's depreciable life. *Id*. In this way, a plant's full ADIT balance is credited to customers when the effects of accelerated versus straight-line depreciation reverse and the tax timing differences even out. *Id.*

This process stopped when Liberty abandoned Asbury. For tax purposes, Liberty took an abandonment loss deduction on Asbury's remaining accelerated depreciation balance. (LF 1352). For ratemaking purposes, Asbury's financial items were captured in an AAO until the plant was removed from rates. (LF 1344). Through securitization, Asbury becomes "energy transition costs," including the remaining book depreciation,

which Liberty will recover immediately through the issuance of the securitized bonds. (LF 1299).

Asbury will not continue to depreciate over time.[5] No further depreciation-related tax timing differences will occur, so Asbury's ADIT balance will never unwind and never be credited to customers absent Commission action. Asbury's ADIT balance no longer represents a future tax liability, as Liberty claims. (Liberty Br. pgs. 21-24, 27-29, 31). For this reason, Sections 393.1700.1(7)(a) and 393.1700.2(3)(c)m require Asbury's ADIT to immediately be credited to customers at the time Liberty immediately recovers all Asbury's energy transition costs through securitization. Staff's method implements the statutory language, so it was lawful and reasonable for the Commission to adopt it. The Amended Order should be affirmed.

No statutory language or other authority supports Liberty's definition of the "tax benefits of accumulated…. deferred income taxes" as merely the rate impact of deducting the company's ADIT balance from rate base in the general ratemaking process. (Liberty Br. pgs. 20-30). From customers' perspective, deducting ADIT from rate base is a "rate benefit," not a "tax benefit." Liberty cites no statutory language defining "tax benefits" as merely a deduction to rate base, a reduction to revenue requirement, or otherwise mandating Liberty's interpretation. The Court should not read Liberty's narrow criteria into the text.

Moreover, deduction of ADIT from rate base is not the total value of the ADIT balance to customers. The deduction simply prevents customers from paying a return on the cost-free capital recorded as ADIT. Customers receive credit for the full ADIT balance in later years when the differential between accelerated and book depreciation

[5] See 18 CFR 101, Uniform System of Accounts (USOA) for Public Utilities definition 12: "Depreciation… means loss in service value not restored by current maintenance incurred in connection with the consumption or prospective retirement of electric plant *in the course of service*." (Emphasis added). (A173).

reverses and ratepayers underpay the taxes. (Tr. Vol. 3 pg. 243-44). Liberty's analogy to traditional ratemaking is unreasonably incomplete.

Liberty cites no authority or evidence to support its claim that Asbury's ADIT balance represents taxes that Liberty will owe after securitization. (Liberty Br. pgs. 20, 22, 24 fn. 6, 31). Liberty misleadingly conflates general descriptions of ADIT with the specific nature of Asbury's ADIT balance and the treatment prescribed in Section 393.1700.2(3)(c)m. (Liberty Br. 21). Asbury's ADIT balance specifically represents timing differences between Liberty's actual income tax deductions for Asbury under accelerated tax depreciation versus the income tax deductions for Asbury assumed under ratemaking book depreciation.[6] (Tr. Vol. 3 pg. 243-44). Asbury's ADIT balance accounts for these specific timing differences, not any future taxes.

Liberty's proposal to use Asbury's ADIT balance to pay any taxes on the "securitized utility tariff charges" it will receive from customers over the life of the bonds does not make sense. (Liberty Br. pg. 24 fn. 6). Liberty does not recover its Asbury-related energy transition costs through the securitized utility tariff charges over time; instead, Liberty will recover its Asbury-related energy transition costs immediately when it sells the right to receive the tariff charges to the special purpose entity. (LF 1298, 1379; Ex. 1148; Tr. Vol. 3 pg. 242). The securitized utility tariff charges are "gross income to the utility recognized under the utility's usual method of accounting." (Ex. 1148). There are no timing differences or tax deferrals associated with these securitized tariff charges. They have no connection to the scrapped Asbury power plant or its ADIT balance. No language in Section 393.1700 mandates Liberty's proposed treatment for Asbury's ADIT.

The Amended Order adopted Staff's method because it is reasonable and consistent with the meaning of "the tax benefits of accumulated… deferred income taxes" as the full amount of Asbury's ADIT. The Amended Order is lawful and reasonable, and should be affirmed.

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[6] The Commission has prescribed the USOA for Missouri electrical corporations. 20 CSR 4240-20.030. See 18 CFR 101, USOA General Instruction 18. (A174-75).

3. The Amended Order adopted Staff's method because it reasonably comports with the statutory scheme to provide a just and reasonable treatment of Liberty's energy transition costs, and Liberty's does not.

The Commission must construe a new statute in light of the entire statutory scheme. *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d at 318. Statutory provisions must be read in harmony with the entire section. *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating LLC*, 248 S.W.3d 101, 107 (Mo. Ct. App. W.D. 2008). Statutory interpretation should avoid unreasonable or absurd results. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 480-81 (Mo. Ct. App. W.D. 2013). Strained construction should not be used to thwart the evident purpose of the Legislature. *Northcutt v. McKibben*, 159 S.W.2d 699, 705 (Mo. Ct. App. 1942).

The statute allows utilities to securitize "energy transition costs" encompassing "all… pretax costs… including the undepreciated investment in the retired or abandoned… electric generating facility…". Section 393.1700.1(7)(a), RSMo. The energy transition cost recovery shall be reduced by "the applicable tax benefits of accumulated and excess deferred income taxes, insurance, scrap and salvage proceeds." *Id.* After the customers receive credit for the plant's ADIT balance through securitization, the plant's ADIT balance is no longer deducted from rate base in future rate cases. Section 393.1700.2(3)(c)m. The results of securitization must be just and reasonable and in the public interest. Section 393.1700.2(3)(c)a and b.

The total "energy transition costs" as defined in Section 393.1700.1(7)(a) reflect a statutory scheme to provide comprehensive ratemaking treatment for the retired or abandoned electric plant, including both utility costs and customer credits. Liberty petitioned for securitized recovery as an alternative to carrying Asbury's costs on its own books and amortizing them over time. (Ex. 184). The statute is premised on allowing the utility to immediately recover its costs through the bond proceeds to provide economic benefits of securitized financing to both the utility and its customers. (LF 1298).

The phrase "applicable tax benefits of accumulated and excess deferred income taxes" appears within the customer credit provision of Section 393.1700.1(7)(a). The net

present value of Asbury's ADIT must be credited to customers, along with similar customer credits like amounts customers paid for Asbury's insurance and Asbury's scrap and salvage proceeds. *Id.* By crediting customers with the full amount of Asbury's ADIT in the securitization case, the Amended Order completely treats Asbury's ADIT along with all other energy transition costs through securitization. This is consistent with the statutory scheme, so the Amended Order should be affirmed.

Liberty's method does not credit customers with a significant portion of Asbury's ADIT balance. (Ex. 1126). Liberty proposes to retain a significant portion of Asbury's ADIT after it fully recovers Asbury's energy transition costs and amortize it over time. (Liberty Br. pg. 20). This does not meet the objective of securitization as explained by the company's own witness. (Ex. 184 lns. 17-22).

Liberty's claim that Asbury's ADIT balance represents Liberty's future income tax liability on the securitized utility tariff charge conflicts with the statutory scheme. (Liberty Br. pgs. 20, 22, 24 fn. 6, 31). Section 393.1700.1(7)(a) says that Asbury's ADIT balance shall reduce Liberty's energy transition costs, not reduce some future taxes on the tariff charges. Liberty's proposal conflicts with the Section 393.1700.2(3)(c)m requirement that Asbury's ADIT balance "shall be excluded from rate base in future general rate cases…". This provision does not contemplate Liberty retaining Asbury's ADIT balance to pay some future taxes.

Staff's method does not deprive Liberty of funds to pay future taxes. (Liberty Br. pg. 20). The Commission's ordinary ratemaking formula includes the tax expenses a utility incurs in the test year used to fix rates. *State ex rel. Utility Consumers Council*, 606 S.W.2d at 224-25. Liberty does not explain why it could not address any tax expense it may incur in a general rate case.

Also, Section 393.1700.1(8) includes "any taxes… imposed on the revenues generated from the collection of the securitized utility tariff charge or otherwise resulting from the collection of securitized utility tariff charges…" in the "financing costs" that can be recovered through the "securitized utility tariff charge." (A153-54). As required by Section 393.1700.2(3)(c)e, the Amended Order includes a "true-up" mechanism to ensure

the billing of securitized utility tariff charges provides timely payments of any amounts due in connection with the securitized utility tariff bonds, including "financing costs." (LF 1394-95). (A157). This section referring to taxes does not mention ADIT. The statute does not contemplate Liberty retaining Asbury's ADIT to pay future taxes that may be owed on the securitized utility tariff charges.

If and when Liberty incurs a tax liability associated with the securitized utility tariff charges, it will not need to use Asbury's ADIT balance to recover the expense. Staff argued that Liberty could double-recover its tax expense by using Asbury's ADIT to reduce an expense recovered by other means. (EO-2022-0193 LF 1265). This would flow Asbury's ADIT to shareholders as profit. The statute requires Asbury's ADIT to be credited to customers, not shareholders. Liberty failed to explain how its method would not result in an unjust and unreasonable double-recovery, so the Commission properly adopted Staff's method instead.

Liberty's argument is based on a misleading implication that it will recoup its Asbury costs through the securitized tariff charges over the 13-year bond period, similar to depreciation of a plant or amortization of an asset. (Liberty Br. pgs. 23-27). This is not the statutory scheme. Instead, the statute allows Liberty to recover all its Asbury costs immediately upon the issuance of the securitized utility tariff bonds, when the special purpose entity transfers the proceeds from the sale of the bonds to Liberty as consideration for its transfer to the special purpose entity of the "securitized utility tariff property," which is the right to collect the "securitized utility tariff charge" from customers over time. (LF 25, 1298; Ex. 184 ln. 18-185 ln. 2; Tr. Vol. 3 pg. 242); Section 393.1700.1(16) and (18). Because the utility recovers all its energy transition costs in an immediate lump sum, securitization is not analogous to the depreciation of an asset or the amortization of an asset balance to expense as Liberty describes. Through securitization, Liberty immediately recovers Asbury's undepreciated balance as energy transition costs, and Asbury's ADIT immediately "unwinds" as a customer credit at NPV to the energy transition costs. Liberty's proposal to unwind Asbury's ADIT balance over the 13-year bond period has no basis in the statutory scheme.

Liberty parses the juxtaposition of "tax benefits" and "accumulated and excess deferred income taxes" incorrectly. (Liberty Br. pg. 22-23). In the statute's technical regulatory accounting context, the term "net tax benefits" can be reasonably interpreted as broadly describing the shifting net balance of accumulated and excess deferred taxes for each plant item included in a securitization petition, and the ongoing effects of plant additions, accelerated depreciation, and tax changes. A securitization petition may include multiple plant items in different positions under accelerated depreciation, depending on when that plant item was placed in service. Liberty's strained construction would thwart the statutory purpose to credit customers with the ADIT balance at the time the utility recovers all the plant's outstanding costs.

Staff and Liberty did not dispute the other items included in the statutory customer credit: excess deferred income taxes,[7] insurance, or scrap and salvage proceeds. Only as to ADIT, Liberty applied an unreasonable method inconsistent with the statute. The Amended Order delivers the ADIT customer credit the statute contemplates. It should be affirmed.

4. The Amended Order lawfully and reasonably adopted Staff's method to calculate the net present value of the ADIT tax benefits in order to determine the ADIT customer credit, because Staff's method followed the statutory instructions, and Liberty's method did not.

Section 393.1700.2(3)(c)m describes how the ADIT offset is to be calculated:

[7] The parties did not define "excess deferred income taxes" (Excess ADIT). The term generally refers to accumulated deferred income tax amounts the utility will never owe due to corporate tax cuts. *Fla. Progress Corp. & Subsidiaries v. Comm'r*, 348 F.3d 954, 956 (11th Cir. 2003). Liberty and Staff agreed on the customer credit associated with Asbury's Excess ADIT. (LF 1324). Notably, for a plant that is abandoned early before its ADIT balance has unwound, the statute similarly treats both the ADIT and Excess ADIT balances as customer credits to the securitized recovery, using the same language.

> "The customer credit shall include the net present value of the tax benefits, calculated using a discount rate equal to the expected interest rate of the securitized utility tariff bonds, for the estimated accumulated and excess deferred income taxes at the time of securitization including timing differences created by the issuance of securitized utility tariff bonds amortized over the period of the bonds multiplied by the expected interest rate on such securitized utility tariff bonds…".

Calculating the "present value" of a future stream of money "rests on some fairly sophisticated economic concepts." *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537-38 (1983). The basic elements of a present value calculation are (1) the amount of earnings each year and (2) the appropriate discount rate reflecting the investment potential of today's dollars. *Id*. The discount rate reduces the value of future amounts because the right to receive a dollar in the future is not as valuable as a dollar today. *Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1412 (D.C. Cir. 1985). The trier of fact should apply the discount rate to each of the estimated installments in the stream of income, then add up the discounted installments to determine the present award. *Jones & Laughlin Steel Corp.*, 462 U.S. at 537-38.

4.a. The Amended Order adopted Staff's method because it followed the statutory instructions.

Section 393.1700.2(3)(c)m sets forth a basic net present value calculation for the retired plant's ADIT balance as performed by Staff. (Tr. Vol. 3 pgs. 245-46; Ex. 1407). First, Staff began with its estimated ADIT balance associated with Asbury at the time of securitization, $22,306,686. (Ex. 1126-27, 1407). Next, Staff amortized the ADIT balance over the 13-year period of the bonds in equal installments of $1,715,899. (Ex. 1407; Tr. Vol. 3 pg. 245). Staff used a discount rate equal to its expected bond interest rate of 4 percent.[8] (Tr. Vol. 3 pg. 234 lns. 7-9; Conf. Ex. 824).

[8] Liberty claim that Commission's calculation used a 2.47 percent discount rate is incorrect. (Liberty Br. pg. 28 fn. 8).

Staff applied the discount rate to each annual amount by multiplying the expected bond interest rate by the 13-year timing difference created by the issuance of the bonds. (Ex. 1407; Tr. Vol. 3 pg. 245). Staff added up the discounted installments to determine the net present value of the ADIT tax benefits as $17,134,363. (Ex. 1407).[9]

Staff's calculation of $17,134,363 is a reasonable net present value of its total estimated ADIT balance of $22,306,686. The Amended Order properly relied on Staff's method. The Court should defer to the Commission's resolution of this issue and affirm the Amended Order.

4.b. The Amended Order rejected Liberty's method because it did not follow the statutory instructions.

Judicial review is conducted upon the record made before the Commission. Section 386.510, RSMo. Liberty's Brief includes a series of charts not supported by citations to the record. Liberty included similar charts in its application for rehearing. (LF 1444-47). They were not included in the record submitted to the Commission. The charts appear inconsistent with the workpaper Liberty's expert witness provided to the Commission. (Compare Liberty Br. pgs. 24-29 with Ex. 1055). The only evidence of Liberty's calculation provided to the Commission was through its witness Emery. Liberty's charts should be disregarded.

Regardless, the charts reflect Liberty's flawed interpretations. Liberty's method does not follow the statutory instructions. Liberty began with its estimated ADIT balance of $35,665,767. (Ex. 1055). Liberty divided that balance into 13 installments of $2,743,521, then subtracted this amount from the ADIT balance 13 times. (Ex. 1055).

Then Liberty arbitrarily applied two discounts. First, Liberty multiplied each year's remaining ADIT balance by its expected bond interest rate of 2.47 percent. (Ex. 1055). Liberty justifies this initial discount using its incomplete and misleading analogy

[9] The witnesses did not precisely described the NPV math equation. It appears to be embedded in Excel spreadsheet software. (Tr. Vol. 2 pg. 141 ln. 22-pg. 144 ln. 7).

to ADIT's "tax benefits" as merely a rate base deduction, as discussed previously. (Liberty Br. pg. 25). The statute says that the "timing differences," not the ADIT balance, shall be multiplied by the bond interest rate. Liberty twists the statute to justify this arbitrary initial discount, which dramatically reduces the resulting customer credit without any statutory basis.

Liberty says its second step is to "consider" the timing differences. (Liberty Br. 25). But the statute says to include "timing differences created by the issuance of [the] bonds… *multiplied* by the expected interest rate." (Emphasis added). This language refers to a one-time application of the discount rate to the annual installments in the NPV procedure. It does not justify Liberty's double discount. The 13-year bond period is not analogous to a 13-year depreciation or amortization period. (Liberty Br. pgs. 23-25). The ADIT balance is "unwound" when the net present value of the ADIT balance is credited to the utility's immediate recovery of energy transition costs. It is not unwound over the 13-year bond period.

In its Step 3, Liberty discounts the ADIT sums a second time by applying the NPV calculation to the ADIT amounts that it already steeply reduced by the bond interest rate percentage. (Ex. 1055; Liberty Br. pg. 26). The statute does not say the discount rate/bond interest rate should be applied twice. Liberty misconstrues the statute to improperly limit the ADIT customer credit. (Ex. 1055).

A net present value calculation is supposed to reduce a stream of future cash flows to a lump sum discounted from the future back to a present value. (Ex. 1807-08). No reasonable investor would accept Liberty's calculation of $4,728,671 as the net present value of a stream of payments totaling $35,665,767. (Tr. Vol. 3 pg. 245). The statute does not support the absurd results of Liberty's convoluted approach.

Staff's calculation of the ADIT customer credit comports with the plain language of Section 393.1700 and securitization's entire statutory scheme, and reaches a reasonable result. It was lawful and reasonable for the Amended Order to adopt Staff's method and reject Liberty's method. The Amended Order should be affirmed.

I.B. The Amended Order should be affirmed because it is lawful and reasonable under Section 386.510 in that it is supported by substantial and competent evidence of Staff's method and reflects the Commission's reasoned decision. [Responds to Liberty's Points I.B and I.C].

1. The Amended Order is reasonable because it is supported by substantial and competent evidence presented by Staff witness Bolin about the proper method to calculate the ADIT customer credit.

A Commission order is reasonable if it is supported by competent and substantial evidence on the whole record. *State ex rel. Praxair, Inc.*, 344 S.W.3d at 184 (Mo.banc 2011). "'Substantial' does not necessarily mean quantity or even quality, it simply means that the evidence relied on must be probative of the issues it was offered to prove." *State ex rel. Noranda Aluminum*, 356 S.W.3d at 309. Evidentiary determinations by the Commission are favored by a strong presumption of validity, which extends to determinations based on expert evidence. *Friendship Vill. of S. Cty. v. Pub. Serv. Comm'n*, 907 S.W.2d 339, 349 (Mo. Ct. App. W.D. 1995). Witness credibility is a matter for the factfinder. *State ex rel. Mo. Gas Energy*, 186 S.W.3d at 382.

The Commission must include sufficient findings of fact to determine how the controlling issues were decided. *State ex rel. Acting Pub. Counsel Coffman v. Pub. Serv. Comm'n*, 150 S.W.3d 92, 101 (Mo. Ct. App. W.D. 2004). This Court is allowed to determine whether the Commission could reasonably have reached the result that it did. *State ex rel. Pub. Counsel. v. Pub. Serv. Comm'n*, 938 S.W.2d 339, 342 (Mo. Ct. App. W.D. 1997). The Commission's decision will not be reversed unless the action of the Commission was arbitrary, capricious and without reasonable basis. *Id*.

Staff witness Bolin provided pre-filed testimony and workpapers describing her calculation. (Ex. 1125-28, 1406-07). Bolin described her net present value calculation and explained Liberty's improper double-discount, which is evident on the face of Liberty's workpaper when compared to the proper calculation on Bolin's workpaper. (Ex. 1055, 1126, 1407; Tr. Vol. 3 pgs. 242-247). The Commission found her explanation credible. (LF 1341).

At the hearing, Bolin described how customers receive the full benefit of ADIT in traditional ratemaking. (Tr. Vol. 3 pg. 243). Bolin testified that absent securitization, over time the ADIT balance associated with one item like Asbury would eventually be zero. (Tr. Vol. 3 pg. 243-44). Bolin explained that, similarly, the securitization statute requires customers to be credited for the full amount of a plant's ADIT balance when it is retired prematurely and treated immediately through securitization. (Tr. Vol. 3 pg. 243-45). Bolin's substantial and competent expert testimony supports the Commission's conclusion that Liberty must credit customers with the net present value of Asbury's total ADIT balance under the terms of the securitization statute. (LF 1343).

Staff witness Bolin is an accountant and director of the Commission Staff's Financial and Business Analysis Division. (LF 1341). Bolin has audited and examined public utility books and records since 1994. (Ex. 1116). She performed calculations and testified on ADIT, taxes and depreciation in numerous Commissions cases. (Ex. 1130-1140). Her testimony constitutes substantial and competent evidence supporting the Amended Order, so the Amended Order is reasonable. Liberty's claim that Staff's testimony lacks probative force is wrong. (Liberty Br. pg. 33).

The Amended Order set forth findings, conclusions and explained its decision on the ADIT credit, with citations to the record. (LF 1341-43). The Amended Order shows how the Commission decided to calculate the ADIT customer credit, and Staff's evidence provides a reasonable basis for the Amended Order. The Amended Order is neither arbitrary nor completely conclusory, as Liberty claims. (Liberty Br. pg. 35). The Court should not re-weigh this evidence or second-guess the Commission's evaluation of witness credibility, as Liberty requests. (Liberty Br. pgs. 32-34). The Court should defer to the Commission's reasoned determination and affirm the Amended Order.

2. Liberty does not meet its burden under Section 386.510 to overturn the Amended Order on reasonableness grounds.

The Court presumes the Commission's order is valid, and the appellant has the burden of proving the order is unlawful or unreasonable. *Mo. Am. Water Co.*, 591 S.W.3d

at 469 (Mo. Ct. App. W.D. 2019). The Court reviews "the evidence and exhibits introduced before the Commission…". Section 386.510, RSMo. No new or additional evidence may be introduced in the appellate court. *Id*.

A not-supported-by-substantial-evidence challenge requires an appellant to identify all favorable evidence supporting the challenged factual proposition, and demonstrate why the challenged evidence, along with all reasonable inferences, lack probative force such that the trier of fact could not reasonably decide the existence of the proposition. *Mo. Am. Water Co.*, 591 S.W.3d at 470 fn. 2. Citation to contrary evidence is irrelevant. *Houston v. Crider*, 317 S.W.3d 178, 186 (Mo. Ct. App. S.D. 2010).

Liberty's argument ignores Bolin's hearing testimony persuasively explaining how customers receive the full benefit of a plant's ADIT—over the life of a plant in normal circumstances, or immediately through securitization when the plant retires early. (Tr. Vol. 3 pgs. 243-445). (Liberty Br. pg. 34). Liberty cannot support its challenge by ignoring favorable testimony. Nor can Liberty carry its burden simply because its witness provided different testimony. (Liberty Br. pg. 33).

Liberty's argument lacks evidentiary support. Liberty asserted that the tax benefits of ADIT are merely the rate base deduction, but failed to rebut Staff's persuasive description showing how ADIT is credited to customers over the life of a plant. Liberty claimed it must retain Asbury's ADIT balance to pay future taxes, but failed to quantify those future tax amounts or explain why it cannot seek recovery in a rate case at a time when its tax expenses are known and measurable. Staff testified proper ratemaking should consider actual amounts. (Tr. Vol. 3 pg. 240). The Commission was not persuaded by Liberty's testimony.[10] In its discretion the Commission adopted Staff's method. Under the standard of review in Section 386.510, the Amended Order should be affirmed.

[10] Liberty cites an affidavit attached to its application for rehearing. (Liberty Br. pg. 22 citing LF 1243-47). The affiant did not testify before the Commission or submit to cross examination. (LF 251). By the time Liberty submitted this affidavit, the record before the Commission was closed. 20 CSR 4240-2.150(1). This material was neither presented to

3. The Amended Order balances customer and investor interests and does not penalize Liberty.

The Amended Order treats Asbury's ADIT under the securitization statute similar to traditional ratemaking. Had Asbury not retired early, it would have continued to run and depreciate. (Tr. Vol. 3 pgs. 243-45). Customers would be fully credited with Asbury's ADIT over the life of the plant. (Tr. Vol. 3 pgs. 243-45).

A similar treatment could have resulted had Liberty pursued the Asbury AAO established in its 2019 rate case. (LF 1344). An AAO creates a balance-sheet account to defer extraordinary financial items for consideration in a utility's next general rate case. *Matter of Empire v. Pub. Serv. Comm'n,* 630 S.W.3d 887, 892 (Mo. Ct. App. W.D. 2021). The Asbury AAO created a regulatory liability that included Asbury's ADIT balance. (Ex. 183, 1422). A "regulatory liability" represents amounts that a utility would ordinarily book as an increase to earnings, but are instead preserved on the utility's balance sheet for potential return to customers in a subsequent general rate proceeding. *Pub. Counsel v. Evergy Mo. West*, 609 S.W.3d 857, 862 fn. 3 (Mo. Ct. App. W.D. 2020).

Had Liberty pursued rate treatment of the Asbury AAO in its 2021 rate case, Asbury's total regulatory assets and liabilities, including the ADIT balance, would be considered by the Commission for final rate treatment. (LF 1328; Ex. 183-84). The ADIT balance would be addressed as part of the total asset balance to be amortized over time. (LF 1328). The amortization expense for the total asset balance would be included in the company's rates. (LF 1328). The ADIT would be included in the balance, not held aside to pay taxes on the amortization expense.

Under the Amended Order, securitization leads to a similar result immediately instead of over time. Liberty immediately recovers all its costs, less customer credits. Asbury's ADIT is included in the statutory customer credit. Liberty chose securitization

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the Commission nor included in the record before it, so it cannot be introduced in this Court under Section 386.510.

as an alternative to carrying Asbury's balance over time. (Ex. 184). It has not been penalized for electing securitization. (Liberty Br. pg. 35).

Missouri's new securitization statute addresses power plants that retire early. Plants that retire before the end of their depreciable lives will likely carry significant ADIT balances that will never unwind as planned. The statute credits these ADIT balances to customers when the utility recovers its costs. The Amended Order lawfully and reasonably adopted Staff's method, so the Amended Order should be affirmed.

II.A. The Amended Order should be affirmed because it is lawful and reasonable under Section 386.510 in that Section 393.1700 authorizes the Commission to determine whether Liberty's securitized cost recovery is just and reasonable and in the public interest, and a 95/5 percent sharing of extraordinary storm costs between customers and shareholders meets that standard. [Responds to Liberty's Point II.A].

Section 393.1700.1(13), RSMo permits a utility recover "[q]ualified extraordinary costs." (A154). These are costs that would cause extreme customer rate impacts if they were recovered through customary ratemaking. *Id.* They include costs of fuel or power purchased during anomalous weather events. *Id.*

The costs must be prudently incurred. *Id.* Also, the Commission must find that recovery of securitized utility tariff costs is "just and reasonable" and "in the public interest." Section 393.1700.2(3)(c)a, RSMo. The Commission must also find that securitization is expected to provide quantifiable benefits to customers as compared to recovery of the costs absent securitization. *Id*. at b.

"Just and reasonable" rates allow public utilities to recover expenses that are (1) fair to both investors and ratepayers and (2) prudently incurred. *Spire Mo. Inc. v. Pub. Serv. Comm'n*, 618 S.W.3d 225, 232 (Mo.banc 2021). The Commission has broad discretion to include or exclude expenditures to set just and reasonable rates. *Id.* Courts cannot and should not circumscribe regulatory agencies by any hard or fast formula. *State*

ex rel. Mo. Water Co. v. Pub. Serv. Comm'n, 308 S.W.2d 704, 718 (Mo. 1957). What is just and reasonable in each case depends upon the particular facts. *Id.*

1. The Amended Order's allocation of 5 percent of Uri's fuel and power costs to Liberty's shareholders is just and reasonable and in the public interest.

Section 393.1700 authorized the Commission to apply a 95/5 sharing percentage to Liberty's Uri-related "qualified extraordinary costs," because the statute obligated the Commission to determine an amount of recovery that was just, reasonable and in the public interest. Section 393.1700.2(3)(c)a. The Amended Order found that, in this situation, a 95/5 sharing percentage met this statutory objective. (LF 1307-10). The statute does not mandate any hard and fast formula. Liberty's arguments that Section 393.1700 does not authorize the Commission to impose a just and reasonable sharing percentage in the public interest ignore the statutory language. (Liberty Br. pg. 37-42).

The Amended Order properly applied *Spire.* The Commission found that a 95/5 percent sharing of extraordinary fuel and purchased power costs strikes a fair balance between Liberty's customers and shareholders. (LF 1310). A 95/5 percent sharing provides Liberty with an incentive to plan for and manage extraordinary events, and to operate efficiently when they occur. (LF 1307, 1309-10). A 95/5 percent sharing protects Liberty against excessive fuel and power costs, and provides its investors an opportunity for a fair return. (LF 1307). This result is just and reasonable and in the public interest, so the Amended Order should be affirmed as lawful and reasonable.

Liberty misreads *Spire*. (Liberty Br. pgs. 36-40). *Spire* affirmed the Commission's conclusion that including certain expenditures in utility rates "was not ***just***…". 618 S.W.3d at 233 (emphasis original). That the costs only benefited shareholders was a valid reason to exclude them from rates under the "just and reasonable" standard in the circumstances of that case, but the Court did not say that is the *only* reason costs can be excluded. The *Spire* standard is "just and reasonable," not "prudently incurred for the benefit of customers." The Court rejected Spire's assertion that a utility is entitled to recover any and all prudent expenditures in rates. *Id.* Liberty makes the same argument

here. (Liberty Br. pg. 37-38). The Court should not narrow *Spire's* holding as Liberty suggests.

Liberty's "for the benefit of customers" frame is a bit misleading. (Liberty Br. pg. 36-39). Liberty must provide safe and adequate service to customers. Section 393.130.1, RSMo (2016). Customers provide Liberty a reasonable return on investment. Section 393.270.4, RSMo (2016). Liberty's electricity business benefits both shareholders and customers, so the Commission must balance their interests and fairly allocate costs as it did here. See e.g., *Spire*, 618 S.W.3d at 233.

Spire commands the Commission to set rates that are lawful, reasonable, not arbitrary, and "fair to both investors and ratepayers." 618 S.W.3d at 232. The Commission reasoned that the 95/5 sharing percentage justly and reasonably protected the utility from the extreme costs, preserved its opportunity for a fair return, and provided an efficiency incentive in the public interest. This law and reasoning would not support a decision to "lop off" any amount of recovery in any ratemaking case and threaten adequate service, as Liberty fears. (Liberty Br. pg. 40). The Amended Order should be affirmed because it lawfully and reasonably balances the costs of extreme weather between Liberty's customers and shareholders.

2. Comparison to traditional ratemaking supports Amended Order's just and reasonable cost allocation of Uri's storm costs.

In establishing a just and reasonable allocation of Liberty's Winter Storm Uri costs, the Amended Order cited Section 393.1700.2(3)(c)b, RSMo. This subsection authorized the Commission to evaluate Liberty's recovery of fuel and power costs through securitization as compared to traditional ratemaking. Here, traditional ratemaking is the fuel adjustment clause (FAC) and the accounting authority order (AAO). (LF 1307).

First, the Commission found that experience with Liberty's fuel adjustment clause (FAC) supported a 95/5 percent allocation of the company's Uri costs as just and reasonable. (LF 1310). In the FAC, this 95/5 percent sharing of over- and under-

recoveries protects utilities "from extreme fluctuations in fuel and purchased power cost." *State ex rel. AG Processing v. Pub. Serv. Comm'n*, 340 S.W.3d 146, 148 (Mo. Ct. App. W.D. 2011). This sharing also provides the utility "a significant incentive to take all reasonable actions to keep its fuel and purchased power costs as low as possible, and still have an opportunity to earn a fair return on its investment." *Id.*

Applying the securitization statute's "just and reasonable" and "public interest" standards, the Commission determined that Liberty's recovery of Uri-related qualified extraordinary costs should protect Liberty from extreme price fluctuations, incentivize reasonable management of severe weather, and provide an opportunity for a fair return. (LF 1307-10). The Commission found that its experience with the FAC demonstrated that a 95/5 percent sharing meets these objectives. (LF 1307-10).

Section 393.1700 uses the "just and reasonable" standard, so it did not need to repeat the specific incentive language of Section 386.266.1, RSMo. (Liberty Br. pg. 41). Liberty's argument that the Commission simply applied this sharing "because of" the FAC mischaracterizes the Amended Order. (Liberty Br. pg. 44). Liberty's argument that the FAC has nothing to do with securitization ignores the statute's "just and reasonable" and "public interest" standards and the statute's required comparison to traditional ratemaking. (Liberty Br. pg. 44). Liberty cites no authority or evidence showing that a 95/5 sharing of extraordinary costs will impair its opportunity to earn a fair return. (Liberty Br. pgs. 37-38). See *Noranda*, 356 S.W.3d at 313 (rejecting claims of an unreasonable return without evidence).

Liberty argues that extraordinary costs are different from FAC costs because there are no "ups and downs" that net out over time. (Liberty Br. pg. 41). To the contrary, extreme weather can produce extra revenue for a utility, as it did here, which Liberty retained. (LF 1311-12). More importantly, the Commission reasoned that insulating Liberty from all costs of extreme weather is not just, reasonable, or in the public interest. (LF 1311).

The Commission's authority to justly and reasonably allocate costs extends to "extraordinary" costs recovered through an AAO. Initially, Liberty sought recovery of

Uri costs through an AAO. (LF 1307-08). Staff testified it would recommend a 95/5 sharing of Uri costs in an AAO. (LF 1307-08). The Commission has the discretion to impose a 95/5 percent sharing, because AAOs create no expectation that deferral items within them will be incorporated or followed in a rate application proceeding. *Pub. Counsel*, 609 S.W.3d at 871. Liberty is not worse off under securitization. (Liberty Br. pg. 43-45).

Comparing securitization to the results of traditional ratemaking allows the Commission to issue financing orders that are just, reasonable, in the public interest, and that provide the customer benefits required by the statute. Securitization is not a means to evade the Commission's discretion to reach just and reasonable results under the circumstances of each case. The Amended Order properly applied the statutory standard. Liberty failed to demonstrate the Commission acted unlawfully or unreasonably. The Amended Order should be affirmed.

II.B. The Amended Order should be affirmed because it is lawful and reasonable under Section 386.510 in that substantial and competent evidence supports the Commission's reasoned decision to apply a 95/5 percent sharing to Liberty's qualified extraordinary costs. [Responds to Liberty's Point II.B].

Once it is determined that an act is within the Commission's authority, considerations regarding rate adjustments and others become part of the broad discretion accorded the Commission to set just and reasonable rates. *State ex rel. Office of Public Counsel and Missouri Indus. Energy Consumers v. Mo. Pub. Service Comm'n*, 331 S.W.3d 677, 682 (Mo. Ct. App. W.D. 2011). Furthermore, if the Commission's decision is based on purely factual issues, the Court may not substitute its judgment for that of the Commission. *Id.*

Staff persuasively explained that some of Uri's costs should be allocated to Liberty shareholders. (Ex. 1120) Otherwise securitization would unfairly insulate utility shareholders from all risk of unforeseen events. (Ex. 1120). Staff demonstrated Commission precedent for sharing of natural disaster costs. (Ex. 1120). The Commission

found that a 95/5 percent sharing has worked well in the FAC. (LF 1306). Liberty's claim that the Amended Order did not meaningfully explain its decision ignores the Commission's findings. (Liberty Br. pg. 45).

The Commission acknowledged the FAC precludes recovery of extraordinary costs. (LF 1307-08). Nevertheless, the Commission drew upon its experience with the FAC to find that a 95/5 percent sharing fairly apportions some of the risk of extreme weather to Liberty's investors. (LF 1306-07). The Commission reasoned that a 95/5 percent sharing preserved Liberty's ability to earn a fair return. (LF 1306-07). The Amended Order is not contradictory as Liberty claims. (Liberty Br. pg. 45).

The Commission explained why the prudence standard is not an effective incentive regarding fuel and purchased power costs. (LF 1308-09). A prudence review can evaluate major decisions. (LF 1308). But a utility makes thousands of small decisions every hour regarding fuel, purchased power and off-system sales. (LF 1309). A prudence review cannot uncover and evaluate all those decisions. (LF 1309). The Amended Order reasonably imposed a more effective incentive. The Court should not substitute its judgment on the most effective incentive for public utilities to reasonably manage the effects of severe weather, as Liberty requests. (Liberty Br. pg. 46).

The Amended Order will not discourage securitization. (Liberty Br. pg. 46). Liberty chose securitization for the benefit of receiving all its $290 million in qualified extraordinary costs immediately, in a lump sum. (LF 1302). Liberty concedes that the "just and reasonable" standard applies in proceedings under the securitization statute just as in traditional ratemaking proceedings. (Liberty Br. pg. 40). Liberty should not expect securitization to unjustly and unreasonably insulate the utility from any risk associated with severe weather.

Securitization does not place "acts of God" upon customers alone. The Amended Order adopted a just and reasonable allocation of the costs of this storm between customers and shareholders in the public interest, as authorized by the statute. The Amended Order is lawful and reasonable and should be affirmed.

III.A. The Amended Order should be affirmed because it is lawful and reasonable under Section 386.510, RSMo in that the Amended Order approved carrying charges associated with Asbury's retirement that are just, reasonable and in the public interest. [Responds to Liberty's Points III.A and III.C].

Section 393.1700.1(7)(a) defines "energy transition costs," including "accrued carrying charges" as a cost that may be recovered through securitization. The statute does not further define "carrying charges." *Id.* A financing order issued by the Commission shall include a finding that recovery of securitized costs is "just and reasonable" and "in the public interest." Section 393.1700.2(3)(c)a, RSMo. Statutes that do not specifically define broad ratemaking terms give the Commission "substantial discretion" to select an appropriate method to determine the utility's recovery. *Spire Mo. Inc. v. Missouri Pub. Serv. Comm'n*, 607 S.W.3d 759, 770 (Mo. Ct. App. W.D. 2020).

1. The Amended Order properly credited customers with the return on Asbury that Liberty collected from December 2019 through May 2022 because it was recorded as a regulatory liability for possible return to customers.

A "regulatory liability" represents amounts that a utility would ordinarily book as an increase to earnings, but are instead preserved on the utility's balance sheet for potential return to customers in a subsequent general rate proceeding. *Pub. Counsel*, 609 S.W. 3d at 862 fn. 3. In a rate proceeding, the deferred amounts, in combination with any other factors, may be considered for final rate treatment by the Commission. *Id.* at 871.

Asbury succumbed to market pressure. (LF 1331-39). Staff testified, and the Commission agreed, that Liberty's decision to retire Asbury when it did was reasonable and prudent. (LF 1336-39). The Amended Order awarded Liberty $82.9 million in energy transition costs, including Asbury's full undepreciated balance and retirement costs recorded as regulatory assets through Asbury's AAO. (LF 1306).

The Amended Order also included a customer credit representing the regulatory liability established by the Commission in the Asbury AAO. (LF 1344). This regulatory liability included amounts that customers paid for Asbury—depreciation expense,

operating costs, etc.—while Asbury was out of service but still included in rates between December 2019 through May 2022. (LF 1344). One of those regulatory liability items is the return on Asbury that Liberty collected during that time. (LF 1344).

The Amended Order concluded that the return on Asbury component of the regulatory liability should be included in the offset to Liberty's net balance of securitized costs. (LF 1344). Including the return on Asbury component in the offset recognizes that customers paid Liberty the full 6.77 percent weighted average cost of capital (WACC) return on Asbury's plant balance in rates from the time the plant retired in December 2019 until the plant was removed from rates beginning June 1, 2022, even though Asbury provided no service to customers during that time. (LF 1344). The Amended Order is lawful and reasonable because the return on Asbury was included as a regulatory liability for potential return to customers in the Asbury AAO. Under the "just and reasonable" and "public interest" standards in Section 393.1700, the Commission may consider all factors in the final ratemaking treatment of an AAO and apply its ratemaking discretion in the securitization context. The Amended Order should be affirmed.

Absent securitization, the Commission could have addressed Asbury's AAO in Liberty's 2021 general rate case. (Ex. 184). Because the return amount was included in the regulatory liability for possible credit to customers, Liberty would not be entitled to retain that amount. (Ex. 184). In the 2021 rate case, Staff recommended a sharing of the responsibility for the unrecovered capital costs of Asbury as of its retirement date between Liberty's shareholders and customers. (Ex. 1088). Staff proposed to accomplish this by including an amortization of the balance in rates, but excluding the unamortized balance from Liberty's rate base. (Ex. 1088). The Commission would decide.

Liberty elected not to pursue ratemaking treatment of the Asbury AAO. Instead, Liberty sought treatment of Asbury's retirement through securitization. (LF 1344). The Amended Order included the return on Asbury component with other regulatory liability amounts in the customer credit. (LF 1344). A similar result could have occurred had Liberty sought AAO recovery in its 2021 rate case. Section 393.1700 does not mandate

any particular treatment for regulatory liabilities, nor does it mandate use of Liberty's WACC in addressing carrying charges.[11] (Liberty Br. pgs. 47-49, 53-54).

2. The Amended Order properly included "accrued" carrying charges in Liberty's energy transition costs.

The Amended Order follows the statutory language. Customers paid a full 6.77 percent return on Asbury in rates from the time the plant shut down in December 2019 through May 2022. (LF 1344). Therefore, no carrying charges "accrued" under Section 393.1700.1(7)(a) on the Asbury balance during that time. Liberty collected Asbury's full return, but tracked the amount as a regulatory liability.

For the period after Asbury was removed from rates, beginning June 2022, the Amended Order awarded Liberty carrying costs at 4.65 percent that accrued on the Asbury balance. (LF 1361). These carrying costs continue until the securitized bonds are issued and Liberty recovers all its energy transition costs. (LF 1361). At that time, Liberty's immediate lump sum recovery will be reduced by the customer credit that includes the December 2019 through May 2022 return on Asbury. (LF 1361). The credit will not apply until Liberty is made whole for Asbury's costs. Liberty's claim that the Commission denied carrying charges "merely because the plant is retired" is wrong. (Liberty Br. pg. 47-48).

The just and reasonable standard in Section 393.1700 authorized the Commission to establish the ratemaking treatment for the return on Asbury component of Liberty's

[11] The legislature specifically refers to an electrical corporation's weighted average cost of capital in other statutes enacted along with Section 393.1700. Section 393.1705.2(2)(d) and (h), (3)(a) and (d), and (5). (A169-171). The legislature chose not to refer to the WACC in Section 393.1700.1(7)(a) to define "accrued carrying charges." The Court should reject Liberty's request to read such a requirement where it does not exist.

AAO. Securitization does not preclude the treatment provided by the Amended Order. It should be affirmed.[12]

3. The Amended Order properly applied the used and useful principle in reaching a just and reasonable result under Section 393.1700.

The utility property upon which a rate of return can be earned must be "used and useful" to provide service to its customers. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. Ct. App. W.D. 1988). The "used and useful" standard is one of many relevant factors the Commission can weigh in reaching a just and reasonable decision. *Id.* at 623. Liberty's contention that the "used and useful" principle does not apply to Section 393.1700 misconstrues the just and reasonable standard incorporated therein. (Liberty Br. pg. 50).

Generally, the Commission uses a utility's WACC as a reasonable rate of return on used and useful plant. *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 367 S.W.3d 91, 99 (Mo. Ct. App. S.D. 2012). A utility's WACC refers to its composite cost of capital, which is the sum of the weighted cost of each component of the utility's capital structure, i.e, debt and shareholder equity. *Id.* The Court should not grant Liberty the same WACC-level return on a retired plant as it earns on a used and useful plant. (Liberty Br. pg. 53-54).

The "used and useful" principle informed the Commission's decision. (LF 1361). The "used and useful" factor is particularly relevant to Asbury. Liberty's 2008 and 2014 environmental upgrades together account for 73 percent of Asbury's total undepreciated

[12] If the Court reverses the Amended Order, it should not mandate the use of Liberty's WACC as Liberty requests. (Br. pg. 53-52). The statute does not mandate WACC. Missouri courts do not fix utility rates. *State ex rel. GTE North, Inc. v. Pub. Serv. Comm'n*, 835 S.W.2d 356, 361 (Mo. Ct. App. W.D. 1992). When a decision is reversed and remanded, it is remanded to the Commission "for further action." *Id.* at 361-62. The Court has no authority to tell the Commission what its action should be. *Id.*

investment. (LF 1351). At the time, Liberty claimed these investments would extend the plant's life to 2035. (Ex. 1703-04). Liberty's claim that the principles of *Union Electric* do not apply to Asbury because it comprises assets used for many years is wrong. (Liberty Br. pg. 50).

Liberty's decision to prematurely retire Asbury means customers received very little benefit from these expensive recent upgrades. Yet customers will fully reimburse Liberty for these investments. (LF 1305-06). Under these circumstances, it was reasonable for the Commission to credit customers with the return Liberty collected on Asbury while the plant, and these new upgrades, sat idle.

Like the "used and useful" standard, the "prudent decision theory" is just one factor for the Commission to weigh in reaching a just and reasonable decision. *Union Elec.*, 765 S.W.2d at 623. Courts have affirmed the Commission's discretion to balance these factors. *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 293 S.W.3d 63, 74-75 (Mo. Ct. S.D. 2009). Liberty's argument that it prudently retired Asbury does not preclude the Amended Order's just and reasonable cost allocation based on all the circumstances of this case. (Liberty Br. 49-51). The Amended Order's treatment of Asbury under these circumstances does not mean the Commission could deny all carrying costs for every retired plant in all circumstances, as Liberty claims. (Liberty Br. pg. 50).

The Amended Order strikes a just and reasonable balance between Liberty and its customers as to Asbury's retirement costs in the public interest. The statute does not mandate Liberty's proposal to impose all the cost burdens of shifting market forces onto captive customers. The Amended Order should be affirmed.

III.B. The Amended Order should be affirmed because the Amended Order explained why Staff's method for calculating carrying charges on Asbury fairly apportioned those costs and Liberty's method did not. [Responds to Liberty's Points III.B and III.C].

A public utility is in its nature a monopoly. *State on inf. Barker ex rel. Kansas City v. Kansas City Gas Co.*, 163 S.W. 854, 857-58 (Mo. 1913). State regulation takes the place of and stands for competition. *Id.* In fixing of just and reasonable rates, the Commission must balance investor and consumer interests. *State ex rel. Assoc. Nat. Gas Co.*, 706 S.W.2d 870, 873 (Mo. Ct. App. W.D. 1985).

A major power plant retirement is an "extraordinary event." *Pub. Counsel*, 609 S.W.3d at 867. It presents one of the "inherent complexities involved in the rate setting process" where the Commission has considerable discretion. *State ex rel. Praxair v. Pub. Serv. Comm'n*, 328 S.W.3d 329, 341 (Mo. Ct. App. W.D. 2010). Courts have approved the Commission's authority to allocate some risk of market forces to utility shareholders. *State ex rel. Union Elec. Co.*, 765 S.W.2d at 622 (Mo. Ct. App. W.D. 1988); *State ex rel. City of St. Louis v. Pub. Serv. Comm'n*, 47 S.W.2d 102, 111 (Mo.banc 1931).

The Amended Order's reference to June 2022 is reasonable. Before then, Asbury was retired, but all its costs were included in customer rates. Liberty collected a full 6.77 percent return on Asbury during that time. (LF 1359). Asbury was removed from rates in June 2022. (LF 1361). Liberty will collect carrying costs at 4.65 percent that have accrued from the time Asbury was removed from rates and will continue to accrue through the bond issuance. (LF 1361). At the time of the bond issuance, Liberty will fully recover all its costs for Asbury. (LF 1361). Only then are customers credited with the return on Asbury and other components of Asbury's regulatory liability. (LF 1361). The Amended Order's use of the June 2022 date is reasonable, contrary to Liberty's argument. (Liberty Br. pg. 51).

Most of Asbury plant balance includes expensive recent plant additions that benefited customers very little. (LF 1332). Customers will pay for it all, but receive a credit for the return they paid on Asbury after it retired. (LF 1305-06). Liberty's claim

that the Amended Order lacks reason ignores all the factors involved. (Liberty Br. pg. 51-52). The Amended Order struck a reasonable balance under the facts of this case.

Historically, the Commission has ordered some sharing of the costs of unforeseen events between a utility's shareholders and ratepayers. (Ex. 1091). Generally utilities cannot expect to recover *any* costs associated with retired assets, because retired assets are no longer used and useful and providing benefits to customers. (Ex. 1091). Staff testified that the Asbury retirement is one instance where customers should contribute to cost recovery of a retired asset. (Ex. 1091). Coal plants across the U.S. face similar market risks. (LF 1334). The Amended Order requires customers to pay all Asbury's costs, even though it is not providing customers a benefit, and requires Liberty to share some rate responsibility for the risk of the unanticipated economic, regulatory and political changes that led to Asbury's demise. (Ex. 1091). This is a just and reasonable balance that serves the public interest, not a penalty on Liberty. (Liberty Br. pg. 52).

The Amended Order will not discourage utilities from seeking alternatives to uneconomic coal plants. (Liberty Br. pg. 52). Shareholders invested in Liberty, not in Asbury. Shareholders earned a return on Asbury for many years as compensation for the risk it might become uneconomic, while rate regulation protected them from extreme financial losses, as evidenced in this case. (Ex. 1090). Liberty claims that retiring Asbury will save customers money. (Liberty Br. pg. 49). These purported savings are only projections, however, and not assumed to materialize, if at all, until many years in the future. (Ex. 1092).

Liberty recently invested more than $1 billion in ratepayer-backed shareholder capital in three wind farms. (Ex. 1704-05). Liberty's investors earn a full return on those investments. (Ex. 1091-92, 1290; Tr. Vol. 5 pg. 445 lns. 17-19). Liberty's arguments would require captive utility customers[13] to pay both a full return on retired plants that

[13] Liberty's customers, the people of southwest Missouri, live in communities with lower median household incomes and higher poverty rates than the Missouri average. (Ex. 1712).

provide no service, plus a full return on new replacement plants. (Ex. 1091). Securitization does not mandate such a one-sided result.

Liberty's arguments do not balance investor and shareholder interests. The Amended Order strikes a just and reasonable balance under the circumstances in the public interest. The Amended Order is lawful and reasonable and should be affirmed.

CONCLUSION

For these reasons the Commission respectfully requests the Court affirm the Amended Order, deny Public Counsel's motion to dismiss, and grant other relief as justice requires.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Respondent's Brief of the Public Service Commission of the State of Missouri complies with the limitations contained in Rule 84.06(c) and that:

1. The signature block above contains the information required by Rule 55.03;
2. The brief complies with limitations contained in Rule 84.04(b);
3. The brief contains 13,937 words, as determined by the word count feature of Microsoft Word.

I further certify that copies of the foregoing have been served by means of electronic filing to all counsel of record this 12th day of April, 2023.

/s/ John D. Borgmeyer
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