BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISOURI

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

POST-HEARING BRIEF OF UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company"), and for its post-hearing brief, states as follows:

INTRODUCTION

In 2021, the General Assembly enacted Section 393.1700, RSMo,[1] providing a pathway for electric utilities in Missouri to retire energy production facilities and to finance and recover costs associated with those facilities and their retirement in a manner that would benefit their customers, that is, by using low-cost, highly rated securitized utility tariff bonds. The General Assembly charged the Commission with receiving, processing, and resolving such "securitization" applications. This is the third securitization case brought before the Commission under the statute, and the second involving retirement of a coal-fired electric generating plant.[2] While the final securitized sums varied from the sums recommended by the parties in those cases, the Commission found that securitization was beneficial for customers and appropriate in each case.

In filing and supporting this case, the Company was – and the Commission should be – informed by the decision involving the Asbury Plant in the prior Empire securitization case. There

[1] All statutory references are to the Revised Statutes of Missouri (Cum. Supp. 2024), unless otherwise indicated.
[2] Files Nos. EO-2022-0040/0193 (Empire) and EF-2022-0155 (Evergy). The statute also contains provisions allowing securitization of certain "qualified extraordinary costs," provisions utilized in both the Empire and Evergy cases (along with the provisions dealing with generating plant retirements in the Empire case).

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are a number of common issues and similar or analogous facts on those issues between that case's authorization of securitization for the Asbury costs and the record in this case.[3]

To authorize issuance of securitized utility tariff bonds, the Commission needs to determine, among other things (in the case of a generating plant retirement case) whether the retirement was reasonable and prudent and must determine the appropriate level of Energy Transition Costs and Upfront Financing Costs,[4] the sum of which will constitute the bond principal.

All parties filing testimony and sponsoring witnesses in this case, except the Office of the Public Counsel ("OPC"), support issuance of securitized utility tariff bonds in this case. As between the Staff and the Company, the difference in the sums recommended for securitization is approximately $17 million (Company $514.9 million; Staff $497.5 million).[5]

The parties identified twenty-one issues to be decided by the Commission (some with sub-issues). Two of those issues (Issues 15 and 20)[6] have been resolved, as discussed later in this Brief. Questions were raised during the evidentiary hearing regarding whether the Commission needed to resolve Issue 3.a. It is the Company's position that the Commission may not need to resolve Issue 3.a if, as is possible given the record in this case, the Commission determines that the only "prudence disallowance" proposed in this case, OPC's proposed disallowance of $34 million, is insufficiently supported (it is insufficiently supported, as discussed in Section II.A. of the Argument portion of this Brief, below).

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[3] On Issue 8, the factual record in this case is materially different than it was in the Empire case and on that basis Staff and the Company both recommend a different approach to addressing the net present value of tax benefits. The facts in Empire relating to the timing of when Asbury retired versus the to-be-retired Rush Island plant also drive differences in the facts in the Empire case versus this case on Issue 21.

[4] Section 393.1700.1

[5] Based upon an October 15, 2024, retirement date. The difference between the recommendations is addressed in the discussion of Issues 4b, 9, and 13 below.

[6] *See* Joint List of Issues, Order of Witnesses, Order of Cross-Examination and Order of Opening Statements ("Issues List").

ARGUMENT[7]

I. Legal Principles Relevant to This Case.

A. Energy Transition Cost Definition.

More than 98% of the sums recommended by the Company and the Staff for securitization consist of Energy Transition Costs, as defined by Section 393.1700.1(7). Prior to adoption of the securitization statute, such costs would have been recovered the only way they could be recovered – in a rate case. The General Assembly's passage of the securitization statute and its inclusion of a specific definition, Energy Transition Costs, evidences an intention on its part that if the cost in question meets the definition, it should be financed and recovered through the issuance of securitized utility tariff bonds, regardless of whether it "could be" recovered in another way.

B. Mandatory Reconciliation.

It is also important to recognize that in the end, the mandatory reconciliation process reflected in the statute (Section 393.1700.2(1)(g)) will ensure that to the extent an Energy Transition Cost is estimated, customer rates will ultimately reflect only the final, actual costs, whether higher or lower than those estimates. The fact that some costs are estimated is therefore no reason not to securitize the costs in the first place.

C. The Meaning of Reasonable and Prudent.

In a case such as this one, involving a retired or to be retired electric production plant, a prerequisite to securitization of Energy Transition Costs is that the retirement be deemed by the Commission to be "reasonable and prudent."[8] The Company and the Staff agree that this standard

[7] This Brief presents arguments by issue, according to the issues identified in Issues List. However, the Company presents the issues in a different order than reflected in the Issues List given that the order in the Issues List was driven by witness availability and not necessarily by reference to the most logical progression of the issues the Commission is called upon to decide. The issue number according to the Issues List being addressed by a given Section of the Company's argument is stated in parenthesis and italics at the end of each Section or Sub-Section heading.

[8] Section 393.1700.1(7)(a).

has been met. OPC has thus far declined to take a position on it (as earlier noted, all other parties who sponsored witnesses in this case, at least implicitly, support such a finding given that they support securitization in this case).

During the evidentiary hearing, the Presiding Officer asked whether the General Assembly intended some distinction between the meaning of "reasonable" and the meaning of "prudent." It is well-established that the primary rule of statutory interpretation is to give effect to legislative intent as reflected in its plain language. *See, e.g.,* ***State ex rel. T.J v. Cundiff***, 632 S.W.3d 353, 357 (Mo. *banc* 2021). Another important statutory interpretation principle is that in construing a statute, courts [and here, this Commission] "must presume the legislature was aware of the state of the law at the time of its enactment." *Id.* And the state of the law prior to the enactment of the securitization statute was that there is no meaningful distinction under the law between a reasonable and a prudent decision.

In the Empire securitization case involving Asbury, the Commission, citing ***State ex rel. Associated Natural Gas Co. v. Pub. Serv. Com'n***, 954 S.W. 2d 520 (Mo. App. W.D. 1997), resolved the question posed in that case, "Was it reasonable and prudent for Liberty to retire Asbury?" In doing so, the Commission applied the prudence standard that it and Missouri courts have applied for decades. The Commission recognized that,

> The company's conduct should be judged by asking whether the conduct was *reasonable* at the time, under all circumstances, considering that the company had to solve its problems prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine *how reasonable people would have performed* the tasks that confronted the company.[9]

In addition, in reaching its conclusions in that case, the Commission identified the statutory "reasonable and prudent" standard found at § 393.1700.1(7)(a) as governing the issue. And it

[9] *Amended Report and Order*, File Nos. EO-2022-0040, EO-2022-0193 ("Empire Order") (emphasis added), p. 28.

explained the statutory standard in a way that demonstrates the terms "reasonable" and "prudent" are interrelated and do not serve as two independent standards:

> The Commission's prudence standard requires that the prudence of Liberty's decision to close the Asbury plant be judged by asking *whether the conduct was reasonable* at the time it was made, based on the knowledge available to the decision makers while they were making their decision. A decision does not need to be perfect. Rather, that decision *must fall within a range of reasonable decisions*.[10]

The Commission did not conduct a separate analysis as to the reasonableness of the decision distinct from the prudence of the decision. The same can be said of numerous other Commission decisions where the Commission routinely finds that the decisions at issue were "prudent and reasonable" without stating a separate justification or analysis for each term. *See, e.g., In the Matter of Union Elec. Co. d/b/a AmerenUE's Purchased Gas Adjustment Factors to Be Audited in Its 2006-2007 Actual Cost Adjustment, In the Matter of Union Elec. Co. d/b/a AmerenUE's Purchased Gas Adjustment Factors to Be Audited in Its 2007-2008 Actual Cost Adjustment; In the Matter of Union Elec. Co. d/b/a Ameren Missouri's Purchased Gas Adjustment Factors to Be Audited in Its 2008-2009 Actual Cost Adjustment*. GR-2008-0107, 2013 WL 4507711, at *2 (Mo. P.S.C. Aug. 14, 2013) (finding that "that it was prudent and reasonable for Ameren Missouri and Laclede to enter into the Settlement Agreement"); *In the Matter of the Application of Kansas City Power & Light Co. for Auth. to Extend the Transfer of Functional Control of Certain Transmission Assets to the Sw. Power Pool, Inc*., EO-2012-0135, 2013 WL 3477483, at *1 (Mo. P.S.C. June 19, 2013) (finding independently that Stipulation and Agreement was consistent with public interest and that KCP&L's participation in SPP was prudent and reasonable).

[10] *Id.*, p. 48 (emphasis added).

That the General Assembly intends the terms to be used interchangeably is further demonstrated by a different statute enacted by the same bill by which Section 393.1700 was enacted,[11] that is, Section 393.1705. The latter statute also uses the terms "prudent" and "reasonable"—referring, interchangeably, to an investment in replacement resources as being "prudent and reasonable" -- and then to the management and execution of replacement resources projects in a "reasonable and prudent" manner.

II. Argument on the Issues for Decision in this Case.

A. It is Reasonable and Prudent to Retire the Rush Island Energy Center ("Rush Island"); the Energy Transition Costs Should Thus Be Securitized. *(Issue 3, subpart b).*

i. Ameren Missouri's Decision to Retire Rush Island Rather Than to Retrofit it Was Reasonable and Prudent, and in the Best Interest of Its Customers. (*Issue 3.b (first sentence)).*

Ameren Missouri's decision not to invest as much as a billion dollars or more[12] to retrofit the nearly 50-year-old Rush Island plant with scrubbers, and to instead retire it after the U.S. Eighth Circuit Court of Appeals upheld the Federal District Court's decisions,[13] was prudent, reasonable, and in the best interest of the Company's customers. In deciding not to retrofit the plant and to retire it instead, the Company's initial analysis that underlies the retirement decision determined that retirement would result in lower costs to customers in 45 of the 48 scenarios modeled by Company witness Michels.[14] In fact, in every single scenario where there was any level of carbon

[11] L. 2021 H.B. 734.

[12] Ex. 14, Matt Michels Direct Testimony, at Sch. MM-D1, p. 3 (indicating that the overnight cost of adding scrubbers was estimated as of December 2021 to be as much as $941 million); (At p. 4, fn. 1 (indicating that the estimates do not include financing costs, *i.e.*, allowance for funds used during construction ("AFUDC")). AFUDC, which would add to the cost of any actual scrubber project, would add another $75 million or more to the estimated costs. Ex. 15, Matt Michels Surrebuttal Testimony, p. 24, ll. 11-13. Updated cost estimates developed this year indicate that the overnight costs could be more than one billion dollars ($1.059 billion, without AFUDC); Id., p. 24, ll. 8-10.

[13] *See* Ex 110, Keith Majors Rebuttal Testimony, Sch. KM-r2, Ex. 606, Ex. 110, Sch. KM-r3 (The District Court's 2017 Liability Opinion, 2019 Remedy Opinion, and the Court of Appeals 2021 Opinion, respectively).

[14] Supra, Ex. 14, p. 5, l. 19 to p. 6, l. 2.

regulation, the Company's decision to retire the plant rather than to retrofit it is estimated to save customers hundreds of millions of dollars on a net present value of revenue requirement ("NPVRR") basis.[15]

While as discussed in Section II.C of this Brief the Staff and OPC are debating issues around the decisions on the NSR[16] permits for the 2007 and 2010 projects, even the Staff agrees that retiring the plant in accordance with the Federal District Court's modified remedy order was a prudent decision irrespective of any NSR-related issues.[17] Indeed, Staff agrees that nearly all of the sums sought to be securitized by the Company should in fact be securitized, meaning that the Staff necessarily agrees that the retirement of Rush Island is "reasonable and prudent." Section 393.1700.1(7)(a). That this is Staff's position was confirmed directly during the evidentiary hearings. In response to Commissioner Holsman's questions, Staff witness Keith Majors agreed that "it's more economical for the ratepayer to retire Rush Island, securitize the costs, and move onto different generation."[18] Similarly, in response to questioning from Judge Clark, Mr. Majors testified, "I think the question now is, is it prudent and reasonable to close the plant now and securitize it? I think the answer to that question is yes."[19]

Not only did the Company's direct case analysis upon which its retirement versus retrofit decision was based (and that underlies Staff's recommendation) determine that retirement was the reasonable and prudent decision to make, but later analysis performed in response to allegations made in OPC's rebuttal testimony demonstrates even more strongly that the Company's decision

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[15] Id., Sch. MM-D1 (Showing NPVRR savings for customers by retiring the plant in each of the 36 scenarios where carbon regulation at some level was assumed).
[16] New Source Review.
[17] Ex. 102, Claire Eubanks' Rebuttal Testimony, p. 3, ll. 8 – 11 (Company decision to retire the plant per the District Court's order is reasonable and prudent; Commission should allow securitization of remaining net book value); Ex. 110, Keith Majors Rebuttal Testimony, p. 6, ll. 17 – 18 (Staff does not dispute the decision to retire Rush Island).
[18] Tr. (Vol. 4) p. 122, ll. 9-12.
[19] Id., p. 96, ll. 13-15.

to retire the plant was the correct one. Specifically, accounting for all of the Company's planned resource additions, including added renewables (which have nothing to do with the Rush Island retirement[20]), and other additions that might not have been made or not made when they are now planned (like new simple cycle gas-fired generation planned for addition in 2027), customer rates are expected to be *lower* by *about $1.452 billion dollars* on an NPVRR basis in the case where Rush Island is not retrofitted with scrubbers and is retired in 2024, and where these other additions are made.[21] When the Company performed the original direct case analysis, the most comparable figure showed a benefit from retirement versus retrofitting of $851 million;[22] *i.e.*, the later analysis shows a benefit that has increased by more than forty percent, even when higher FGD[23] costs, higher transmission upgrade costs, and additional generation costs are accounted for.[24]

The *only* contrary evidence in this case is provided by OPC witness Seaver's crude, conceptually flawed, and just plain wrong calculation of a claimed $34 million detriment from retiring Rush Island. But the analysis is so fundamentally flawed that it should be given no weight whatsoever. To highlight just one fatal flaw, Mr. Seaver completely failed to account for the fact that building a scrubber would have produced financing costs (*i.e.*, AFUDC) that would have to be reflected in rates had the Company scrubbed the plant instead of retiring it. Correcting just that one flaw flips Mr. Seaver's $34 million detriment to a $41 million benefit.[25] But to be crystal

[20] Supra, Ex. 15, p. 34, ll. 12 – 22.
[21] Id., p. 26, Table 3. The $1.452 billion benefit is based upon base FGD costs and probability weighted average carbon prices. Depending on the assumptions, the expected benefit on an NPVRR basis of not scrubbing Rush Island but instead retiring it in 2024 ranges from $975 million to as much as $2.201 billion.
[22] Ex. 14, Sch. MM-D1 (Analysis Results for FGD Capital Cost of $811 million, Scenario 1, PWA case.
[23] Flue gas desulfurization unit or "scrubber".
[24] Supra, Ex. 15, p. 23, l. 12 to p.25, l. 16 (The more than 40% improvement compares the $1.452 billion of NPVRR benefits (from Michels' surrebuttal) to the $851 million of NPVRR benefits (from Michels' direct), a percentage difference of 41.4%).
[25] Id., p. 36, ll. 15 – 18. Among other things, it leaves out market benefits from the solar resources Mr. Seaver points to and ignores the substantial ongoing costs of operating scrubbers for limestone and other costs. *Id.* p. 35, l. 13 to p. 36, l. 4.

clear, Mr. Seaver's analysis cannot truly be "corrected" because it is as Mr. Michels put it "a completely insufficient (and inaccurate) way to gauge the benefit (or detriment) resulting from the Company's decision to retire Rush Island."[26]

Given that Mr. Seaver's testimony on this issue is completely unreliable and should be discarded entirely, the only reliable evidence in the case dictates the conclusion that the Company's decision to retire Rush Island instead of retrofitting it and leaving it open was a reasonable and prudent decision.

ii. <u>In a purely hypothetical case where the retire versus retrofit decision was shown to have been unreasonable and imprudent, there would be no customer harm. *(Issue 3.b (last sentence)).*</u>

The law is that if the Commission determines a utility has acted imprudently, it does not impose a remedy absent also concluding, based upon substantial and competent evidence of record, that the imprudence resulted in harm to customers. *See, e.g.,* ***State ex rel. Associated Natural Gas Co. v. Pub. Serv. Com'n,*** 954 S.W. 2d 520 (Mo. App. W.D. 1997). *See also,* ***Office of Public Counsel v. Mo. Pub. Serv. Comm'n***, 409 S.W.3d 371 (Mo. banc 2013). As discussed above, aside from OPC witness Seaver's flawed analysis, no party to this case – other than the Company – analyzed the financial impact on customers of the Company's retire versus retrofit decision. And the results of those analyses – from 2021 and from this year – demonstrate not only that there is absolutely no harm from the retirement decision but that indeed there is a *benefit* from that decision of about a billion dollars, and possibly more than two billion dollars, on a NPVRR basis.

Consequently, the evidence dictates a finding by the Commission that the retirement of Rush Island is indeed reasonable and prudent, as contemplated by Section 393.1700.1(7)(a). This means that the Energy Transition Costs proposed by the Company should be securitized, together with

[26] <u>Supra</u>, Ex. 15, p. 34, ll. 20 – 22.

the associated Upfront and Ongoing Financing Costs associated with the securitization.

B. The Company's Planning Was Reasonable and Prudent -- Different Planning Would Not Have Led to Different Decisions – Staff's "Hold Harmless" Proposal is Inappropriate. *(Issue 5).*

i. <u>There is Nothing for the Commission to Decide on This Issue.</u>

As the evidentiary hearing testimony made clear, the Staff has raised questions about whether the Company planned appropriately for the possibility that the NSR litigation could be lost leading to a Rush Island retirement earlier than originally expected. Raising these issues is solely related to Staff witness Eubanks' "hold harmless" proposal.[27] And Ms. Eubanks' hold harmless proposal relates to transmission upgrade costs that (a) are not at issue in this case at all,[28] and (b) have not been presented to or considered by the Commission in a rate case.[29] The bottom line is that there is not– and never was – any legitimate reason to debate these issues in this case, but Staff chose to inject them into this case out of some perceived need to "preserve" future arguments that Staff believes may come up about harms Staff may claim will occur in the future arising from NSR permit-related decisions that impacted the timing of the retirement of Rush Island.[30] Indeed, having injected the issues into this case, Staff concedes that such issues could be

[27] Tr. (Vol. 6) p. 12, l. 16 to p. 13, l. 8 (Staff witness Fortson confirming that the questions about planning raised by his rebuttal testimony relate to Staff witness Eubanks' hold harmless proposal).

[28] As Staff admits, these upgrade costs are not included in the costs for which securitization authority is sought in this case. Tr. (Vol. 4) p. 62, ll. 9-11.

[29] Tr. (Vol 4) p. 200, l. 15 to p. 201, l. 21.

[30] *See, e.g.,* Tr. (Vol. 4) p. 213, l. 16 to p. 214, l. 2. The irony is that the questions about NSR permitting and future harms were injected into this case by a series of Staff actions, starting with Staff's desire that an investigatory docket be opened (EO-2022-0215) which led to testimony on these issues in the Company's last electric rate case (ER-2022-0337), with Staff then directly indicating to the Commission and the Company that these issues should be taken up in *this* case, followed by Staff's yet again revised position that, despite what it said in the ER-2022-0337 case, such issues did not need to be taken up in this case. Mr. Wills addressed this in his surrebuttal testimony (Ex. 20, p. 12, l. 10 to p. 16, l. 2) and in a discussion he had with Chair Hahn during the evidentiary hearing, Tr. (Vol. 8) p. 42, l. 9 to p. 44, l. 19.

taken up in a future case where the transmission costs would actually be at issue: "I think Staff is not opposed to addressing it [the transmission hold harmless issue] in a future rate proceeding."[31]

It is clear that there is nothing for the Commission to decide in this case, both because Issue 5 has no bearing on the retirement versus retrofit decision, and because the rate treatment of capital investments in transmission projects, that have *not even been proposed for inclusion in the Company's rate base that would underlie a future revenue requirement*, is an issue for a rate case. To issue an order today that purports to cap the transmission upgrade costs that could be considered for inclusion in rate base in a future rate case (*i.e.*, to adopt Staff's "hold harmless" proposal) would run afoul of the requirement that the Commission make ratemaking decisions in rate cases based upon a consideration of all relevant factors. *See, e.g.,* ***State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n***, 308 S.W.2d 704, 719 (Mo. 1957) (Under Section 393.270, the Commission must consider all relevant factors when setting rates); ***State ex rel. Pub. Counsel v. Pub. Serv. Comm'n,*** 397 S.W.3d 441, 448 (Mo. App. W.D. 2013) (Failure to consider all relevant factors constitutes impermissible single-issue ratemaking). Moreover, even Staff could not come up with a valid reason for the Commission to issue any orders on this issue. During redirect examination, Staff Counsel attempted to elicit a justification for an order in this case from Ms. Eubanks, asking her "[c]an a hold-harmless provision help quantify the actual harm for a later case?" Ms. Eubanks' answer "it would help in the future case to track costs either above or below [the **__________**]." Ms. Eubanks' answer makes no sense.

There is no dispute that the Company's December 2021 retirement versus retrofit analysis, presented by Company witness Michels in his direct testimony, used a base transmission upgrade cost assumption of **__________**. Mr. Michels also confirms that this is the case in his

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[31] Tr. (Vol. 5) p. 346, l. 1-2. Note, this quote comes from an in-camera session but the quote is not confidential.

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surrebuttal testimony. Nor is there any dispute about the fact that the transmission upgrade projects are expected to cost more than that base cost assumption (current estimate is approximately **__________**).[32] The question in a future rate case (assuming Staff chooses to make such a claim) will be "were the actual costs of the transmission upgrades (*e.g.*, **________**) prudently incurred given the known and undisputed fact that when the initial retirement versus retrofit analysis was performed, the base estimate was **_________**?" Answering that question requires no "tracking." To the contrary, if Staff wants to later claim that the prudent level of costs for the upgrades is **___________** and that they actually cost **__________**, Staff and the Commission can solve a simple math problem by calculating the difference between the two.[33]

ii. While the Commission Need Not Decide Issue 5, Staff's Decision to Make It an Issue and Question the Company's Planning Warrants a Response.

In suggesting (but not outright claiming) that the Company may not have properly planned for a possible early retirement of Rush Island, the Staff has posited two speculative theories that (a) have nothing to do with the question the Staff says is the only question to be addressed in this case,[34] and (b) are misleading and completely unsupported by the facts in any event.

Staff's first theory is that had the Company, in its resource planning dating back to 2011, made express assumptions about a possible loss of the NSR case (yet when such a loss might occur, what the remedy might be, etc. are completely lacking from Staff's theory), the Company "might" be in a different resource planning position now.[35] Staff's second theory is that different planning

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[32] Supra, Ex. 15, p. 33, l. 8.

[33] As Judge Clark suggested, to the extent anything ought to be said on this issue in the Report and Order in this case, at most the Commission could state that final amounts are not known (since the transmission upgrades are not complete) and any treatment of them would be for a future rate case. Tr. (Vol. 3) p. 56, ll. 9- 12; p. 58, ll. 6 – 12.

[34] *See* Supra, Ex. 102, p. 3, l. 19 to p. 4 l. 30 (Claiming that only the question for decision in this case is whether the retirement is "reasonable and prudent," citing Section 393.1700.1(7)(a) RSMo and indicating the Commission need not decide other prudence questions).

[35] Ex. 105, Brad J. Fortson Corrected Rebuttal Testimony, p. 6, ll. 13- 16 (Different planning "may" have allowed….).

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might have had an impact on (*i.e.*, apparently Staff claims it might have lowered) the costs of transmission upgrades needed to ensure transmission system reliability once Rush Island is no longer in operation. Neither theory holds water.

As for the first theory, in its 2020 IRP,[36] the Company analyzed specific alternative resource plans that assumed that the NSR litigation would be lost, that the plant would not be scrubbed in that event, and that it would instead retire in 2024.[37] Put another way, the Company analyzed a circumstance that matches precisely what, as it turned out, is happening. The key takeaways from its 2020 IRP analysis for that scenario were:

- Retrofitting the plant with scrubbers if the NSR case were lost instead of retiring it would cost customers hundreds of millions of dollars in extra costs on a NPVRR basis;[38] and
- The Company would not need to add dispatchable generation capacity post-a 2024 Rush Island retirement until the 2040s.[39]

No party – including the Staff – took issue with those conclusions. Staff neither claimed the 2020 IRP was deficient in some way in terms of the Company's planning around a possible NSR case loss, nor did the Staff express any concerns about the Company's planning around a possible NSR case loss.[40] This indicates that the planning reflected no major non-compliance with the integrated resource planning rules (see definition of "deficiency" at 20 CSR 420-22.020(9)) and reflected no major concerns with the planning itself nor a concern about whether the planning would fulfill the fundamental objective of resource planning (see definition of "concern" at 20 CSR 4240-22.020(6)). Put another way, the planning clearly met the Commission's resource planning rule's fundamental resource planning objective, including its requirement that planning

[36] References to the "IRP" are references to the Company's triennial integrated resource plan filings, in 2011, 2024, 2017, 2020, and 2023, as applicable.
[37] Supra, Ex. 15, p. 6, l. 15 to p. 7, l. 17.
[38] Id., Page 28 of Sch. MM-S8 (Plan R NPVRR v. Plan S NPVRR – retiring Rush Island better for customers by $541 million).
[39] Id., Table 9.4 of Schedule MM-S7 (Plan R – next dispatchable resource in 2043).
[40] Id., p. 10, ll. 13 – 19.

use minimization of NPVRR as the primary criterion in choosing a preferred resource plan. 20 CSR 4240.22.010(2), (2)(B). Simply stated, the 2020 IRP concluded that if the NSR case was lost the right decision was to retire the plant and not scrub it, and that the loss of Rush Island would not create a capacity deficit. As discussed in Section II.A, later analyses have confirmed that the correct decision was to retire Rush Island and not to retrofit it.

Despite this, the Staff speculates that different planning in earlier IRPs (2017, 2014, even 2011 when the NSR litigation had only just begun) "may have allowed" avoidance of the "current situation." While the Staff is vague and opaque about what this "situation" is, the Company assumes the Staff's reference is to a now identified need for additional dispatchable generation sooner than prior planning (*e.g.*, resource planning conducted in 2020 and 2022) had indicated. But the Staff's claim that different planning around Rush Island might or would have avoided the needs that exist today is demonstrably untrue.

The first reason it is untrue is that, as noted, the 2020 IRP planning occurring less than four years ago did not indicate that a retirement of Rush Island in 2024 would create a "situation" to begin with. That is, that planning did not indicate there would be a need for more or earlier dispatchable resources if what is happening – a retirement of Rush Island in 2024 – did happen. The second reason it is untrue is that when the Company again examined its resource needs, post-the decision to retire Rush Island and changed its preferred resource plan (less than two years ago, in June 2022), that analysis too demonstrated that additional dispatchable resources would not be needed anytime in the 2020s. To the contrary, that analysis did not show such a need until about a decade later, at the end of 2031.[41] Less than two years ago, the retirement of Rush Island in 2024 did not suggest the existence of a "situation" that Staff, using hindsight, points to now.

[41] Id., p. 11, l. 17 to p. 12, l. 8.

And while MISO had not yet implemented a seasonal capacity construct by June 2022 when the Company conducted the 2022 analysis and changed its preferred resource plan, the Company, using the information that MISO had provided as of that time, did account for the seasonal construct Ms. Eubanks points to in her surrebuttal testimony.[42] And even accounting for that seasonal construct (given what the Company knew about it at the time) the planning did not suggest a need for more dispatchable resources until the end of 2031.

The third reason the Staff's contention is untrue is that circumstances (we now know with hindsight) continued to change after these recent (2020, 2022) resource planning exercises. Consequently, different planning at an earlier time could not have accounted for them because those circumstances had not yet arisen. While at the time of the 2022 change in preferred resource plan it was thought (according to MISO information) that the planning reserve margin under a seasonal construct would be 15.9% in the winter, when the seasonal construct was later actually implemented MISO increased it by nearly two-thirds, to 25.5%, leading to a need for an additional 750 megawatts that the 2022 analysis simply did not (and could not) show.[43] Similarly, changes *since* 2022 in MISO's existing and future unit accreditation have further created a need for 300 megawatts of additional winter capacity, again that was not indicated by the 2022 analysis using the best information available at that time.[44] Those two changes alone, which were not foreseen even less than two years ago, increased capacity needs by over 1,000 megawatts – nearly the size of the previously planned combined cycle plant slated to replace Sioux by the end of 2032.

Moreover, while not driving a "capacity need" in the sense of meeting a formal MISO resource adequacy requirement, we have experienced unusually severe and extreme winter

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[42] Id., p. 15, ll. 3 – 19.
[43] Id., p. 17, Table 1. See the related discussion at id., p. 16, l. 10 to p. 18, l. 2.
[44] Id.

weather on two separate occasions since the submission of the 2020 IRP – Winter Storms Uri and Elliot – which resulted in high profile and impactful grid reliability events in different parts of the country.[45] One such event was an anomaly; two suggests a pattern and a new planning reality. This new pattern of extreme winter weather and the severe impact of capacity availability in the MISO market and on the cost of relying on that market assuming it can deliver has created a planning reality for utilities that was largely unthinkable as late as the time of the 2020 IRP, if not later, and certainly not on planners' radars in 2014 or 2017.

The Staff's speculation that the Company's earlier planning was lacking is even more offensive when applied to claims that the Company could have avoided the "current situation" had it planned differently around Rush Island in the 2014 and 2017 IRPs. Why? Because the Company *did* study alternative resource plans that would have had Rush Island retire (un-scrubbed) in 2024 in both of those IRPs.[46] No, it did not *explicitly* develop those alternative resource plans *because* of a possible NSR loss, but that makes no difference at all because the Company did in fact consider what would happen to its resource planning and needs (and what it would cost customers) if in fact Rush Island retired in 2024 – which is in fact exactly what is happening now. Moreover, the choice of a 2024 retirement date in those 2014 and 2017 IRP scenarios was informed by the timing of when, if the NSR case were lost, the Company believed a remedy (such as installing scrubbers or retiring the plant if installing scrubbers was not the right decision) may have been put into effect.[47]

Those analyses demonstrate that changing the label placed on the alternative plan that had Rush Island retiring in 2024 would *not have changed anything about the Company's resource*

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[45] Id., pp. 19-20.
[46] Id., p. 6, l. 15 to p. 7, l. 9.
[47] Tr. (Vol. 6) p., 50 l. 16 to p. 51, l. 2 (Mr. Michels addressing that a potential remedy from the litigation also figured into the alternative scenarios).

planning or decisions in or after 2014, in or after 2017, or in or after 2020. Different planning at any of those times would not have indicated that more dispatchable resources should be added even if Rush Island were to retire in 2024. Different planning in 2014 or 2017 would still not have called for such additions.[48] Different planning would not have avoided a "situation" because even assuming Rush Island retired in 2024, there was no indication that there would be a "situation" to avoid.

Staff witness Fortson, who provides all the factual underpinnings of Staff's speculation that the planning could have been different or better, was candid during the evidentiary hearing regarding just how speculative these planning questions Staff raised are. Among other things, Mr. Fortson testified:

- "I can't sit here and list or even state what the Company may or may not have done differently [if the Company had engaged in different planning]."[49]

- "I offered up thoughts of, you know, had they planned differently, *maybe* there could have been a smoother transition . . . that was more suggestions or thoughts as opposed to, you know, this would have been a smoother ... transition."[50]

- Q [by Judge Clark]: "it seems that even more so than the plant retirement issue, that what harm would come over this multi-year process [IRP planning spanning many years] would be highly speculative and absolutely nonquantifiable. Do you believe that's a fair assessment? [A:] I do think that's a fair assessment."[51]

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[48] According to the 2014 IRP there would have been a small capacity shortfall in 2025 had Rush Island retired in 2024 and should Noranda's 495-megawatt peak load still remained as of 2025 but even then, the Company would not have built more dispatchable resources in the 2020s on that basis because the shortfall was small. Noranda's load long ago left the system and by the time of the 2017 IRP, the planning indicated that retiring Rush Island in 2024 would not require dispatchable resources before the late 2030s. Id., p. 7, ll. 3-9; p. 8, ll. 1 – 15; Sch. MM-S5, page 10 (Table 9.4) (Plan M, with Rush Island retiring in 2024, no need for dispatchable generation until 2037 – 20 years later).
[49] Tr. (Vol. 6) p. 15, ll. 18-19.
[50] Tr. (Vol. 6) p. 18, ll. 5-12 (emphasis added).
[51] Tr. (Vol. 6) p. 19, ll. 5 – 10.

Statements such as these, coupled with the point-by-point explanations in Mr. Michels' surrebuttal testimony indicating that an early retirement of Rush Island in 2024 was considered consistently in the Company's planning from 2014 through post-the retirement decision – and that different planning would not have led to different outcomes – completely debunks Staff's speculation about avoiding "situations" and "smoother transitions."[52]

The Staff's second theory, that different (presumably "better") planning might have lowered the ultimate cost of necessary transmission upgrades, fares no better when the actual *evidence* is examined. Staff, contradicting its own claim about the scope of the decision the Commission needs to make in this docket, asks the Commission to "acknowledge" imprudence on the Company's part and to then order customers be "held harmless" from transmission upgrade costs above **__________**. The Staff's basis? That because this is the amount of the "base" (middle) assumed transmission upgrade costs from the 2020 IRP and actual upgrade costs are expected to cost more *____________** it must somehow have been poor planning on the Company's part that led to the difference. But there is no evidence whatsoever that a failure to plan earlier or to plan differently has imprudently increased the cost of these upgrades. Even Staff concedes that this is so:

> Q [by Ameren Missouri counsel]: "Well, the truth is that you don't know whether or not putting transmission upgrades in hypothetically earlier at a hypothetical lower cost, you don't know whether that, on a net basis, would have been better for customers or not, do you? [A:] I don't know."[53]

While Staff doesn't know – and has presented no contrary evidence – the record does reflect that retiring the plant earlier even if, hypothetically, the transmission costs would have been lower, would *not* have been better for customers even if (and the Company does not concede this

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[52] Supra, Ex. 15, pp. 3 – 28.
[53] Staff witness Fortson, Tr. (Vol. 6) p. 27, l. 9-14.

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is true – nor is there any evidence that it is true) transmission upgrade costs would have been lower by $49 million. The evidence in this case shows that if, hypothetically, the Company had thrown in the towel on the NSR litigation earlier (before it actually lost the case, e.g., in 2017 or 2019[54]) and installed transmission earlier, that would have meant the plant would have needed to retire earlier. And if the plant needed to retire earlier, it would have had to move the plant to operation as an SSR[55] earlier while the transmission upgrades were undertaken. And if that had occurred, its generation would have been significantly reduced earlier, thus lowering the margins it contributed that *lowered revenue requirements for customers*. From 2020-2022 alone, those margins totaled $360 million, far more than any $49 million increase in transmission upgrade costs "caused" by Ms. Eubanks' hypothetical "the Company should have planned better" theory.[56]

C. Ameren Missouri Made Reasonable and Prudent Decisions on NSR Permitting. *(Issue 3.a)*

Should the Commission examine the prudence of Ameren Missouri's permitting decisions, application of the proper prudence standard shows that Ameren Missouri made prudent and reasonable permitting decisions given the information available at the time.

i. The Rush Island permitting decisions followed Ameren Missouri's established process.

Just like every utility operating coal-fired electric generating units, Ameren Missouri has for decades performed boiler component replacements like the Rush Island Projects.[57] It is routine—both at Ameren Missouri and at all other electric utilities in the industry—to repair or replace components as they wear in order to maintain the availability and reliability of the overall

[54] The years of the federal District Court's liability and remedy decisions, respectively)
[55] System support resource, the status it has been on since September 1, 2022, pending completion of the transmission upgrades.
[56] Ex. 15, p. 33, ll. 1-19 (**______________________________**).
[57] Ex. 6, Direct Testimony of Mark C. Birk, p. 2, l. 23 to p. 3, l. 9; p. 10, l. 17 to p. 12, l. 2.

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unit.[58] This includes the replacement of boiler tube assemblies (*e.g.*, economizers, reheaters, waterwalls) and ancillary equipment (air preheaters, fans, pumps, pulverizers, etc.).[59] Ameren Missouri performed such projects at scheduled outages that took place for Rush Island Unit 1 in 2007 and for Rush Island Unit 2 in 2010.[60] The Rush Island Projects were no different from the sort of component replacements that occur routinely across the Ameren Missouri system and the industry as a whole.[61]

Before Ameren Missouri undertook the Rush Island Projects, the Environmental Services Department ("ESD") at Ameren Services Company reviewed the projects for permitting implications—just as ESD had done for similar projects in Missouri and in Illinois countless times before.[62] Because Rush Island is located in Missouri, the applicable law was written and administered by the Missouri Department of Natural Resources ("MDNR") and approved by the United States Environmental Protection Agency ("EPA") as a state plan for implementing the Clean Air Act (*i.e.*, a "State Implementation Plan" or "SIP").[63] Once EPA approves a SIP, the SIP (and not the federal EPA regulations) apply to the sources in that state.[64] This made MDNR, not EPA, the relevant permitting authority for Rush Island and all other sources in Missouri.[65]

ESD's review of the Rush Island Projects for permitting requirements followed the normal process for such compliance evaluations.[66] ESD's Air Quality Group identified the projects,

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[58] Id., p. 2, l. 23 to p. 3, l. 2; Tr. (Vol. 3) p. 112, ll. 5-24 (Staff witness Majors could go on "ad infinitum" about the number of projects designed to increase unit reliability and availability, like the Rush Island Projects).
[59] Supra, Ex. 6, p. 3, ll. 2–5; Ex. 8, Direct Testimony of Steven C. Whitworth, p. 20, ll. 6–11 and Schedule SCW-D6.
[60] Supra, Ex. 6, p. 14, l. 15 to p. 15, l. 15.
[61] Id., p. 3, ll. 5-9; supra, Ex. 8, p. 53, ll. 10–15.
[62] Supra, Ex.6, p. 5, ll. 13–21; supra, Ex. 8, p. 20, l. 18 to p. 22, l. 11; id., p. 23, ll. 17–22; Ex. 9, Surrebuttal Testimony of Steven C. Whitworth, p. 1, l. 13 to p. 2, l. 6; id., p. 3, ll. 1–20.
[63] Supra, Ex. 6, p. 3, ll. 20–22; supra, Ex. 8, p. 4, ll. 12–16.
[64] Ex. 10, Direct Testimony of Jeffrey R. Holmstead, p. 5, ll. 12–23; Ex. 12, Direct Testimony of Karl R. Moor, p. 20, ll. 3–7.
[65] Supra, Ex. 9, p. 7, ll. 18–23' id., p. 8, ll.19–22; supra, Ex.10, p. 11, ll. 3–10; Tr. (Vol. 4), p. 100, ll. 3–6 (Staff witness Majors acknowledges that MDNR is the relevant permitting authority).
[66] Supra, Ex. 8, p. 20, l. 17 to p. 25, l. 5; id. p. 47, l. 7 to p. 48, l. 9; supra, Ex. 9, p. 1, l. 12 to p. 4, l. 21.

considered their nature and scope, and evaluated whether such work would trigger any permitting requirements under the applicable Missouri law (*i.e.*, the federally-approved SIP).[67] ESD's permitting decisions for Rush Island were based on the knowledge and experience of the ESD professional staff, the text of the Missouri SIP, MDNR and EPA guidance, the shared knowledge and experience of the utility industry in Missouri and nationwide, and the input of lawyers at Hunton & Williams—recognized experts on NSR compliance.[68]

Former Director of ESD Steven Whitworth testified that his department was in "constant contact" with MDNR on the legal requirements for permitting.[69] Under the Missouri SIP written and administered by MDNR, and approved by EPA as consistent with the CAA, permitting for work on an existing source (such as Rush Island) was required only for the construction of a new source or a "modification" to an existing source, which the SIP defined as a change to the source (*i.e.*, not routine maintenance, repair or replacement) and which would result in an increase in the potential emissions from that source. 10 CSR 10-6.020(2)(M) (2006).[70] If there was an increase in potential emissions caused by a change to the source (*i.e.*, a "modification"), then the Missouri SIP required consideration of whether that increase would be significant (*i.e.*, a "major modification") triggering New Source Review permitting requirements.[71] But if there was no change that would cause an increase in potential emissions (*i.e.*, no "modification"), then the permitting inquiry was at an end and no permit was required for the work.[72] This was the test for permitting set forth in the text of the SIP, in guidance provided by MDNR, and confirmed under

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[67] Supra, Ex. 8, p. 25, l. 8 to p. 28, l. 31 (Unit 1); id., p. 36, l. 1 to p. 39, l. 29.
[68] Supra, Ex. 6, p. 25, ll. 14–21; supra, Ex. 8, p. 4, ll. 3–11; id., p. 5, l. 16 to p. 8, l. 18; id., p. 27, l. 9 to p. 28, l. 26 (Unit 1); id., p. 38, l. 16 to p. 39, l. 29 (Unit 2); supra, Ex. 9, p. 6, l. 10 to p. 7, l. 7; supra, Ex. 10, p. 30, l. 22 to p. 31, l. 14.
[69] Tr. (Vol. 3), p. 353, ll. 2–14.
[70] Later references to this rule are also to the 2006 version.
[71] Supra, Ex. 10, p. 11, l. 12 to p. 13, l. 18.
[72] Supra, Ex. 8, p. 12, l. 15 to p. 13, l. 10; supra, Ex. 9, p. 5, ll. 1–15; supra, Ex. 10, p. 11, l. 12 to p. 13, l. 18.

oath by MDNR.[73] And the record in this case is clear: the Rush Island Projects did not increase potential emissions – no party claims otherwise.

Ameren Missouri's understanding of the law led it to identify three criteria concerning permitting for projects at existing sources in Missouri such as Rush Island. First, no permits were required unless the project would increase the source's potential emissions. Second, if there was an increase in potential emissions, then an NSR permit would be required if that project would also cause an increase in actual annual emissions by more than 40 tons per year unless the project fell within the routine maintenance, replacement, and repair exclusion ("RMRR"). Third, as noted no permit would be required (regardless of emissions impact) for RMRR activities that were routine for the industry.[74]

Ameren Missouri's understanding of the relevant criteria for determining when NSR permits apply was widely shared at the time. Ameren Missouri, the other utilities in Missouri, and MDNR shared this understanding of the permitting requirements under the Missouri SIP.[75] The criteria employed by both MDNR and the regulated parties in Missouri were also similar to those adopted by EPA's Office of Air and Radiation—the "program office" responsible for implementing the Clean Air Act's NSR program and developing the federal NSR regulations that would apply in the absence of an approved state implementation plan.[76] Finally, the criteria

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[73] Supra, Ex. 8, p. 13, l. 11 to p. 15, l. 16; supra, Ex. 10, p. 13, l. 19 to p. 15, l. 23; Schedule JRH-D2; Schedule JRH-D3; Tr. (Vol. 4), p. 83, l. 12 to p. 84, l. 4 (Staff witness Majors confirming that Ameren Missouri and MDNR had the same position on NSR permitting requirements under the Missouri SIP—they applied only if potential emissions would increase).
[74] Supra, Ex. 8, p. 29, ll. 1–18.
[75] Supra, Ex. 6, p. 3, l. 22 to p. 4, l. 2; supra, Ex. 8, p. 13, l. 11 to p. 15, l. 16; id., p. 48, ll. 10–15.
[76] Supra, Ex. 6, p. 4, ll. 11–15; supra, Ex. 8, p. 7, l. 7 to p. 8, l. 18 and Schedule SCW-D9, Schedule SCW-D13, Schedule SCW-D3, Schedule SCW-D9, Schedule SCW-D11, Schedule SCW-D12, Schedule SCW-D13, Schedule SCW-D14.

employed by Ameren Missouri (and MDNR and others in Missouri) were the same criteria used throughout the utility industry at the time.[77]

ii. Ameren Missouri made prudent and reasonable permitting decisions for Rush Island.

Faithful application of the established prudence framework (discussed earlier in this brief) to Ameren Missouri's permitting decisions has two consequences. First, it requires the Commission to focus on the information that was known or reasonably knowable at the relevant time. Because New Source Review is a preconstruction permitting program, sources must make their applicability decisions *before* construction begins. *See* ***United States v. DTE Energy Co.***, 711 F.3d 643, 644 (6th Cir. 2013). For Rush Island Unit 1, the permitting decisions were made by ESD in 2006.[78] For Rush Island Unit 2, the permitting decisions were made in 2008-2009.[79] Whether the permitting decision on Rush Island Unit 1 was a prudent decision therefore must be determined based upon what was known or reasonably knowable to Ameren Missouri in 2005 to 2006. And whether the permitting decision on Rush Island Unit 2 was a prudent decision must be determined based upon what was known or reasonably knowable to Ameren Missouri in 2005 to 2009. Because the NSR permitting decisions must be made prior to commencement of construction, any information that arose after construction commenced must be excluded from the prudence analysis of those permitting decisions.

Second, Ameren Missouri had three independent reasons for concluding that NSR permits were not required.[80] This means that the Commission would have to find that all three of those conclusions were unreasonable in order to find the failure to obtain NSR permits was imprudent.

[77] Supra, Ex. 10, p. 4, l. 13 to p. 5, l. 2; id., p. 38, l. 2 to p. 39, l. 9.
[78] Supra, Ex. 8, p. 25, ll. 9–12.
[79] Id., p. 36, ll. 4–13.
[80] Supra, Ex. 8, p. 29, ll. 1–18 (Unit 1 projects); id., p. 40, ll. 6–23 (Unit 2 projects); supra, Ex. 9, p. 9, ll. 1–19 (all Rush Island Projects).

a. The evidence shows that each of Ameren Missouri's three independent reasons for concluding no NSR permit was required was reasonable, and its permitting decisions were therefore reasonable.

1. Ameren Missouri reasonably concluded that because potential emissions would not increase, NSR permits were not required.

Ameren Missouri reasonably understood that under the Missouri SIP, projects would not require NSR permits unless they would first produce an increase in potential emissions. Ameren Missouri determined that the Rush Island Projects would not increase potential emissions and therefore do not constitute a "modification" requiring permitting.[81] In fact, the Projects did not increase potential emissions, and no one contends otherwise.[82]

The threshold applicability provisions of the Missouri SIP were set forth under the heading, "Construction Permits Required – Applicability." Section (1)(C) of these regulations stated that "[n]o owner or operator shall commence construction or modification of any installation subject to this rule . . . without first obtaining a permit from the permitting authority [MDNR] under this rule." 10 CSR 10-6.060(1)(C) (emphasis added).

Under the Missouri SIP, a "modification" occurs only if there was a physical or operational change of "a source operation" that causes an "increase *in potential emissions* of any air pollutant emitted by the source operation." 10 CSR 10-6.020(2)(M) (emphasis added). The Missouri SIP defined potential emissions as "[t]he emission rates of any pollutant at maximum design capacity." 10 CSR 10-6.020(2)(P)(19). Thus, the plain language of the Missouri SIP provided that "a project is a modification only if it will cause an increase in the emission rate when the source is operating at its maximum design capacity."[83] If not, then under the plain language of the Missouri SIP "the project is not subject to Missouri's construction permitting regulations, meaning that the source is

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[81] Supra, Ex. 8, p. 29, l. 19 to p. 31, l. 6 (Unit 1); id., p. 41, l. 1 to p. 42, l. 12 (Unit 2).
[82] Ex. 13, Surrebuttal Testimony of Karl R. Moor, p. 46, ll. 2–20.
[83] supra, Ex. 10, p. 13, ll. 2–4.

not required to obtain a construction permit for the project before beginning construction or modification."[84] In other words, the project would be "screen[ed] out" from further review.[85]

If, on the other hand, a project would constitute a "modification" (*i.e.,* potential emissions would increase), then the Missouri SIP required a determination of whether the "modification" is also a "major modification." To make that determination, the Missouri SIP directed MDNR to apply the federal NSR rules by incorporating them by reference. In other words, the plain language of the Missouri SIP provided that if a project would cause an increase in potential emissions (and will therefore be a "modification"), the source must then determine whether it will cause a significant increase in *actual* emissions and therefore be a "major modification" that requires an NSR permit under 10 CSR 10-6.060(8). "If the proposed project would not first increase potential emissions," then under the Missouri SIP as it was understood at the time of the projects, "no permit was required."[86]

This was in fact how MDNR applied the Missouri SIP at the time of the Rush Island Projects.[87] MDNR itself explained this in a Rule 30(b)(6) deposition (Ex. 10, Schedule JRH-D2) and in a 2006 determination concerning a $25 million component replacement project on a coal-fired boiler at the Associate Electric Cooperative Thomas Hill plant (Ex. 10, Schedule JRH-D3). These were not isolated incidents. Guidance published by MDNR as late as 2011 continued to identify step one, in the process of determining permit applicability, as asking whether an increase in the potential to emit would occur.[88] OPC concedes that Ameren Missouri and MDNR had the same interpretation of the Missouri SIP.[89]

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[84] Id., p. 13, ll. 4–7.
[85] Id., p. 13, l. 7.
[86] Id., p. 13 ll. 8–18.
[87] Id., p. 13, l. 19 to p. 15, l. 23 and Schedule JRH-D2 and Schedule JRH-D3.
[88] Tr. (Vol. 3), p. 338, l. 6 to p. 339, l. 12; id., p. 340, ll. 4–7; id., p. 362, l. 22 to p. 364, l. 1; id., p. 364, l. 3–14.
[89] Tr. (Vol. 2), p. 55, ll. 2–5.

Because the Rush Island Projects would not increase potential emissions, Ameren Missouri concluded that no NSR permit was required under the Missouri SIP. That was a reasonable conclusion, because it was consistent with the text of the Missouri SIP, with MDNR's application of the Missouri SIP, and with the settled understanding of the Missouri SIP at the relevant time (2005 to 2010).[90]

2. Ameren Missouri reasonably concluded that the projects would not cause an increase in actual annual emissions.

Even if Ameren Missouri had been required to proceed to the second step under the Missouri SIP (applying the federal NSR rules – it wasn't under its and MDNR's interpretation of the Missouri SIP), Ameren Missouri reasonably concluded that these rules would not require NSR permitting for the Rush Island Projects. That is because the federal NSR rules require permitting only for a "major modification," which is a physical change that would "result in" (*i.e.*, cause) an increase in actual annual emissions. Ameren Missouri reasonably concluded that the Rush Island Projects would not cause an increase in actual annual emissions because (1) the units were capable of accommodating increases in annual generation, and (2) the Rush Island Projects would not increase the maximum hourly emissions rate.[91] EPA's program office had stated in 2005 that under those circumstances, component replacement projects are not expected to cause annual emissions to increase.[92] Ameren Missouri applied that same approach in evaluating the Rush

[90] OPC concedes that a "plain reading" of the Missouri SIP provided the understanding that projects on existing units would trigger NSR only if they first increased the potential emissions. Tr. (Vol. 2), p. 55, ll. 7–8. Ameren Missouri also reasonably concluded that the projects were not expected to increase annual actual emissions but because it is undisputed that potential emissions would not increase, questions about the annual emissions evaluation are irrelevant.
[91] Supra, Ex. 8, p. 32, l. 4 to p. 34, l. 5 (Unit 1); id., p. 43, l. 4 to p. 45, l. 25 (Unit 2).
[92] Supra, Ex. 8, p. 16, l. 29 to p. 17, l. 3, Schedule SCW-D9, Schedule SCW-D13, Schedule SCW-D14; supra, Ex. 10, p. 41, l. 10 to p. 42, l. 9; supra, Ex. 12, p. 30, l. 15 to p. 31, l. 9.

Island Projects, and reasonably concluded that the projects would not meet the definition of "major modification" under the federal NSR rules.[93]

3. Ameren Missouri also reasonably concluded that because the projects were routine, the regulations excluded them from NSR permitting requirements.

Ameren Missouri reasonably understood that component replacements routinely performed within the industry do not require NSR permits, regardless of any change in emissions.

From the inception of the NSR program in 1977, EPA's regulations had excluded RMRR activities from NSR permitting requirements. In making its permitting decisions for Rush Island, Ameren Missouri reasonably understood this language to exclude maintenance, repair and replacement activities that are routine for the relevant *industr*y (here, coal-fired power plants). Ameren Missouri shared that understanding with MDNR, industry, and national NSR experts.[94] EPA established that understanding through a series of regulatory determinations and guidance documents issued between 1988 and 1992.[95] Referring back to these determinations and guidance documents in 2006, EPA acknowledged that it had not limited its application of RMRR to "de minimis" activities at an individual unit.[96]

The Rush Island Projects were routine for the electric utility industry.[97] Ameren Missouri employees had experience with numerous similar projects across the system, at the sister units in Illinois, and knowledge of numerous others across industry.[98] Ameren Missouri's conclusion that the Rush Island Projects were RMRR, and therefore excluded from NSR permitting requirements, was a reasonable one. CAA expert Jeffrey Holmstead acknowledged "hundreds" of similar

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[93] Supra, Ex. 10, p. 42, l. 14 to p. 43, l. 18; supra, Ex. 12, p. 31, ll. 10–22.
[94] Tr. (Vol. 3), p. 355, l. 18 to p. 356, l. 7.
[95] Supra, Ex. 10, p. 18, l. 1 to p. 22, l. 4.
[96] Supra, Ex. 12, p. 39, ll. 14–18.
[97] Supra, Ex. 13, p. 46, ll.10–20. In its 2017 decision finding that the Rush Island Projects were not routine, the District Court applied a different standard—one in which routine is judged relative to the unit and limited to trivial or "de minimis" activities. Id.
[98] Tr. (Vol. 3), p. 356, l. 24 to p. 357, l. 15.

component replacements having been done across the utility industry.[99] Moreover, in conducting such component replacements, utilities regularly group them together in an outage for efficiency.[100] As Mr. Holmstead testified, "I don't think anybody disputes that hundreds of these projects have been done throughout the industry and no one has ever sought an NSR permit for the, for these component replacements, even when they're doing several at a time."[101] One concrete example provided to Ameren Missouri, which MDNR reviewed and concluded did not require NSR permits was the $70 million project to replace multiple components at the Sibley Generating Station.[102] Ameren Missouri was aware that similar projects had occurred throughout the industry, all without any application for an NSR permit.[103] "At the time Ameren Missouri made these determinations, I don't believe that any power company in the country would have taken a different position. Even today, I believe that many power companies would make the same determination" for projects like those at Rush Island.[104]

iii. Attempts by OPC and Staff to question Ameren Missouri's permitting decisions fail.

Over the course of this case, OPC and Staff have tried various approaches to suggest that Ameren Missouri's permitting decisions were not reasonable. None of those approaches suggest that Ameren Missouri had an unreasonable understanding about the law *at the relevant time*.

First, OPC suggested that the 1988 decision by EPA—finding that a power plant renovation project at Wisconsin Electric Power Company's ("WEPCo") Port Washington plant would trigger

[99] Tr. (Vol. 2), p. 80, ll. 5–16; id., p. 81, ll. 3–9.
[100] Tr. (Vol. 2), p. 81, ll. 10–20.
[101] Tr. (Vol. 2), p. 82, l. 22 to p. 83, l. 2.
[102] Supra, Ex. 9, p. 43, l. 20 to p. 46, l. 2 and Schedule SCW-S1; Tr. (Vol. 2) p. 83, ll. 3–14.
[103] Supra, Ex. 10, p. 45, ll. 3–30; Tr. (Vol. 2), p. 77, ll. 5–25 and Schedule SCW-D6 (discussing over 21 companies, with over 100 projects, similar to the Rush Island Projects as of 2007).
[104] Tr. (Vol. 2), p. 46, ll. 4–9. As discussed below, even the District Court agreed that the question of whether the RMRR exclusion applied was one upon which reasonable minds could differ, as evidenced by the Court's refusal to grant the government summary judgment on that issue.

New Source Performance Standards (a different program under the Clean Air Act than the NSR program at issue here) as well as NSR permitting requirements—meant Ameren Missouri's permitting decisions were unreasonable.[105] Under examination, that contention crumbled as OPC's witness Seaver was forced to admit (1) he did not consider the relevant EPA documents in which it explained its decision and (2) the WEPCo Port Washington Project was distinguishable from the Rush Island Projects.[106] If anything, the story of EPA's WEPCo decision supports the reasonableness of Ameren Missouri's permitting decisions. *See* ***United States v. Alabama Power Co***., 681 F. Supp. 2d 1292, 1309, 1310 (N.D. Ala. 2008) (explaining how EPA's post-WEPCo statements and actions established an understanding that utility renovation projects would *not* trigger NSR).

Second, both OPC and Staff pointed out that Ameren Missouri was aware of EPA cases brought by the Clinton Administration against other utilities for similar projects, and suggest that Ameren Missouri knew it was running a risk with these permitting decisions. That suggestion runs contrary to the facts. None of the other cases involved the Missouri SIP, which was understood to provide protection against enforcement in the absence of an increase in potential emissions (which was the case with the Rush Island Projects). Moreover, Ameren Missouri knew that EPA's claims were generally failing in those other NSR cases.[107] Given these two facts, Ameren Missouri's belief that any risk of losing an NSR case over the Rush Island Projects was remote was reasonable. Finally, there is no evidence that anyone at Ameren Missouri actually thought that the Company was running any significant risk with its permitting decisions.[108]

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[105] Ex. 204, Rebuttal Testimony of Jordan Seaver, p. 3, ll. 23–26.

[106] OPC witness Seaver lacks the knowledge and experience to speak with any credibility on the prudence issues before this Commission. Tr. (Vol. 4), p. 151, ll. 6–24. His testimony carries no weight whatsoever.

[107] Supra, Ex. 6, p. 4, ll. 15–18; supra, Ex. 8, p. 20, ll.11–14 and Schedule SCW-D10, Schedule SCW-D11, Schedule SCW-D12, Schedule SCW-D13, Schedule SCW-D14, Schedule SCW-D15, Schedule SCW-D16, Schedule SCW-D17, Schedule SCW-D18.

[108] Supra, Ex. 9, p. 19, l. 7 to p. 20, l. 26.

Third, citing the Taum Sauk incident, Staff suggested that "over-compartmentalization" and "financial pressure" may have affected Ameren Missouri's permitting decisions, making them unreasonable. Like OPC's WEPCo argument, that contention fell apart upon examination and was thoroughly discredited by Messrs. Birk and Whitworth.[109]

Neither OPC nor Staff provide any evidence to suggest that Ameren Missouri made a flawed or unreasonable decision based upon what Ameren Missouri knew or could have known *at the time* (2005-2010). In fact, the one witness that Staff and OPC offer who has any relevant background in environmental issues—Claire Eubanks—cannot say that Ameren Missouri was wrong and it should have obtained NSR permits before doing this work.[110]

Having abandoned their earlier attempts to show that Ameren Missouri's permitting decisions were outside the range of reasonableness given what was known or knowable at the time, OPC—and to a lesser extent, Staff—now take up a different argument: that Ameren Missouri should have confirmed its decisions by seeking the opinion of EPA. For example, OPC contends that it was imprudent to proceed with the Rush Island Projects without confirming that EPA has the same interpretation of the Missouri SIP as MDNR, Ameren Missouri, and the rest of Missouri industry.[111] That new argument is wrong, as CAA expert Jeffrey Holmstead and NSR expert Karl Moor explained. A prudent utility would not have sought a concurring opinion from EPA on MDNR's interpretation of the Missouri SIP. First, the language of the SIP was clear, as even OPC recognizes: permits are required only for "modification," which requires an increase in potential emissions.[112] Second, this understanding was shared between MDNR and Missouri industry, and

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[109] Supra, Ex. 7, Surrebuttal Testimony of Mark C. Birk, p. 28, l. 1 to p. 35, l. 6; supra, Ex. 9, p. 12, l. 5 to p. 15, l. 13.
[110] Tr. (Vol. 4), p. 55, ll. 20–23.
[111] Tr. (Vol. 2), p. 55, ll. 20–24.
[112] Tr. (Vol. 2), p. 55, ll. 7–8; id., p. 66, ll. 9–19.

MDNR's interpretation was well-known.[113] Third, because EPA approved the SIP as implementing the NSR program for Missouri, MDNR—not EPA—was the relevant permitting authority.[114] EPA in all likelihood would have referred any question on the SIP over to MDNR.[115] OPC cannot point to *any* example where a utility has asked EPA to confirm a *state* interpretation of a SIP. Mr. Holmstead made clear that this is not something a reasonable utility would do.[116] Imposing a "check with EPA" requirement on Ameren Missouri would require "something that no reasonable company would have done under the circumstances, given what [Ameren Missouri] knew at the time."[117]

The NSR program requires sources to make their own decisions on NSR applicability, and does not require sources to supplement their own decisions with a concurring opinion from EPA. ***See DTE Energy***, 711 F.3d at 644. Applicability determinations by EPA are therefore very rare.[118] Utilities have been doing projects like those Ameren Missouri performed at Rush Island throughout the nearly 50-year history of the NSR program, without seeking applicability determinations.[119] For this Commission to hold that Ameren Missouri should have obtained an applicability determination from EPA before proceeding with the Rush Island Projects would mean that every utility in the industry has acted unreasonably and imprudently.[120] That cannot be the case.[121]

[113] Tr. (Vol. 2), p. 55, ll. 2–5; id., p. 88, l. 20 to p. 89, l. 3.
[114] Tr. (Vol. 2), p. 89, ll. 4–9.
[115] Tr. (Vol. 2), p. 93, ll. 19–21.
[116] Tr. (Vol. 2), p. 103, ll. 13–25.
[117] Tr. (Vol. 2), p. 104, ll. 8–23.
[118] Tr. (Vol. 2), p. 109, l. 24 to p. 110, l. 6. The 2000 DTE applicability determination (Ex. 200) concerned a turbine upgrade that was distinguishable from the boiler projects at issue in this case. Tr. (Vol. 2), p. 94, l. 1 to p. 95, l. 14.
[119] Tr. (Vol. 2), p. 106, l. 23 to p. 107, l. 4 (discussing Schedule SCW-D6); Tr. (Vol. 4), p. 20, ll. 6–23 (discussing industry practice).
[120] Tr. (Vol. 2), p. 121, ll. 1–16.
[121] Although OPC and Staff do not appear to argue that Ameren Missouri should have sought an applicability determination from MDNR, that would not be sensible either because MDNR's position was clear. Tr. (Vol. 4), p. 33, ll. 14–21 (NSR expert Moor explaining why it was not reasonable to expect Ameren Missouri to ask MDNR for a determination).

At bottom, OPC and Staff have nothing other than the results of EPA's NSR enforcement case against Ameren Missouri to support their claims of imprudence in Ameren Missouri's permitting decisions. As we explain below, this litigation has no effect on the Commission's prudence analysis.

iv. The NSR litigation did not and cannot decide the issue of prudence.

a. History of the NSR litigation.

The federal NSR case began in 2011—long after the relevant permitting decisions by Ameren Missouri. The case was bifurcated for purposes of discovery and trial between a liability phase and a remedy phase. After significant fact and expert discovery on the liability issue, the parties filed cross-motions for summary judgment. Among the motions for summary judgment filed by Ameren Missouri was its motion for full summary judgment on the grounds that none of the Rush Island Projects increased potential emissions and were not "modifications" under the SIP, and therefore NSR permitting requirements were not applicable. As an alternative argument, Ameren Missouri argued that EPA's claims of "major modification" under the federal NSR rules failed because EPA provided no evidence on the "standard of care" for a reasonable power plant operator in making the pre-project permitting decisions called for under the federal NSR rules.

In January 2016, the District Court decided Ameren Missouri's motion for full summary judgment (on the meaning and application of the Missouri SIP). Ex. 607. Without analysis or consideration of how MDNR and industry had actually understood and applied the SIP at the relevant time, the District Court held that when EPA approved the amendments Missouri made to incorporate by reference the 2002 NSR rules into the Missouri construction permitting rule, it had the effect of eliminating the two step process that had previously applied (i.e., step one evaluate for any "modification," and if so, proceed to step two to see if the project was also a "major

modification"). This is the first time – years after Ameren Missouri made its permitting decisions – that anyone had ruled that the Missouri SIP's two-step process did not mean what the industry and MDNR thought it meant.

In February 2016, the District Court decided the remaining summary judgment motions. As is relevant here, the District Court held that (1) genuine issues of fact precluded entry of summary judgment for EPA on Ameren Missouri's RMRR defense (*i.e.*, a reasonable factfinder could conclude the Rush Island Projects were routine); (2) genuine issues of fact precluded entry of summary judgment for EPA on its claim that the Unit 2 work constituted a "major modification" under the federal NSR rules (*i.e.,* a reasonable factfinder could agree with Ameren Missouri that the Unit 2 projects did not require NSR permits); and (3) EPA was not required to present any evidence on the "standard of care" for a reasonable power plant operator in making the pre-project permitting decisions called for under the federal NSR rules, and no such "standard of care" evidence would factor into the upcoming trial on liability - *i.e.*, confirming the statute did apply a strict liability standard.

As a result of these summary judgment decisions, Ameren Missouri went into the liability trial with the understanding that the only issue for decision was whether the Rush Island Projects were "major modifications" within the meaning of the federal NSR rules (*i.e.*, a physical change to the source, that is not RMRR, which "would result" in a "significant net emissions increase" measured in tons per year). More to the point, Ameren Missouri did not have any notice that the "standard of care" for a reasonable power plant operator in making permitting decisions would be part of the trial, or that Ameren Missouri would be expected to show that its permitting decisions were reasonable since the District Court had ruled that standard of care issues (which if relevant would turn on reasonableness) were *irrelevant*.

After conclusion of the trial on liability, the District Court entered a decision in 2017 finding Ameren Missouri to have violated the Missouri SIP by undertaking "major modifications" within the meaning of the federal NSR rules without first obtaining permits for such work. Although the District Court found Ameren Missouri liable, it never found that Ameren Missouri had acted in bad faith or lacked a legitimate basis for its position on the legal requirements.[122] The District Court never said Ameren Missouri's understanding of the law, which it had used to determine permitting did not apply, was unreasonable.[123] The District Court did write that the *actual* emissions evaluations it presented at trial were not "reasonable under the law," but in context that simply meant that the company's evidence did not conform to what the District Court declared—years after the fact—were the legal requirements for actual emissions calculations relevant to the question of whether a "major modification" had occurred.[124]

The remedy phase then commenced with discovery. The District Court held a trial on the remedy, in which the only issue was what if any remedy should the District Court order to ensure compliance with the law and to mitigate any harm from the violations that had been found. The District Court issued a decision on those issues in 2019.

Importantly, the District Court stayed implementation of its 2019 remedy order pending Ameren Missouri's appeal to the U.S. Court of Appeals for the Eighth Circuit. That the District

[122] Supra, Ex. 6, p. 5, ll. 3–5; supra, Ex. 13, p. 17, l. 14 to p. 18, l. 16.

[123] Supra, Ex. 7, p. 3, ll. 8–13; supra, Ex. 10, p. 54, ll. 12–19; supra, Ex. 13, p. 17, l. 14 to p. 18, l. 16; Tr. (Vol. 4), p. 82, l. 23 to p. 83, l. 11 (Staff witness Majors explaining that he does not read any of the court opinions to say that Ameren Missouri's understanding of the law was unreasonable).

[124] Supra, Ex. 10, p. 53, l. 19 to p. 54, l. 11. The District Court did say in its 2019 remedy decision that it had found in the 2017 liability decision that the failure to obtain permits for the Rush Island Projects "was not reasonable." Id. This language from the remedy decision is mere *dicta*, not a holding, as it simply purports to describe the prior findings in the liability decision. Ex. 11, Surrebuttal Testimony of Jeffrey R. Holmstead, p. 10, l. 18 to p. 11, l. 20; supra, Ex. 13, p. 24, l. 6 to p. 28, l. 26. The liability decision discusses how Ameren Missouri had a different view of the applicable law than the District Court did, but does not suggest that Ameren Missouri's understanding of the law was unreasonable or that it imprudently relied upon that understanding in making its permitting decisions. Supra, Ex. 13, p. 17, l. 16 to p. 20, l. 2.

Court stayed its remedy decision demonstrates an understanding that reasonable minds could differ on the issue of whether the Rush Island Projects triggered NSR permitting requirements.[125]

On appeal, the Eighth Circuit affirmed the District Court's judgment finding Ameren Missouri liable, but reversed in part the District Court's judgment concerning the appropriate remedy. On appeal, the Eighth Circuit applied its normal approach of reviewing judgments, not opinions**.** ***Doe v. Univ. of St. Thomas***, 972 F.3d 1014, 1017 n.3 (8th Cir. 2020) ("We review a district court's judgments, not its opinions."). The Eighth Circuit therefore had no reason or occasion to consider the characterization by the District Court in its remedy decision of its earlier liability decision, discussed *infra*.

b. The NSR litigation has no relevance for the Commission's prudence question.

The results of the NSR litigation have shown that Ameren Missouri was wrong about the law. Ameren Missouri acknowledges these results and its liability for violation of the Clean Air Act, but maintains that it was reasonable in its interpretation and understanding of the law.[126] As evidence for the reasonableness of that interpretation and understanding, Ameren Missouri points out that it was the same as the regulators and industry.[127] When it made the relevant permitting decisions, Ameren Missouri did not anticipate that a court would *later* take a different view of the permitting requirements than Ameren Missouri, MDNR, EPA's program office, other utilities, and the majority of the courts held.[128] But the District Court did just that, and on that basis held Ameren Missouri liable for failing to obtain permits from MDNR seven to ten years earlier.[129]

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[125] Tr. (Vol. 2), p. 129, ll. 3–18; id., p. 131, l. 4 to p. 132, l. 13.
[126] Tr. (Vol. 3), p. 328, l. 24 to p. 329, l. 15.
[127] Tr. (Vol. 3), p. 329, ll. 9–15.
[128] Supra, Ex. 6, p. 25, ll. 1–7; supra, Ex. 8, p. 48, l. 16 to p. 50, l.8; id., p. 54, ll. 5–15; supra, Ex. 9, p. 6, l. 10 to p. 7, l. 7; supra, Ex. 10, p. 54, ll. 20–22.
[129] Supra, Ex. 9, Whitworth Surrebuttal, p. 21, l. 6 to p. 22, l. 13 (discussing the different emissions tests); id., p. 29, l. 9 to p. 30, l. 6 (discussing District Court's RMRR rulings); supra, Ex. 13, Moor Surrebuttal, p. 3, l. 18 to p. 4, l. 11.

Although as it turns out Ameren Missouri was wrong about the law, that does not mean its understanding was unreasonable at the time.[130] Even Staff witness Majors acknowledges that this is "a fair distinction" to draw.[131] To conclude that because (a) the District Court[132] disagreed with Ameren Missouri on the law, then (b) Ameren Missouri must therefore have had an unreasonable understanding, impermissibly relies upon a hindsight view of how things turned out.[133] Ameren Missouri had a reasonable understanding of the law.[134] No one contends otherwise.[135]

c. The results of the NSR litigation cannot impute imprudence.

Staff witness Keith Majors contends that three opinions from the NSR litigation (the District Court liability decision, the District Court remedy decision, and the Eighth Circuit's decision) mean that Ameren Missouri's permitting decisions were unreasonable and imprudent.[136] That cannot be the case. Certainly the outcome of the NSR enforcement litigation does not mean that Ameren Missouri's permitting decisions were unreasonable or imprudent. "A prudence determination by the Commission would need to be based on facts that were known and knowable at the time, and whether the decision was within a range of reasonableness, not on how things

[130] Ex. 23, Direct Testimony of John J. Reed, p. 19, ll. 19–27 ("The District Court's rejection of Ameren Missouri's understanding of the law years after the Projects were completed does not mean that Ameren Missouri was unreasonable or imprudent in its position on what the law was at the time of its decision-making involving the Projects. Because Ameren Missouri's decisions have to be judged based on what it knew or should have known at the time, what the District Court later decided is not relevant to the question of whether Ameren Missouri acted reasonably in 2007 and 2010.").
[131] Tr. (Vol. 4), p. 97, l. 22 to p. 98, l. 3.
[132] Later affirmed by the 8th Circuit.
[133] Tr. (Vol. 3), p. 330, l. 23 to p. 331, l. 15.
[134] Supra, Ex. 10, p. 3, l. 15 to p. 5, l. 2; id., p. 26, l. 6 to p. 28, l. 5; id., p. 38, l. 2 to p. 46, l. 9; supra, Ex. 12, p. 4, l. 17 to p. 6, l. 20; id., p. 19, l. 14 to p. 45, l. 11; id., p. 64, ll. 10–15; supra, Ex. 13, p. 4, l. 24 to p. 7, l. 20; Tr. (Vol. 2), p. 115, l. 16 to p. 116, l. 10 (CAA expert Holmstead opining that Ameren Missouri had a reasonable understanding of the law).
[135] Supra, Ex. 9, p. 18, l. 21 to p. 19, l. 6; id., p. 21, l. 6 to p, 22, l. 13; supra, Ex. 13, p. 4, l. 24 to p. 6, l. 10.
[136] Mr. Majors made clear time after time that his claim of imprudence was based on these three opinions alone—and nothing else. Supra, Ex. 24, Surrebuttal Testimony of John J. Reed, p. 9, ll. 12–19 (quoting Majors deposition testimony); Tr. (Vol. 4), p. 71, l. 22 to p. 72, l. 7; id., p. 84, ll. 11–19; id., p. 93, ll. 5–14.

turned out."[137] Staff witness Majors, however, relies "on how things turned out" to claim imprudence—namely, the results of the litigation. Initially, in Rebuttal Testimony, Majors contended "It is not prudent or reasonable to make decisions that lead to violations of federal law."[138] When questioned, Mr. Majors changed his position and acknowledged that a subsequent finding of violation does not mean that a utility made imprudent permitting decisions.[139]

Another reason the results of the NSR litigation do not control the Commission's prudence inquiry is that the elements of a CAA violation stand in stark contrast to the prudence inquiry.[140] To determine whether a decision is prudent requires the Commission to examine whether the utility acted reasonably, given the information reasonably available to it at the time, without consideration of any hindsight.[141] That is not what the District Court did in holding Ameren Missouri liable.[142] Staff acknowledges that the District Court's test for NSR liability and the Commission's test for prudence are fundamentally different.[143] The negligence standard for prudence that OPC advances conflicts with the strict liability standard of the Clean Air Act.[144] As a court of limited jurisdiction, the federal court lacked any jurisdiction to decide whether Ameren Missouri was negligent or imprudent in its permitting decisions.[145]

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[137] Supra, Ex. 24, p. 10, ll. 18–21; Tr. (Vol. 3), p. 31, ll. 5–8.
[138] Supra, Ex. 110, p. 13, ll. 22–23.
[139] Supra, Ex. 24, p. 11, ll. 1–9 (quoting Majors deposition testimony); Tr. (Vol. 4), p. 71, ll. 15–21.
[140] Supra, Ex. 24, p. 10, ll. 7–9 (District Court's 2017 liability decision "was not a prudence determination on the question of whether Ameren Missouri, knowing what it knew or should have known at the time, was prudent in not seeking the permits").
[141] Empire Order, at 28–29.
[142] Supra, Ex. 24, p. 10, ll. 9–12 (stating "[T]he District Court based its decision on its later determinations that Ameren Missouri misunderstood the legal requirements at the time, including the legal standards governing" how to measure emissions increases).
[143] Supra, Ex. 13, p. 13, l. 12 to p. 15, l. 23; Tr. (Vol. 4), p. 79, l. 15 to p. 82, l. 16 (Staff witness Majors agrees the elements of CAA liability employed by the District Court and the test for prudence to be employed by the Commission are different tests).
[144] Tr. (Vol. 2), p. 105, ll. 12–18 (OPC analogizes imprudence to negligence); id., p. 113, ll. 9–25 (CAA expert Holmstead identifies the CAA standard as strict liability).
[145] Tr. (Vol. 2), p. 114, ll. 11–16 (CAA expert Holmstead notes the federal courts lack jurisdiction to determine whether permitting decisions were reasonable).

A third reason that the Commission cannot treat the District Court decisions as having resolved whether Ameren Missouri made prudent permitting decisions is because to do so would place the Commission in the position of relying on hindsight. The only relevant opinion here is the 2017 liability decision by the District Court, which resolved the question of whether NSR permits were required for the Rush Island Projects, as the Staff agrees.[146] The problem with treating the 2017 liability decision as a determination on prudence is that the 2017 liability decision explicitly and repeatedly relied on facts, analyses, and case law that became available only after the permitting decisions at issue.[147] Any prudence decision would have to limit the information considered to what was known or knowable at the time, but the liability decision did not do that. Instead, the District Court heavily relied on data, analyses, and case law that was not available at the time of Ameren Missouri's permitting decisions to hold Ameren Missouri liable.[148] In other words, the District Court relied on hindsight—which means that its decisions cannot be considered to have resolved the question of prudence.[149]

For the Commission to accept Mr. Majors' position that the 2017 liability decision answers the question of prudence would unlawfully bootstrap hindsight into the prudence analysis. Moreover, it would also encourage parties to litigate utility decisions in courts, in the hope of avoiding the jurisdiction of this Commission and its prudence standard. If the Commission accepts Mr. Majors' contention that the liability decision—with its extensive reliance on post-decisions facts, analyses and caselaw—resolves the prudence of the Company's underlying decisions, neither the prudence standard nor the authority of this Commission would emerge intact.

[146] Tr. (Vol. 4), p. 73, ll. 9–21 (Mr. Majors claims the liability decision is "the most important document" on the issue of prudence).
[147] Tr. (Vol. 4), p. 25, l. 13 to p. 26, l. 4.
[148] Supra, Ex. 13, p. 15, l. 24 to p. 17, l. 13; Tr. (Vol. 4), p. 73, l. 22 to p. 74, l. 21; id., p. 75, ll. 22–25; id., p. 76, l. 18 to p. 77, l. 1.
[149] Supra, Ex. 13, p. 15, l. 24 to p. 17, l. 13; Tr. (Vol. 4), p. 84, ll. 5–10 (Staff witness Majors concedes that courts did not evaluate the prudence of Ameren Missouri's actions).

d. Dicta cannot decide for this Commission the issue of prudence.

At bottom, all that Majors points to in claiming imprudence is the statement in the remedy opinion that the liability opinion concluded that the Company's failure to obtain NSR permits was not reasonable. But that is not what the liability opinion actually held, and no such findings or conclusions are found there. Instead, what the cited pages in the liability opinion contain are the findings that Ameren Missouri's actual emissions analyses did not suffice under the legal standards that the District Court declared in its 2016 summary judgment decisions (*i.e.,* the emissions analyses "are not reasonable under the law"). Even Staff agrees that the liability opinion itself is the "best evidence" of what it held.[150] This isolated sentence in the remedy opinion, misquoting the earlier liability opinion, represents nothing more than *dicta*: language superfluous to the actual holding of the remedy opinion. *See* ***Husch & Eppenberger, LLC v. Eisenberg***, 213 S.W.3d 124, 132–33 (Mo. Ct. App. 2006) ("*Obiter dicta*, by definition, is a gratuitous opinion. Statements are *obiter dicta* if they are not essential to the court's decision of the issue before it. . . . The Missouri Supreme Court's *dicta* are not binding.") (internal citations omitted).[151] The "not reasonable" *dicta* in the remedy opinion is just shorthand for the liability opinion conclusion that Ameren Missouri violated the law.[152] Indeed, this statement can only be *dicta* because the reasonableness or prudence of Ameren Missouri's permitting decisions was not before the District Court in this strict liability NSR case before the Court.[153]

To treat the remedy decision *dicta* as binding, as the Staff requests, would also violate due process. Due process required that litigants receive notice and an opportunity to be heard. ***State***

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[150] Tr. (Vol. 4), p. 72, l. 25 to p. 73, l. 8.
[151] Tr. (Vol. 2), p. 116, l. 11 to p. 117, l. 20 (CAA expert Holmstead explains why the reference to the liability ruling in the remedy decision relied upon by Staff was mere *dicta*).
[152] Tr. (Vol. 2), p. 117, l. 21 to p. 118, l. 16.
[153] Tr. (Vol. 4), p. 28, l. 19 to p. 29, l. 15 (NSR expert Moor explaining why the "unreasonable" sentence in the remedy opinion is *dicta*).

ex rel. Missouri Pipeline Co. v. Mo. Pub. Serv. Comm'n, 307 S.W.3d 162, 174 (Mo. Ct. App. 2009), *as modified* (Feb. 2, 2010) ("In an administrative proceeding, due process is provided by affording parties the opportunity to be heard in a meaningful manner. The parties must have knowledge of the claims of his or her opponent, [and] have a full opportunity to be heard, and to defend, enforce and protect his or her rights.") (internal marks omitted). Entering the liability trial, Ameren Missouri had no notice that it would be on trial for prudence in addition to facing the allegations of strict liability under the CAA. In fact, the Court's 2016 summary judgment decisions, declaring the legal standards to be applied in the liability trial, held just the opposite: the settled interpretation and application of the Missouri SIP, as requiring permitting only for increases in potential emissions, was irrelevant—as was any "standard of care" evidence for a reasonable power plant operator's application of the federal NSR rules. The only issue for trial in the liability phase of the case was whether the Rush Island Projects were "major modifications" under the federal NSR rules.

Whether the Company reasonably believed those federal NSR rules did not apply (because they were not first triggered by a "modification" under the Missouri SIP) was irrelevant. So too was whether the Company reasonably believed EPA's statements and actions finding RMRR to broadly exclude boiler component replacements routinely done within the industry, rather than the more narrow RMRR exclusion applied by the District Court. The Company had no notice that the liability trial would require it to demonstrate why its decisions were reasonable. Much less did the Company have any notice that the results of that liability trial (*i.e.,* the liability opinion) would be recharacterized in *dicta* by the District Court's subsequent remedy decision, or that Staff in a different proceeding—yet another step removed—would try to replace the 195-page liability decision with that one-sentence soundbite of *dicta* from a second decision on the remedy. Staff's

suggestions would mean that Ameren Missouri never had and would never get an opportunity to defend the reasonableness of its decisions. That perversion of justice would violate due process and any sense of fundamental fairness.[154]

v. Summary.

If the Commission decides the prudence questions raised by OPC concerning the decisions Ameren Missouri made in 2005-2010 that the Rush Island Projects would not require NSR permits, the only reasonable conclusion the Commission can reach is that the Company's decisions were reasonable given the facts known and knowable to it at the time.

D. Issuance of Securitized Utility Tariff Bonds and Imposition of Securitized Utility Tariff Charges Will Benefit Customers. *(Issue 1, subparts a, e, f & g)*

i. Definition of "traditional financing and recovery." *(Issue 1a, e, and f)*

The securitization statute requires a finding from the Commission that the proposed issuance of securitized utility tariff bonds are in the public interest and are expected to provide quantifiable net present value benefits to customers as compared to traditional financing and recovery of these costs.[155] Despite the various related subpart questions posed to the Commission on the Issues List, this is the only question the Commission must truly answer per the statute. In the Empire Order, the Commission found that "[t]he traditional method of ratemaking would occur through a general rate case and would entail amortization of the costs to be recovered over a period of years with the company being allowed to recover its carrying costs during the period of amortization."[156] Traditional financing and recovery of the Company's long-term investments

[154] Tr. (Vol. 4), p. 47, l. 6 to p. 49, l. 8 (NSR expert Moor explaining why treating the remedy court *dicta* as dispositive on the prudence issue would be "a travesty").
[155] Section 393.1700.2(3)(c)b.
[156] Empire Order, p. 40.

occurs at a carrying or financing cost rate equal to the Company's weighted-average cost of capital.

The Company's unrecovered investment in the Rush Island Energy Center is currently financed through a mix of debt and equity, which is a utility's traditional method of financing its long-term investments.[157] Those financing costs are reflected in the revenue requirement upon which rates are based and are equal to (and will continue to be equal to) the Company's weighted average cost of capital ("WACC") applied to the unrecovered investment, absent a refinancing at a lower cost of capital like through the issuance of securitized utility tariff bonds as requested in this case.[158] The WACC approved for the Company in its last rate case was 6.82%.[159]

Staff witness Keith Majors agrees that the appropriate comparison is to recovery of the cost and inclusion of a return. "The rate of return based upon current securitized utility tariff bond rates that customers would be responsible for through a securitization case is expected to be much lower than the weighted average cost of capital return that might have been required of customers for the Rush Island retired investment in a general rate case."[160]

The record in this case contains no justification to define "traditional financing and recovery" in any other manner; there is no basis for the Commission to reverse its Empire Order interpretation in this case.

The one other interpretation offered in this case is put forth by OPC witness Murray. He claims traditional recovery means that no return would be allowed. He goes on to state that no securitization would ever be less costly to customers than traditional ratemaking.[161]

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[157] Ex. 3, Mitchell J. Lansford Sur-Surrebuttal Testimony, p. 2, ll. 16-22.
[158] Ex. 1, Mitchell J. Lansford Direct Testimony, p. 13, ll. 3-4.
[159] Id., p. 13, ll. 4-5.
[160] Supra, Ex. 110, p. 19, ll. 9-12.
[161] Ex. 201, Rebuttal Testimony of David Murray, p.3, ll. 14-16.

There are a few major problems with Mr. Murray's argument. Initially, the premise of his argument is wrong. The language of the statute uses the phrase "traditional method of financing and recovery," not just "traditional method of recovery."[162] Financing, by definition, includes costs in addition to the amount financed. Defining recovery without financing completely ignores the requirement of the statute.

Just as importantly, Mr. Murray's interpretation violates several basic principles of statutory interpretation. First, if Mr. Murray were right, then the legislature completely wasted its time in enacting Section 393.1700 because no utility could ever show that securitization produces net present value benefits. But such a conclusion would fly directly into the face of the statutory interpretation principle that "the legislature will not be charged with having done a meaningless act." ***See, e.g., State ex rel. Thompson-Stearns-Roger v. Schaffner***, 489 S.W.2d, 207, 212 (Mo. 1973). Second, as noted, Mr. Murray's argument fails to give effect to the phrase "financing and …," which is contrary to another principle of statutory construction, the principle that every word and phrase in a statute is to be given meaning. ***See, e.g., Freestone v. Board of Police Commissioners of Kansas City,*** 681 S.W.3d 602, 609 n.2 (Mo. App. W.D. 2023) ("statutory construction requires effect be given to "'every word, clause, sentence, and provision of a statute[.]'" (quoted cases omitted)). OPC's offered interpretation violates both principles and, accordingly, should be rejected by the Commission in this case.

After applying a meaning to the statute that gives it effect, as the Commission properly did in the Empire securitization case, Ameren Missouri witness Mitchell Lansford's direct testimony provides the analysis to show that securitization of the Rush Island Energy Transition Costs is expected to provide quantifiable net present value benefits.

[162] Section 393.1700.2.(1)(f).

> Securitization affords access to financing at much lower rates for the Company and its customers. As I explained previously, the Company currently estimates that the interest rate on the securitized utility tariff bonds that will be issued is 5.59%. If the Company were to carry the cost of its energy transition costs and amortize those costs over time as part of general rate cases, the Company would carry the balance as a regulatory asset and apply a carrying charge equal to its WACC. For comparison, the Company's approved WACC for purposes specified in File No. ER-2022-0337 is 6.82%. Consequently, financing costs at a lower securitized rate results in a lower cost for customers.[163]

Mr. Lansford estimates the savings of securitization in his direct testimony and updated those results in his surrebuttal testimony. The results in his direct testimony show a benefit and the updated comparison from Mr. Lansford's surrebuttal continue to show securitization remains beneficial to customers, showing nominal savings of $124,271,672 and a net present value saving amount of $77,387,383.[164]

ii. Discount rate *(Issue 1g)*

The utility's WACC is the appropriate discount rate to be applied in quantifying the net present value of benefits as required by the statute, just as was ordered by the Commission in Empire's securitization case concerning the early retirement of its Asbury plant and as is required for similar analyses of other long-term customer costs in the Commission's rules for Integrated Resource Planning.[165] If customers were to collectively have a discount rate below the utility's WACC (which they do not) customers would be willing and should demand that they pay for the Company's outstanding approximately $11 billion in rate base up front instead of over time (which they are not and do not).[166] As noted above, the Company's most recently recognized WACC before the Commission is 6.82%,[167] and with subsequent updates to the Company's WACC for

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[163] Ex. 1, Direct Testimony of Mitchell Lansford, p. 12, l. 19 to p. 13, l. 7.
[164] Ex. 2, Surrebuttal Testimony of Mitchell Lansford, Schedule MJL-S8.
[165] Supra, Ex. 2, p. 14, ll. 13 – 21.
[166] Id., p. 13 l. 12 to p. 14, l. 6.
[167] Supra, Ex.1, p. 14, ll. 2 – 8.

changes only in the cost of debt, the Company's WACC is 6.88% as of December 31, 2023.[168] If the discount rate ordered by the Commission in this case is *either* as proposed by both the Company and Staff or an arbitrary 5% discount rate utilized in OPC's, quantifiable net present value benefits to customers are expected as compared to traditional financing and recovery of these costs.[169]

E. The Commission Should Issue its Financing Order Using Staff's Draft Financing Order with the Edits Reflected on Exhibit A Hereto.[170] *(Issue 1 b, c and d; Issue 2; and Staff's draft financing order)*

i. Timing for When Engagement with the Commission's Designated Representatives and Their Financial and Other Advisors Begins. *(Issue 1b)*

Ameren Missouri agrees that it should begin engagement with the Commission's designated representatives and their financial and other advisors whenever Ameren Missouri begins work on the process to place securitized utility bonds, regardless of whether there is a final and unappealable order in this case. Ameren Missouri initially proposed to begin engagement with the Commission's designated representatives and their financial and other advisors after the financing order becomes final and any appeal concludes; however, the Company agrees that in the situation where Ameren Missouri might undertake the process to place the securitized utility bonds prior to that point, the Commission's designated representatives and their financial and other advisors should be included in that process.

Staff's proposed financing order contains language to address this scenario. Conceptually, Ameren Missouri is agreeable to this language, subject to the edits found in the proposed financing order attached to this brief as Exhibit A and explained below. Ameren Missouri's

[168] Supra, Ex. 2, p. 11, ll. 3 – 11.
[169] Tr (Vol. 3) p. 118 l. 15 to p. 119, l. 10.
[170] Exhibit A is a limited redline of Staff's proposed financing order, reflecting Ameren Missouri's recommendations, discussed herein.

agreement should not be read as requiring any meeting until the order is final and any appeal has concluded.

ii. <u>Should the Finance Order Include the Word "Review."</u> *<u>(Issue 1c)</u>*

After gaining additional context on this issue from testimony at the evidentiary hearing, Ameren Missouri does not object to the use of the word "review" when describing the role of the Commission's designated representative and their financial and other advisors. It should be noted, however, that the statute does not provide for a "review",[171] but regardless, the Company does not believe it provides any additional authority during the securitization process. Mr. Davis agreed at hearing, stating that the word "review" does not infer any right to do anything such as approve or veto.[172] Under the law, the order cannot expand the statutory authority and the role is still limited to one that provides input and collaborates with Ameren Missouri on this process so that the Staff Representative "…can provide the commission with an opinion on the reasonableness of the pricing, terms, and conditions of the securitized utility tariff bonds on an expedited basis."[173]

Despite the Company's willingness to accept the departure from statutory language for the word "review," Ameren Missouri does object to the use of the word "oversight", which can be found in the Staff's proposed financing order.[174] The word "oversight" has connotations of supervision and some type of control, when the statute clearly limits the role to one of providing input and collaboration while expressly stating that neither the designated representative nor representatives from the Commission Staff shall have authority to direct how Ameren Missouri

[171] Section 292.1700.2(3)(h).
[172] Tr. (Vol. 3) p. 229, l. 3-8.
[173] <u>Id.</u>
[174] Staff's Proposed Financing Order, p. 28, para 58.

places the securitized utility tariff bonds to market.[175] To avoid any confusion, it is better to rely upon the language of the statute. Consequently, Ameren Missouri would modify the sentence in question as shown in the edit reflected in Exhibit A.

iii. Inclusion of a Comparative Securities Analysis in the Issuance Advice Letter is Not an Appropriate Condition for the Commission to Adopt. *(Issue 2a)*

It is neither beneficial nor appropriate to require the Issuance Advice Letter ("IAL") to include a comparable securities pricing analysis. Ameren Missouri witness Katrina Niehaus, who has been involved in multiple utility securitization bond issuances since 2005,[176] testified that requiring the inclusion of comparable securities pricing analysis would be viewed by potential underwriters as "relatively unusual" and "is not something that would be done as part of the issuance advice letter in general for these types of transactions."[177] There is no evidence of why inclusion of this analysis would result in any improvement in the utility bond process or cost, in fact, requirement of this in the IAL would result in an increase to the overall cost of the underwriter.[178] Ameren Missouri suggested an IAL consistent with the requirements of the statute, which sets forth information on the final terms of the securitized utility tariff bonds being issued.[179]

iv. Redacting portions of the certification letters is not a viable option. *(Issue 2b)*

The industry standard is for the entire certification letter to be treated as confidential information.[180] It would not be appropriate to make any portion of the certification letters public. These letters contain confidential, trade secret information of the underwriter about marketing

[175] Section 292.1700.2(3)(h).
[176] Tr. (Vol. 3) p. 150, l. 12 – 24.
[177] Tr. (Vol. 3) p. 141, l. 7-14.
[178] Tr. (Vol. 3) p. 149, 14-15. P. 150, l. 3-9.
[179] Section 393.1700.2(3)(h).
[180] Tr. (Vol. 3) p. 142, l. 1-2.

and other underwriter processes which should not be publicly disclosed.[181] OPC's "solution" to this need for confidentiality is to redact certain information, leaving a partially public certification letter. The concern is that one needs to read and understand the entirety of the process undertaken and one cannot do that by reviewing only part of the letter.[182] Ms. Niehaus testified that she was unaware of any securitized bond issuance that deviated from the standard of making certification letters entirely confidential and OPC's witness Murray could only identify one example from the 30 plus year history of this asset class where a certificate from an underwriter was redacted as opposed to being filed confidentially.[183] Ms. Niehaus listed several problems with OPC's solution. A redacted certification letter would not provide a complete picture to someone reading the redacted document. It would not provide a full picture of the complexity of the transaction in the market at the time of issuance.[184] This, in turn, could lead to potential liability exposure for the underwriters.[185] Underwriters are likely to respond to an order that requires publication of a redacted document negatively. Deviation from standard (here, entirely confidential certification letters) may increase the underwriters' potential liability risk and thereby reduce the number of participating underwriters and would likely increase the cost for underwriting for those who were willing to participate.[186]

It should also be noted that the statute does not contemplate intervenors other than the Commission's designated representatives and their financial and other advisors being involved in the IAL process, so there is no need to publicly release these letters. The statute specifically sets out who is to advise the Commission on whether the pricing, terms and conditions of the

[181] Tr. (Vol. 3) p. 142, l. 5-12; p. 148, l. 1-11.
[182] Tr. (Vol. 3) p. 149, l. 8-15.
[183] Tr. (Vol. 3) p. 150, l. 23-24; p. 262, l. 10-13.
[184] Tr. (Vol. 3) p. 148, l. 12-17.
[185] Tr. (Vol. 3) p. 148, l. to p. 149, l. 2.
[186] Tr. (Vol. 3) p. 142, l. 13-20; p. 143, l.2-6; p. 149, l. 14 through p. 150, l. 6; p. 153, l. 18 to p. 151, l. 10.

securitized utility tariff bonds are reasonable,[187] and that language does not include any mention of OPC. In fact, Mr. Murray described OPC as being "excluded" from reviewing these documents.[188] The Commission can already appoint a representative or representatives from Staff and can hire advisors, including financial and legal advisors, to assist the Commission in this bond process.[189] OPC's witness, while surely an individual of many talents, admits that he is not a bond expert, and that he has not participated in other bond offerings.[190] The one argument touted by Mr. Murray as the benefit of having more information made public is to point to the fact that Mr. Murray found an error[191] in the Empire Issuance Advice Letter. Regardless of whether that constitutes sufficient justification to modify the entire statutory process, it should be noted that Mr. Murray points to an error that was discovered without making the certification letters public,[192] thus undercutting the argument entirely.

v. Providing workpapers to all parties in this case is not necessary. *(Issue 2d)*

To the extent that workpapers underlie the certification letters discussed above and for all the same reasons detailed above, workpapers should not be distributed to all parties in this case, but rather only distributed to the Commission's designated representative and their financial and other advisors for review. The securitization statute requires the Commission representative (appointed from Staff and advised by Commission hired financial advisors) to provide the Commission with an expedited opinion on the reasonableness of the pricing, terms and conditions of the securitized utility tariff bonds.[193] There is no mention of any other party from the

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[187] Section 292.1700.2(3)(h).
[188] Tr. (Vol. 3) p. 300, l. 3-8.
[189] Section 292.1700.2(3)(h).
[190] Tr. (Vol. 3) p. 302, l. 23 to p. 303, l. 5.
[191] A correction that yielded a slightly different NPV benefit level, but the correction did not move the results to no longer yielding any benefit.
[192] Tr. (Vol. 3) p. 301, l. 18 to p. 302, l. 22.
[193] Section 292.1700.2(3)(h).

securitization case being included and there has been no reason provided during the pendency of this case to expand that authority beyond the participants contemplated by the statute. Additionally, all of the risks and complications detailed above would apply to the publication of the underlying workpapers. This recommendation should be rejected.

vi. Remaining Issues on Issue 2. *(Issue 2c and e)*

Ameren Missouri takes no position on whether the financial advisor should be required to identify the information relied upon or whether the financial advisor should be required to provide a detailed accounting of fees and charges.

vii. Financing Order

On April 11, 2024, Staff submitted a proposed financing order, designed to implement Staff's recommendations. It is, in many ways, similar to the version Ameren Missouri included with its initial filing. To avoid having competing versions, Ameren Missouri has redlined a limited number of edits onto Staff's version – see Exhibit A. The majority of Ameren Missouri's proposed edits are to make Staff's proposed financing order consistent with the language of the securitization statute. Ameren Missouri asks the Commission to closely review and incorporate the Company's edits into its final financing order, given that the Company has limited its suggested edits to only the most important matters for the Commission to consider. Page numbers listed below refer to the page number in the upper right-hand corner[194] of the Ameren Missouri edited version of Staff's draft financing order.

- Page 6, paragraph 7. As set out in this brief, Ameren Missouri does not believe it is appropriate to agree with Staff's or OPC's proposed disallowances. This paragraph will have to be adjusted according to the Commission's findings in this case.

[194] Page references are to the pages listed in the upper right-hand corner of the document. Pagination at the bottom of each page sometimes differs from the pagination in the upper right-hand corner due to issues that occurred when converting the Staff's filed pdf to a Word document..

- Page 8, paragraph 16; page 51, paragraph 23; and Attachment 2, Schedule D. Ameren Missouri inserted the words "plus applicable federal, state and local income or excise taxes." The Company will incur incremental income taxes[195] and those costs should be included in the final securitized amount. In fact, the securitization statute explicitly calls out this additional cost as one that should be included as part of the financing costs.[196]

- Page 8, paragraph 17; p. 56, paragraph 37. Ameren Missouri changed 12 months to 24 months. The Company's initial application asked for 24 months, as it is allowed to do by the statute.[197] No party has filed testimony opposing 24 months, therefore the Company requests the Commission allow it the flexibility of having 24 months to issue these bonds, although it hopes not to need the additional time.

- Page 9, paragraph 19; p. 34-35, paragraph 11; pp. 45-46, paragraph 8. The concept of "customary" applies to securitization cases involving "qualified extraordinary costs." The statutory language for Energy Transition Costs arising from a retired generating plant is "traditional method of financing and recovery." Section 393.1700.2(1)(f)

- Page 17, paragraph 37. Ameren Missouri has modified the language used to clarify, consistent with the statutory language, that it is Ameren Missouri's decision as to the final maturity date and principal amounts of each tranche after consultation and input from the Commission's representative.[198] The language, as drafted by Staff, indicates it is a joint decision, which under the statute, it is not.

- Page 20-211, paragraph 43. Ameren Missouri updated the legal reference to include the most recent revision.

- Page 24, paragraph 51. Ameren Missouri changed the word "generation" to "transmission", which is consistent with the voltage levels reflected in the voltage adjustment factors in the Company's proposed tariffs in this case. Additionally, Staff recommended making the voltage adjustment factors in the securitization tariff reference similar factors in the Company's Fuel Adjustment Clause tariff.[199] The Company conditionally agreed with this recommendation,[200] but observes that the factors in the Fuel Adjustment Clause that would be referenced under Staff's proposal are based on using forecasted sales at transmission voltage, not generation, making the

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[195] Tr. (Vol. 3) p. 120, l. 1-9; p. 121, l. 12 to p. 122, l. 10.
[196] Section 393.1700.1(8)(d).
[197] Petition, Schedule B, p. 52, paragraph 16.
[198] Section 393.1700.2(3)(h).
[199] Ex. 106, Sarah Lange Rebuttal Testimony, p. 15, ll., 1-8
[200] Supra, Ex. 20, p. 22, ll., 1-7

reference to "generation" in this paragraph of Staff's proposed order inaccurate.[201]

- Page 27, paragraph 57. Ameren Missouri deleted the paragraph addressing a non-standard true-up process to propose revisions to the methodology in the Securitized Utility Tariff Rider. Staff provided no testimony in support of this addition, nor is there any explanation in the record for its purpose. Similar provisions were not included in either financing order issued by the Commission in the Empire or Evergy cases and a non-standard true-up is simply not necessary to market the bonds or achieve the highest credit rating. Including it without also include guidance as to how it would be used will create confusion. Therefore, it should be deleted.

- Page 27-28, paragraph 58. Ameren Missouri modified the language to replace the word "oversight" with "collaborate and provide input", which is the language of the statute. The word "oversight" has connotations of supervision and some level of direction, when the statute clearly lays out the role as providing input and collaboration while expressly stating that the decisions are to be made by the utility. To avoid any confusion and to avoid conflict with the statute, it is better to rely upon the language of the statute.

- Page 29, paragraph 60; page 52-53, paragraph 27. Ameren Missouri added language to clarify in which meetings or conversations the Commission's designated representatives and financial and other advisors must be allowed to participate. Privileged meetings are the clearest example of an exception that must be allowed, whether that privilege is held by Ameren Missouri, the underwriter or by the Commission with its legal counsel. The Commission's hired financial advisor agrees with this exception.[202] In addition, the statute imposes the requirement for representative(s) and financial advisor(s) participation only for meetings "convened by the electrical corporation."[203] If the underwriter holds internal meetings that do not involve Ameren Missouri or if the underwriter receives calls from potential buyers of Ameren Missouri bonds, there is no statutory requirement to include the entire Commission's designated representatives and financial and other advisors on those discussions. The Commission said much the same in its Empire Order: "Fundamentally, a requirement that the Finance Team be allowed to participate in every communication would be unwieldy and could lead to delays that would hamper the bond placement process."[204] Finally, Ameren Missouri proposes language to allow for subsequent reporting for communications that might occur without the Commission's representatives and financial and other advisors being

[201] Please note that if MIEC's alternative allocation approach is adopted, there will be no need for voltage adjustment factors and thus no need for paragraph 51.
[202] Tr. (Vol. 3) p. 215, l. 9 to p. 216, l. 7.
[203] Section 393.1700.2(3)(H).
[204] Supra, Empire Order, p. 83.

present. This added language is taken directly from the Commission's Empire and Evergy Orders.[205]

- Page 29, paragraph 61; page 45-46, paragraph 8. The certification of the underwriter is only for part (iv), while Ameren Missouri will certify all of the items listed in subparts (i) through (iv). The language inserted clarifies this distinction.

- Page 31, paragraph 63. Added "net present value" before benefits which is the test in the statute.

- Page 33, paragraph 7. Ameren Missouri inserted "or to be retired or abandoned." This language is directly from the statute[206] and, given that Rush Island is plant that is to be retired, retaining that portion of the statutory language is a necessary edit.

- Page 43, paragraph 1. Added the unopposed deferral mechanism discussed in Company witness Lansford's testimony to defer amounts included in the Company's current base rate revenue requirement once the Company receives the bond proceeds (see discussion below).

- Page 43, paragraph 2. Ameren Missouri inserted an ordering paragraph, consistent with the requirements of the securitization statute, that states the retirement of Rush Island was reasonable and prudent and that recovery of the energy transition and financing costs identified in the order are just and reasonable and in the public interest.

- Page 47-48, paragraph B10. Ameren Missouri modified the language to align with the description of partial payments reflected in paragraph 47 on page 22. Staff and the Company had different language for handling partial payments made by customers in their proposed tariffs. Ultimately the Commission will have to approve one of those sets of tariff language. The Company's tariff language is consistent with the expectations of rating agencies related to the treatment of partial payments and therefore will support issuance of securitized bonds, and is substantially less costly than Staff's language is to implement from the perspective of programming the Company's billing system, saving money for customers. to

- Page 50 paragraph 20; page 54, paragraph 29. Bond counsel advises that this is not the role of the indenture trustee.

- Page 62, paragraph 44. The Commission has multiple motions pending upon which it has not yet ruled and those rulings should be reflected here.

[205] Id., p. 85; Amended Report & Order, p. 73.
[206] Section 393.1700.1(7)(a).

viii. Deferral Authority

The direct testimony of Mr. Lansford in this case requested the Commission grant the Company authority to defer amounts included in the Company's revenue requirement used to set customer rates in File No. ER-2022-0337 from the date the Company receives the securitized bond proceeds to the date base rates are reset to exclude costs related to the Rush Island Energy Center.[207] The annual amount to defer is $77,795,688 and is made up of the following amounts:

	Amount
Plant in Service	$893,926,949
Reserve for Depreciation	(365,389,078)
ADIT	(138,896,106)
Fuel Inventory	29,171,064
Materials and Supplies Inventory	17,594,944
Total Net Rate Base	436,407,773
WACC (Including Income Taxes)	8.36%
Return on Rate Base (Including Income Taxes)	36,483,690
Depreciation Expense	35,206,296
Non-labor Operations and Maintenance Expense	6,105,702
Labor Operations and Maintenance Expense[208]	0
Total	$77,795,688

[207] Supra, Ex. 1, p. 23, l. 11 to p. 24. l. 1. The change in the numbers results from the updated WACC, as discussed in Exhibit 2, p. 11, ll. 1 – 11.
[208] Ameren Missouri is no longer seeking to include workforce transition costs in the total cost to be financed through securitized utility bonds in this case.

No party to this case has taken issue with this request and it should be adopted as proposed by the Company.

F. The Commission Should Authorize Securitization of the Amounts for Energy Transition Costs and Upfront Financing Costs Outlined in Company Witness Mitch Lansford's Surrebuttal Testimony *(Remaining Securitization Amount Issues 19, 7, 8, 9, 10, 11, 12, 4, 13, 6 & 18)*.

i. Basemat Coal Inventory Costs Should be Included in Energy Transition Costs, as Recommended by the Company and the Staff, Using the Company's Estimate. *(Issue 7)*.

Since the first coal delivery at Rush Island, the Company has accounted for basemat coal in accordance with the Uniform System of Accounts.[208] Since a 2008 rate review, the Company's rates have been set (without dispute by any party) using a basemat coal valuation that serves as the basis for the value Company seeks to include as Energy Transition Costs in this case, $1.924 million.[209] While that figure was and remains an estimate (because the exact amount of basemat coal inventory cannot be determined until the plant is closed and the coal pile is eliminated), it has clearly been sufficient for setting customer rates. And since Rush Island's retirement will mean that the basemat will no longer serve a purpose (*i.e.*, providing a foundation for the usable coal pile) upon the retirement of Rush Island it, like other Rush Island assets, squarely fits the definition of Energy Transition Costs in Section 393.1700. Thus, the Company's basemat coal valuation of $1.924 million should be included in Energy Transition Costs and securitized via issuance of securitized utility tariff bonds.[210]

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[208] Supra, Ex.2, Sch. MJL-S5 and p. 24, ll. 1-11.

[209] Tr. (Vol. 6) p. 116, ll. 7 – 16. While Mr. Majors seems to be vacillating between a recommendation of $1.4 million or $1.924 million, he did testify at hearing when asked if he was still recommending the $1.924 million that he "think[s] that's fair." Tr. (Vol. 6) p. 141, ll. 17-20

[210] Id.

Only OPC contends otherwise, and it does so based on two novel and flawed theories. OPC's position that seeks to exclude basemat coal inventory from Energy Transition Costs has already been rejected by the Commission in the Asbury securitization case.[211]

Undeterred, OPC has come up with a new theory in this case, that is, because the Company's rates over the years were set including a return on this component of coal inventory, OPC contends that somehow the Company has already "recovered" its original investment in the basemat coal inventory. This is plainly wrong under the most basic of ratemaking principles.[212]

Basemat coal is a rate base item just like the rest of the coal pile or other capital assets at the plant.[213] Utility rates are properly set by applying the utility's cost of capital to all of its rate base, including basemat coal, because year after year after year the utility must finance that rate base so long as it exists.[214] That the Company included the value of basemat coal in rate base for all of those years only means that the Company earned a return on the capital invested in that coal – the real costs of financing its investment. But the Company did not receive a return *of* that capital through any form of amortization or depreciation of the costs, making OPC’s claim that the Company already “recovered’ the basemat coal costs untrue.

Finally, OPC's alternative to denying full recovery is to instead rely on OPC's own valuation of basement coal, which is a valuation OPC has never presented before the Commission in any rate review after 2008, when the valuation relied on by the Company and Staff was established. The valuation during the 2008 rate review was a point in time valuation based upon the weighted average cost of the Company's coal at that time. While there unavoidably is some

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[211] Supra, Empire Order, pp. 50 - 51, Findings of Fact 99 to 105, Conclusion of Law KK and Decision. While the details of some of the Empire facts vary in certain respects from the facts in this case, the facts found and decisions made by the Commission in the Empire order are, substantively, supported by the record here. The Commission took official notice of the order in this case. Tr. (Vol. 6) p. 245, l. 15 to p. 246, l. 7.
[212] Supra, Ex. 2, p. 24, ll. 12-23.
[213] Tr. (Vol. 6) p. 108, ll. 1-2.
[214] Tr. (Vol. 6) p. 127, ll. 3 – 16; p. 135, ll. 3 – 11.

uncertainty around both the final quantity and price of the basemat coal once Rush Island is retired, ultimately the Company will use all useable coal at the site and write-off what isn't usable. As Mr. Lansford explained during the evidentiary hearings: "All we can do is estimate basemat coal at this point in time. That's what we are trying to do here. And at some point in time, like I was explaining to Commissioner Holsman, the actual amount will be known. We'll use everything we can use and we'll have to write off the remainder that represents basemat coal. And any difference between our estimate here and the actuals later is reconciled as part of a future rate review."[215] Using OPC's lower estimate, if it turns out to be lower than the ultimate expense, will simply reduce the benefit of securitizing the Company's estimated basemat coal inventory value and, in the end, the actual write-off and the estimated basemat coal inventory included in Energy Transition Costs will be reconciled so that customers pay no more and no less than the actual cost of unusable coal.

OPC's estimate is also demonstrably wrong as it is premised upon the flawed theory that the basemat itself consists entirely of nearly 40-year-old coal. It does not. Instead, the basemat coal primarily consists of ultra-low sulfur coal that the Company *did not even start to use until 2011 or 2012*.[216] But to reiterate the most salient point on this issue: There is a coal inventory valuation on the Company's books and when the coal pile is gone, we will know the exact value of basemat coal. That amount will then be written off because it cannot be used. If the write-off exceeds the estimate used in this case, then via the statutorily mandated reconciliation process, the difference will be included in base rates in a future rate case as an increase to rates; if it's less, it will produce a decrease to rates. Having been good enough to set rates without objection from any

[215] Tr. (Vol. 6) p. 117, ll. 17 – 25.
[216] Tr. (Vol. 6) p. 109, ll. 8-9, Ex. 25, OPC Data Request 8506. Even OPC witness Riley concedes the basemat may not be coal originally purchased for the plant. Tr. (Vol. 6) p. 157, l. 23 to p. 158, l. 3.

party for the many rate cases since 2008, the Company's estimate of $1.924 million is clearly good enough to use as an estimate in this case.

ii. The Amount to Be Securitized Should Reflect an Offset Equal to the NPV of the Tax Benefits of ADIT Associated with Rush Island, Approximately $50 Million, as Recommended by the Company and the Staff. *(Issue 8).*

Based upon the record in this case, accumulated deferred income taxes ("ADIT") and excess ADIT should be treated differently than the Commission decided in the Empire securitization case. When the plant retires (here, presuming a September 1st retirement date[217]) the Company will have ADIT of approximately $112 million recorded on its books.[218] This balance reflects amounts owed to the taxing authority in future periods. Similarly, the Company will have excess ADIT of approximately $26 million[219] recorded on its books resulting from a prior change in tax law that reduced the statutory tax rate.[220] The Company has previously reflected these amounts in its revenue requirements used to set rates for customers and the sum of the two amounts, $138 million, offsets its rate base in general rate proceedings (and lowers the revenue requirement) in acknowledgement that those amounts have been received from customers but not yet paid.[221] A resulting lower rate base and lower annual general rate review revenue requirement is the benefit that results from, and customers receive from, ADIT.[222] The securitization statute requires that a rate base offset in general rate proceedings will no longer exist after issuance of securitized utility tariff bonds subject to the statute.[223] The Company and

[217] The figures are slightly different if the plant retires on October 15, 2024, but we are referencing the figures for a September 1, 2024, retirement since those are the figures that Mr. Riley focuses on in his rebuttal testimony.
[218] Supra, Ex. 1, p. 21 l. 19 – 20 and p. 22 ll. 1-2.
[219] Id. p. 22 ll. 2 – 4.
[220] The Company will pay the Internal Revenue Service $112 million and will return the $26 million to customers via an amortization in base rates. See footnotes 120 and 121. See also supra, Ex. 1, p. 15 ll. 3-6; see also supra, Ex. 2, footnote 22.
[221] Supra, Ex. 1, p. 17, ll. 9 – 13.
[222] Id., p. 17, ll. 13-15.
[223] Id., p. 20, ll. 7 – 12.

Staff's calculations of the amount appropriate to offset Energy Transition Costs in this case related to ADIT reflect the net present value of the rate base offset customers would have otherwise received had no securitization taken place (the net present value of exactly what the statute requires is "taken away" in future general rate proceedings).[224] Empire's Asbury securitization case did not contain an evidentiary record that established these facts.[225] The evidentiary record in this case, however, does establish these facts and ADIT should be handled differently in this case, a proposition with which, on the record in this case, Staff agrees.[226]

OPC has ignored the evidentiary record in this case and seeks to selectively apply only part of the outcome from the prior Empire case (a larger offset to Energy Transition Costs *without* inclusion of income tax costs as ongoing financing costs).[227] Acceptance of OPC's position would leave the Company with just approximately $50 million to pay its $112 million tax obligation to the IRS (for Rush Island's ADIT) and to refund its $26 million deferred tax liability (*i.e.,* the excess ADIT) to customers over the next 15 years (nominally, $89 million dollars short and on an NPV basis, $39 million short of the Company's future obligations). This is an unreasonable recommendation and if adopted would result in an unreasonable outcome. Comparatively, the Company and the Staff's calculations would leave the Company with exactly the cash it needs in present day dollars to meet those future obligations -- approximately $89 million – the NPV of its actual obligations of $138 million over the next 15 years. Given these facts, customers should be credited now – by reducing the Energy Transition Costs to be securitized by approximately $50 million,[228] which is the difference between the net present value

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[224] Id., p. 20, ll. 12 – 21.
[225] Id., p. 22, ll. 12 – 18.
[226] Supra, Ex. 2, p. 28, ll. 2 – 7.
[227] Id., p. 28, ll. 10 – 18.
[228] More specifically, $49,634,010 if the plant will retire on September 1, 2024, or $49,178,167 if the plant will retire on October 15, 2024.

of future obligations the Company must pay ($89 million) and the $138 million nominal value of the future payments, and which represents the net present value of the rate base offset – *i.e.,* the tax benefits of ADIT - that would otherwise exist but are being eliminated per the requirement of the securitization statute to no longer include those deferred tax liabilities as rate base offsets in the future.

Application of the ADIT methodology from Empire in this case, would result in the Company initially recovering its income tax costs in full through base rates, refunding the present value of those remaining obligations to customers via an offset to Energy Transition Costs in this case, and then *re-recovering* a portion of those very same amounts as ongoing financing costs in order to satisfy the Company's tax-related obligations in the future. This initial recover, then refund, then re-recover sequence was necessary in the Empire case because customers were given a credit against Energy Transition Costs that was too large to allow Empire enough cash to meet its future tax obligations, thus requiring the Commission to then authorize that part of the credit in effect be re-recovered from them through higher securitized utility tariff charges that then needed to reflect the ongoing income tax payments that would have to be made (by increasing ongoing financing costs in an amount equal to the income tax shortfall), which ended up complicating the securitization process.[229] Inclusion of income tax amounts as ongoing financing fees is not necessary if the Commission accepts the Company and the Staff's position based on the record in this case. However, if the Commission does not accept the Company and the Staff's position in this case, it would need to complicate the securitization process by adding amounts to ongoing financing costs to be collected through the securitized utility tariff charge equaling a net present value of $39 million to cover the income tax shortfall that would otherwise exist

[229] Supra, Ex. 2, p. 28, ll. 10 – 18.

(difference between $89 million and $50 million).[230] Any other solution deprives Ameren Missouri of the funds it must have to pay future taxes and to return excess ADIT to customers.

iii. Asset Retirement Obligation ("ARO") Costs Should be Reflected in Energy Transition Costs *(Issue 9)*

By definition, these ARO amounts fulfill an obligation to return a piece of property back to its original condition upon retirement of an asset.[231] No party disagrees with the definition but Staff and OPC have raised controversy on this matter related to ARO amounts for water treatment and monitoring.[232] Neither Staff nor OPC dispute the fact that these costs are required for compliance with the Coal Combustion Residual ("CCR") rule nor that these costs are AROs.[233]

Staff recommends recovery of a portion of the ARO amounts (related to closure of the ash ponds) but suggests the Commission split the ARO by excluding the water treatment and monitoring costs from Energy Transition Costs and instead address them in a rate case because, Staff contends, they are a "routine cost" that would be included in the cost of service in a rate case.[234] OPC's rebuttal testimony makes the same recommendation as Staff.[235] although at hearing, Ms. Schaben's position was less clear.[236]

As the Company has previously pointed out in other issues, if a cost qualifies as an Energy Transition Cost, it should be allowed to be securitized. There is no requirement that the costs be "non-routine" to constitute an Energy Transition Cost. And an Energy Transition Cost can reflect either capital or O&M, as per the language of the statute.[237] The fact that the cost is ongoing, as

[230] Id., Ex. 2, p. 28, ll. 8-19.
[231] Supra, Ex. 2, p. 34 ll. 13-14. Tr. (Vol. 6), p. 224, l. 9-24.
[232] Id., p. 34, l. 13-18.
[233] Ex. 209, Schaben Rebuttal Testimony, p. 4, l. 1-8; Tr. (Vol. 6) p. 241, ll. 9-24; Tr. (Vol. 6, p. 197, l. 2 to p. 198, l. 24.
[234] Supra, Ex. 110, p. 23, ll. 2-8.
[235] Supra, Ex. 209, p. 5, ll. 1-4.
[236] Tr. (Vol. 6), p. 248, l. 7-21.
[237] Section 393.1700.1.(7)(a).

pointed out by both Mr. Majors and Ms. Schaben, does not make it inappropriate to be recovered through securitization.

Additionally, Ameren Missouri's approach is the one that most benefits customers. Ameren Missouri included an amount that represents what it anticipates will be needed to complete the water treatment costs through the end of that treatment. If that amount is incorrect, it will be reconciled in a future rate review. But the bulk of the recovery occurs through securitization, which is less costly for customers. The Commission itself made a specific finding in the Empire case that customers are better off if these same ARO costs relating to a utility's obligations under the CCR Rule are recovered through securitization as opposed to financing and recovery under traditional ratemaking.[238]

In summary, these are ARO costs, the Commission has already found that these same type of ARO costs should be included in sums to be securitized, and there is no reason not to do so here.

iv. <u>The Safe Closure and Decommissioning Costs Recommended by the Company and the Staff Should be Included in Energy Transition Costs. *(Issues 10 and 11).*</u>

The Company has included estimates of "safe closure costs" and "decommissioning costs" in the Energy Transition Costs to be securitized in this case. The Staff also recommends inclusion of these same estimated costs in the sums to be securitized.[239] As Commissioner Holsman's questioning and the answers to it indicate, the two categories are closely related and could have been added together, the former being costs for work that "we needed to do to make the plant safe

[238] Supra, Empire Order, p. 59, para 129.
[239] EF-2024-0021, Ex 111, Majors Surrebuttal Testimony, Sch. KM-s1 (presenting a combined figure for safe closure and decommissioning costs that matches the total of those categories recommended by the Company).

to bring a demo contractor in"[240] and the latter consisting of actual demolition, including the activities detailed in Table 1 to Company witness Williams' direct testimony.[241] Cost estimates for the safe closure costs were developed separately from the activities covered by the decommissioning activities discussed in the Black & Veatch report (see Williams' Schedule JW-D1).[242] Cost estimates for the demolition (also referred in testimony as "decommissioning") activities were developed in collaboration with engineering firm Black & Veatch.[243] Specifically, Mr. Williams was involved in decommissioning of two other plants, which gave him knowledge of whether the Black & Veatch estimate was a good estimate and, in fact, Mr. Williams had personal input into the Black & Veatch estimate leading him to have a high degree of confidence in it.[244] The Company utilized two categories since the first, safe closure costs, reflect activities that will generally be undertaken by Company personnel in advance of the broader decommissioning/demolition of the plant structures that are the subject of the scope addressed in the Black & Veatch report.[245]

Only OPC witness Schaben challenges inclusion of the estimated $4.408 million of safe closure costs in Energy Transition Costs.[246] Ms. Schaben's challenge is based on a flawed premise, that is, the incorrect premise that incurring these costs will somehow provide "value" to an adjacent transmission switchyard that is today not part of the power plant itself and that will remain in place

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[240] Tr. (Vol 6) p. 276, ll. 21-23. *See also* Ex. 17, Jim Williams Direct Testimony, p. 6, ll. 9 – 13. See also Mr. Williams Surrebuttal Testimony (Ex. 18, p. 9, ll. 10 – 13) (the safe closure and decommissioning costs are, in substance, not different from each other).
[241] Supra, Ex.17, p. 8, Table 1.
[242] Supra, Ex.17, Sch. JW-D1.
[243] Tr. (Vol. 6) p. 273, l. 25 to p. 274, l. 10.
[244] Tr. (Vol. 6) p. 273, l. 10 to p. 274, l. 10. Tr. (Vol 7) p. 2, ll. 5 – 19
[245] Supra, Ex.17, Sch. JW-D2.
[246] Staff, the only other party to make a recommendation on the proper level of energy transition costs to securitize supports inclusion of the $4.408 million in energy transition costs. (see Supra, Ex. 111, Sch. KM-s1 (showing $46.9 million of Safe Closure and Decommissioning Costs, which matches the Company's total for those two categories)

as an integral part of the post-Rush Island transmission system. Ms. Schaben's premise is false.[247] If a transmission switchyard did not exist today or was not going to exist tomorrow post-the plant's closing, all of the safe closure activities would be undertaken *anyway*. Consequently, the safe closure costs have nothing to do with the adjacent transmission infrastructure and are occasioned entirely by the plant's retirement, fitting them squarely within the definition of Energy Transition Costs. While this was clear for a variety of reasons based upon the pre-filed testimony in this case, the evidentiary hearing testimony made it even more clear. For example, the transmission work at the separate but adjacent transmission switchyard was completed last year.[248] The safe closure activities (as the name implies – activities to close the plant once it is no longer operating) will not even start until later this year, such activities having "nothing to do with the switchyard."[249] Nor is there any overlap in costs for the already-completed transmission work and the safe closure activities. Contrary to OPC witness Schaben's claims, to take one example, porta-potties to support workers engaged in safe closure activities don't support the now complete transmission work as they were not even on-site when the transmission work was performed.[250]

As was the case with the safe closure costs, only OPC questions inclusion of the decommissioning costs the estimate for which is reflected in the above-referenced Black & Veach report. But OPC's concerns would have applied equally to the estimated costs (also supported by a Black & Veatch study conducted for Empire) approved by the Commission for Empire's Asbury Plant.[251] And as noted with respect to safe closure costs, any variance between the estimated costs will be reconciled to actual costs in a future rate case, ensuring that customers will neither under-

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[247] Supra, Ex. 18, p. 8, l. 11 to p. 10, l. 9.
[248] Tr. (Vol. 6) p. 285, l. 1 to p. 286, l. 5.
[249] Tr. (Vol. 6) p. 278, ll. 1-2.
[250] Supra, Ex.18, p. 9, l. 19 to p. 10, l. 3.
[251] See pages 56 – 58 of the Empire Order's discussion of similar decommissioning costs, including the Commission's decision to include them in Energy Transition Costs.

nor over-pay. And, as was true of safe closure costs, given that financing and recovery costs is less costly for customers using securitization, it is in customers' interest to finance them via securitization rather than using traditional financing and recovery, even if there is some uncertainty regarding what the actual costs will be.[252]

v. Energy Transition Costs Should Include the $18.3 Million[253] of Estimated Materials and Supplies Costs Recommended by the Company and the Staff. *(Issue 12).*

The Company conducted an engineering analysis and review of Rush Island's total materials and supplies inventory – which totaled $21.9 million – and determined that while $3.6 million of the inventory could be used elsewhere, $18.3 million of inventory was expected to be unusable.[254] The $3.6 million of useable items (approximately 650 items) were transferred to other plants.[255] The $18.3 million consists of approximately 14,000 items – the Company has specifically reviewed items that total 80 to 85% of the dollar value of those 14,000 items and has determined, as to the items that comprise that 80 to 85%, that the items are not useable elsewhere.[256] The Company will continue to look at the remaining items (with a value of about one to two million dollars) to see if they could be used.[257] To the extent uses can be found for some of those remaining items, the $18.3 million would be lower.

OPC is again the only party questioning the inclusion of this estimated amount in Energy Transition Costs. As earlier discussed, any variance between the estimated costs will be reconciled to actual costs in a future rate case, ensuring that customers will neither under- nor over-pay. It consequently makes more sense to include the estimated sum because financing and recovering

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[252] Supra, Ex. 2, p. 8, ll. 4 – 16; Ex. 111, Sch. KM-s1.
[253] Supra, Ex. 2, Sch. MJL-S5.
[254] Supra, Ex. 17, p. 10, l. 12 to p. 11, l. 2.
[255] Tr. (Vol. 6) p. 281, l. 9 to p. 282, l. 11.
[256] Tr. (Vol. 6) p. 282, ll. 12 – 17.
[257] Tr. (Vol. 5) p. 282, ll. 18 -23.

whatever the final sum turns out to be, will be less costly for customers than including an under-estimated amount in Energy Transition Costs now only to have to recover additional sums via a future rate review. [258]

vi. The Cost of Abandoned Capital Projects Should be Included in Energy Transition Costs. *(Issue 4 and its subparts).*

a. *Abandoned Capital Project Costs (Recorded to Construction Work in Progress, or "CWIP") Are Properly Includable in Energy Transition Costs (Issue 4.a).*

Both the Company and the Staff agree on the general principle that the cost of abandoned capital projects fall within the definition of Energy Transition Costs and that such costs should be included in the sums to be securitized in this case. This is evidenced by the Company's inclusion of $12.97 million of such costs in its securitization request and Staff's inclusion of $3.94 million of such costs in its recommended sums to be securitized.[259] As discussed in Subsection VI.b below, Staff, for other reasons, opposes the inclusion of the costs of one of the abandoned projects involving scrubber studies conducted for Rush Island. And while Staff witness Majors' direct testimony makes note of a legal argument relating to whether such costs can be included in Energy Transition Costs, the Commission has already ruled upon (and rejected) that argument when it included abandoned project costs in the Energy Transition Costs it approved for Empire involving Empire's retired Asbury Plant.[260]

Only OPC opposes inclusion of all abandoned capital project costs in the sums to be securitized, not based upon a claim that such costs were not prudently incurred, nor based upon a

[258] Supra, Ex. 2, p. 8, ll. 4 – 16; Supra, Ex. 111, Sch. KM-s1. (listing $18,304,442 for materials and supplies inventory included within Staff's recommended costs to be financed with securitized utility tariff bonds)
[259] Supra, Ex 2, Sch. MJL-S5; Supra, Ex. 111, Sch. KM-s1.
[260] Supra, Empire Order, pp. 66- 67 (Rejecting OPC's argument in the Asbury docket where OPC claimed that Section 393.135, RSMo. Precluded the inclusion of the cost of abandoned capital projects related to possible environmental compliance needs in Energy Transition Costs).

claim that such projects are too old or otherwise would not have been useful. Rather, OPC simply contends that such costs “should be addressed” in a rate case, in part because of how costs of an abandoned project at Rush Island nearly 50 years ago were addressed in a rate case.[261] But OPC’s position overlooks at least two key facts. First, of course abandoned project costs were addressed in a rate case nearly 50 years ago because there was no other way to address them; the securitization statute did not exist until 2021, and even if it did, it would not have applied unless the plant were retired or to be retired. Second, as noted, this Commission has already rejected OPC’s first attempt to deny inclusion of these kinds of costs in Energy Transition Costs in a securitization case. While OPC’s theory this time is different, OPC has presented no distinguishing facts that suggest that similar abandoned capital project costs for Empire should have been included in the sums to be securitized in the Empire case, while for Ameren Missouri they should not be here.

b. The Costs for the Abandoned Rush Island Scrubber Studies Should be Included in Energy Transition Costs. (Issue 4.b).

The scrubber studies at issue were prudently incurred in good faith and constitute Energy Transition Costs just as the Commission concluded with respect to the Empire abandoned capital projects. Ameren Missouri's abandoned capital projects are the same type of Energy Transition Costs, as explained by Mark Birk.[262] Indeed, the Empire abandoned capital projects were for work toward environmental additions to the Asbury Plant that ultimately were not installed since Asbury was retired instead, just as the scrubber studies in this case were for environmental capital projects that also will not be installed since Rush Island is retiring. And as earlier discussed, there is no legal impediment to including such costs.

[261] EF-2022-0021, Ex. 205, Payne Rebuttal Testimony, p. 7, ll. 7 – 17.
[262] EF-2022-0021, Ex. 7, Mark Birk Surrebuttal, p. 50, l. 8 to p. 51, l. 3.

The scrubber studies at issue, which total approximately $9 million, were undertaken as part of Ameren Missouri's ongoing environmental compliance planning at a time when it appeared proposed EPA regulations would require scrubbing all of the Company's coal plants, including Rush Island. Fortunately, the final rules were less stringent than expected and the Company was able to avoid investing hundreds of millions of dollars in scrubbers and to comply by other means.[263]

While Staff witness Majors "questions the usefulness" of the studies, he completely ignores the fact that the studies would have formed the starting point had the Company needed to install scrubbers – something that continued to be a possibility due to the ever-evolving federal environmental regulation landscape - because they are plant and site specific studies for Rush Island itself and the plant has not changed in any significant way that would render the studies obsolete.[264] While their usefulness is *not in any event* the test of whether they qualify as Energy Transition Costs and should therefore be securitized, the only evidence from an engineer with direct experience in adding scrubbers at a large coal plant – from Mr. Birk – supports the usefulness of the studies had scrubbers been needed.

In this regard, Mr. Birk testified that the studies were site specific and reflected "detailed plans of where the scrubbers would be located all the way down to the specific equipment we would use."[265] Mr. Birk indicated that the studies would have saved time should the need to install scrubbers at Rush Island arisen,[266] and that they were also used to inform scrubber cost estimates that contributed to the analyses that underlie the Company's decision to retire Rush Island instead

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[263] Id., p. 49, l. 11 to p. 50, l. 2; p. 51, l. 15 to p. 52, l. 6.
[264] Id., p. 52, l. 19 to p. 53, l. 11.
[265] Tr. (Vol. 4) p. 246, l. 7-12.
[266] Tr. (Vol. 4) p. 247, l. 18- 22; p. 252, ll. 1-21

of retrofitting it with scrubbers.[267] And while Mr. Majors posits that the studies may not have been useful (contradicted by Mr. Birk, who has been in charge of building scrubbers and is an engineer with decades of power plant experience), even Mr. Majors is "not going to say that there's no value there [*i.e.,* from the studies]."[268] Mr. Majors also concedes that the studies were useful in helping Ameren Missouri establish that retrofitting Rush Island with scrubbers instead of retiring it was not a cost-effective option.[269]

The bottom line is that the Company made a prudent decision in its customers' best interest not to scrub the plant, based in part on information from the studies at issue, after having prudently and in good faith caused the studies to be prepared in the first place so that it could comply with environmental requirements it reasonably anticipated at the time would require scrubbers. Fortunately for customers, scrubbers (and the hundreds of millions of dollars or more of costs for them) did not end up being necessary, and the studies were ultimately abandoned. The Company should not in effect be punished financially now by being denied recovery of the scrubber study costs that were prudently incurred as part of its obligation to serve customers.

vii. Community transition costs are a legitimate cost that should be included as Energy Transition Costs. *(Issue 13)*

The early retirement of Rush Island leaves the Jefferson County School District and the local community without the tax base previously provided by the Company's coal inventory at the energy center. In order to ease the transition, it is in the public interest for the Commission to take modest steps to mitigate the undisputed and direct negative impacts of the energy transition event that is occurring with the closure of Rush Island, which is disproportionately impacting the

[267] Tr. (Vol. 4) p. 278, l. 25 to p. 279, l. 22.
[268] Tr. (Vol. 4) p. 295, ll. 17 – 18.
[269] Tr. (Vol. 4) p. 297, l. 23 – p. 298, l. 7 (It is "not an unfair statement" to conclude that the studies were useful for that purpose; Mr. Majors does not dispute that they were in fact used for that purpose).

Company's customers and communities in the Jefferson County area. The Commission should include $3,677,365 in the securitized revenue requirement.[270] This amount is only a partial offset to the lost tax base but will be used to help maintain bridge funding for schools and identify and implement initiatives to support the surrounding community with economic development opportunities.[271]

Ameren Missouri recognizes that this cost looks a bit different than other retirement costs at issue in this case. But the Company doesn't believe that the Community Transition Costs are that different. No one disputes that property taxes have always been paid on the Rush Island coal pile. No one disputes that those taxes have always been included in Ameren Missouri's revenue requirement. No one disputes that those property taxes provided a significant amount of the local school and community's funding.[272] If the inclusion of a cost is appropriate when setting rates, how is an offset to that loss of that tax revenue – which is clearly caused by the retirement -- somehow inappropriate? They are two sides to the same coin.

Now that asset (the coal pile, which is taxed locally) is going away and the community is losing a major source of tax revenue. The Company believe it appropriate to ease the transition to zero property tax for the surrounding community, including the school district. Not including these costs would be to not recognize the important role that utilities generation assets play in the communities surrounding them.[273] There is clearly a public interest to be considered here.

The statute provides the Commission with the discretion to include this cost, it defines Energy Transition Costs as "pretax costs with respect to a…to be retired…electric generating facility that is the subject of a petition for a financing order filed under this section…include, *but*

[270] Supra, Ex. 1, p. 7, l 20.
[271] Id.,p. 8, l. 1-6.
[272] Supra, Ex. 20, p. 4, ll. 11-20.
[273] Supra, Ex. 20, p. 4, l. 11-20.

are not limited to…"[274] The "not limited to" phrase allows the inclusion of these costs. It means that the list in the statute is not exhaustive and that other items not specifically mentioned may be included. These transition costs are really just tax substitute costs, which are similar in purpose and consistent with the intent of the securitization statute. Taxes are a legitimate and recoverable costs in an electric utility's revenue requirement. This request for inclusion of a substitute for that tax, to allow the community to transition away from having this source of revenue, is a legitimate request and should be allowed on public interest grounds.

viii. The Company and Staff-Recommended Net Plant Balance Should be Securitized. *(Issue 6)*

Both Staff and the Company have provided reasoned estimates of the net plant balance for Rush Island, $473,297,424[275] if Rush Island is retired on September 1, 2024, or $468,926,131[276] if the plant is retired on October 15, 2024.[277]

The only party challenging the net plant level is OPC witness Mr. John Robinett. Mr. Robinett speculates that the Company should not have invested any amount at Rush Island after it decided to retire the plant[278] and recommends the Commission remove $27 million of investment over a nearly three-year period (January 1, 2022, through retirement) from the net plant amount proposed by Ameren Missouri.[279]

What Mr. Robinett does not provide is any rationale for how a utility could operate an 1,178-megawatt power plant for nearly three years, including through nearly an entire summer before it operated as a System Support Resource, without any investment or repairs. In response

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[274] Section 393.1700.1(7)(a). Emphasis added.
[275] Supra, Ex. 2, Schedule MJL-S1.
[276] Id., Schedule MJL-S5.
[277] While Mr. Majors only provided a balance as of October 15, 2024, his approach to determining the net plant balance is the same as the Company's approach.
[278] Tr. (Vol. 6) p. 79, l. 15-23.
[279] Tr. (Vol. 6) p. 79, l. 24 through p. 80, l. 3.

to questioning by Commissioner Holsman, Mr. Robinett did not deny that his recommendation IS rooted in nothing more than his personal opinion:

Q. So it was just a unilateral, almost personal decision to pick that time and place to stop accruing or stop considering the data that obviously Staff and the Company continued to get to the 468.9?

A. They took in additions after and brought forward, yeah. It's all about the starting point and where I didn't keep additions moving forward.

Q. Okay. So was Staff wrong in continuing to make those additions in your estimation? Are you correct in stopping when you stopped and Staff is wrong in continuing?

A. Staff looks at things differently than me. I mean, I don't know that there's a right answer there.[280]

There is a right answer. The right answer is that Ameren Missouri is allowed to recover prudent investments as part of its Energy Transition Costs. The Commission cannot find an investment imprudent without a basis for that finding. As the Commission has recognized previously, a utility's expenditures are presumed to be prudent.[281] The burden was on OPC to create a serious doubt about that prudence in order to rebut the presumption.[282] Absent competent and substantial evidence of record to create such a serious doubt – and such a record is woefully lacking here - the Company's investment must be included as a matter of law. In this case, Mr. Robinett did not even try to obtain any evidence to meet this burden. He only offered his personal opinion. At the hearing, Mr. Robinett admitted that he did not know what annual amounts of capital investment had historically been made at Rush Island plant and did not know whether $27 million was higher or lower or similar to the historical investment level.

Q. …Do you know how much rate base investment was made at Rush Island in 2018?

A. As we sit here, no.

Q. Do you know how much rate base investment was made at Rush Island in 2019?

A. No.

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[280] Tr. (Vol. 6) p. 88, ll. 4-17.

[281] ***State ex rel. Associated Natural Gas v. Pub. Serv. Comm'*n,** 984 S.W.2d 520, 538-29 (Mo. App. W.D. 1997).

[282] Id.

Q. Same question for 2020?

A. No.

Q. Same question for 2021?

A. No.

Q. Same question for 2022?

A. No.

Q. I guess I have to ask the last one. Same question for 2023?

A. I mean, between 2022 and 2023, it's roughly the 27.

Q. But you don't have any idea of whether or not that is more or less than the level of investment in the previous years?

A. No, I don't.

Q. You didn't ask any questions about that?

A. No, I did not.

Q. You did not issue any data requests requesting that information from Ameren Missouri?

A. I don't believe I did, no. [283]

Mr. Robinett also did not know what projects the $27 million were spent on and he didn't know because he didn't ask. Without looking at the projects underlying the $27 million, there is no way to create a serious doubt about whether the expenditures were imprudent.

Q. What is your reason for not including that $27 million?

A. So I basically expected minimal investment going forward after a decision is to retire. You're not going to spend a whole lot of money to keep something running.

Q. Define minimal investment for me.

A. I don't know that I can. It's up to the utility's decision what minimal investment is.

Q. And you don't know what a normal level of investment at Rush Island is, correct?

A. I don't know the annual. Yeah, I don't have an average of the annual spends recently, no.

Q. Because you didn't ask?

A. Correct.

Q. And that's your only reason, is that the amount should be minimal? That's your only reason for justifying not including the $27 million in the securitization?

A. Right. Minimal investment to keep it running until the end.[284]

[283] Tr. (Vol. 6) p. 80, l.9 to p. 81, l. 8.

[284] Tr. (Vol. 6), p. 83, l. 14 to p. 84, l. 9.

At hearing, Mr. Robinett admitted that the investment could have been necessary to keep the plant operational. But he doesn't know if that occurred or not, because he never inquired.

Q. Is it possible that some of the investment that was made at Rush Island was necessary to keep the plant operational?
A. Absolutely.
Q. But you don't know because you didn't ask that question?
A. Correct.[285]

Q. Are you aware that utilities are required to file reports of unit outages as they occur if they are going to last three or more days?
A. Yes.
Q. Did you look to see if Ameren Missouri had filed any such reports since it made the decision to close the plant in December of '21?
A. No.
Q. If indeed some reports had been made, would you anticipate that investment would have to be made to get the plant operational again?
A. Depending on what the outage was, yeah. That could – a possibility.[286]

In summary, OPC has proposed a disallowance for $27 million solely because Mr. Robinett speculates there should not have been investment at the plant. But he failed to investigate his theory and he failed to provide any support for his assertion. Under Missouri law, that is insufficient to overcome the presumption of prudence that is given to utilities. There is no legitimate basis for this recommendation and the Commission should reject it.

ix. Energy Transition Costs Should Include All the Net Plant (Including for Software and Furniture) Recommended by the Company and the Staff. *(Issue 18).*

A small part of the net plant included by the Company and Staff in their recommended Energy Transition Costs consists of software assets and furniture that will not be used once Rush Island retires, as is the case with the rest of the net plant costs the Company and Staff recommended for inclusion in Energy Transition Costs in this case. OPC witness Schaben argues certain software and furniture costs have not reached the end of the previously estimated useful lives of the assets

[285] Tr. (Vol. 6), p. 84, ll. 18-24.
[286] Tr. (Vol. 6) p. 84, l. 25 to p. 85, l. 12.

and, therefore, these costs should be excluded from Energy Transition Costs. OPC's position is not supported by the statute. On the contrary, the statute expressly exists to provide a pathway for the recovery of costs associated with the early retirement (before the end of an asset's previously estimated useful life) of a plant such as Rush Island.

These costs qualify as Energy Transition Costs and should be included in the amount securitized.[287]

x. Upfront Financing Costs *(Issue 14)*

Under the statute, upfront financing costs include the costs of the Commission proceedings necessary to obtain a financing order.[288] Staff witness Majors' rebuttal testimony recommended removing the costs of Ameren Missouri witnesses Jeff Holmstead and Karl Moor. He argued their testimony was duplicative from that which was provided in the Company's most recent rate case and that customers should not have to pay that cost twice.[289] Mr. Wills' surrebuttal testimony pointed out that Staff testified in the Company's last rate case that the prudence of the Rush Island NSR lawsuit would be taken up in the securitization case (thus necessitating that the Company address those issues in its direct case), as indicated by Staff witness Claire Eubanks' rebuttal testimony in the rate case:

> Ameren Missouri intends to seek securitization in a future case. It is Staff's position that that case would be the most appropriate case for the Commission to consider the prudency of Ameren Missouri's decision-making and ultimate recovery of the stranded asset.[290]

[287] Supra, Ex. 2, p. 22, ll. 10-17. When asked to point the Commission to statutory authority to exclude these items from Energy Transition Costs, OPC witness Schaben was unable to do so. Tr. (Vol. 8) p. 155, ll. 11-17.
[288] Section 393.1700.1.(8)(d).
[289] Supra, Ex. 110, p. 22, ll. 19-22.
[290] Supra, Ex. 20, p. 14, ll. 8-11, quoting File No. ER-2022-0337, Eubanks Rebuttal, p. 19, l. 23 through p. 20, l. 2.

While on the stand, Mr. Majors moved away from Staff's original position:

Q. …was it appropriate for Ameren Missouri to, for example, use Moor/Holmstead in direct.
A. Yes.
Q. And you are saying that was appropriate?
A. I'm saying that it's not unreasonable. I am not going to dictate to the company how they should litigate their case.
Q. So you're not challenging that cost?
A. I'm not challenging whether or not it's prudent and reasonable to incur that cost.
Q. …And the same would be true for Mr. Long?
A. Right. I mean, they're all costs to litigate the company's position to put on…their case.

Mr. Majors then went on to develop an entirely new position in cross-examination, after all of Ameren Missouri's witnesses had testified, which meant the Company's witnesses had no opportunity at all to even weigh in on that position. Staff's recommendation now became sharing the cost between customers and shareholders. On the stand, Mr. Majors testified that it would be a "fair outcome" to split these costs 50/50, meaning only 50% of these costs would be included in the amount securitized.[291]

That may be Staff's now standard recommendation in rate cases. But this is not a rate case and there is a statute which specifically governs what costs are to be included in the securitized amount. Staff agrees there is no statute governing rate case expense treatment in a rate case but there is a statute allowing inclusion of utility expenses for Commission cases requesting securitization.[292] Staff agrees that the statutory language allows for the inclusion of legal and expert witness fees in the amounts securitized.[293] Finally, Mr. Majors admits that the securitization statute does not authorize any sharing of these expenses:

[291] Tr. (Vol 8) p. 51, l. 19 to p. 52, l. 4.
[292] Tr. (Vol 8) p. 56, ll. 7-15.
[293] Tr. (Vol 8) p. 57, l. 9 to p. 58, l. 14.

Q. Does the statute contemplate any kind of sharing?
A. No, not that I'm aware of.
Q. It just says [that it] includes all of these costs?
A. Yes.
Q. Which is different from the statutory scheme of rate cases…?
A. Sure. Absolutely.[294]

The securitization statute specifically allows Ameren Missouri to include the costs of its outside experts and attorneys, costs Mr. Majors said were appropriate, as costs of obtaining the financing order.[295] These costs are Upfront Financing Costs, by definition, and the full cost should be included in the securitized amount.

G. Carrying Costs *(Issue 21)*

The appropriate carrying cost rate to be used in this case is the Company's WACC, which is also the Company's actual carrying cost rate relating to long-term investments such as those at Rush Island.[296]

Carrying costs are important during the time between when the Rush Island assets are taken out of the Company's revenue requirement and when the securitized bond proceeds are received.[297] That time period will have no revenue that relates to the costs of Rush Island flowing to Ameren Missouri but the Company will still be financing its unrecovered investment through a mix of debt and equity, while incurring the associated financing costs at its WACC. The Company has brought this case in a timely manner (close to the actual retirement date) in order to minimize the need for carrying costs, but that does not mean carrying costs should not be granted or that they should be set at a cost lower than the Company's actual costs. Full recovery

[294] Tr. (Vol 8) p. 58, ll. 15-22.
[295] Section 393.1700.1(8)(c).
[296] Supra, Ex. 2, p. 15, ll.19-22.
[297] Id., p. 16, ll. 3-7.

of prudently incurred costs is just and reasonable, and full recovery of minimized carrying costs is similarly just and reasonable.[298]

Further, if another party were to appeal a decision that allows for the issuance of securitized utility tariff bonds, the Company will continue to finance the entire sum at its WACC (not just at debt costs) during the appeal, something that could take many months if not years. Providing carrying costs at its actual cost of financing is critical to ensure that carrying costs are aligned with actual financing costs that will be incurred. These costs are prudent, and the Company should be allowed to collect them.[299]

H. Allocation of Revenue Requirement; Tariff Issues. *(Issues 16, 17, & 20).*

i. Either of the Cost Allocation Proposals in this Docket Could be Adopted. *(Issue 16).*

The Company's position is that both the cost allocation method it proposed, and the method proposed by Missouri Industrial Energy Consumers ("MIEC") witness Brubaker are within the Commission's authority to adopt. The Company recommended its approach premised on driving consistency with the prior Commission securitization decisions. The Company would not have significant concerns, however, if the Commission was persuaded by MIEC's arguments and chose to allocate the costs on the basis of base rate revenues.[300]

ii. The Company Has Only Limited Concerns with Tariff Questions Raised in this Docket. *(Issue 17)*.

The Staff recommended three tariff changes so that the Company's proposed tariff would conform to the Evergy securitization tariff on these points:

- Future-proof" the tariff by tying the voltage adjustment factors to the similar factors used in the Company's Fuel Adjustment Clause, ensuring that such factors will be updated in future rate reviews,

[298] Id., p. 15, ll. 7-18.
[299] Id., p. 17, ll. 1-10.
[300] Supra, Ex. 20, p. 20, ll. 3 -9.

- Language about the non-bypassability of securitization charges clarifying that securitization charges are not subject to discount, and[301]

- Language about non-bypassability of securitization charges clarifying what happens if future changes are made to the utility's service territory.[302]

The Company agrees with the "future proof" change assuming that the Commission adopts the Company's revenue allocation methodology; otherwise, such future proofing would be unnecessary.[303]

The Company has no objection to the non-bypassability language change.[304]

With respect to the third change, the Company, based upon further review of the securitization statute, agrees with the resolution of this issue as reflected in paragraph 48 at page 22 of Staff's proposed financing order, filed by Staff on April 11, 2024.[305] With respect to Staff's proposed tariff language, however, the focus on "territorial agreements" is too narrow and should not be included in the language in the tariff. There are a variety of ways that customers could exit the Company's system, and the one highlighted in Staff's tariff language – that being the Company's voluntary agreement with a neighboring municipal or co-operative utility to release those customers - is probably the least likely of those possibilities through which meaningful numbers of customers that are needed to provide recovery of the securitization bonds could leave the system.[306]

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[301] The first two bulleted items fall within that part of Issue 17 that reads "Should the tariff changes recommended by Staff be adopted?"
[302] This is Issue 17.d.
[303] Supra., Ex. 20, p. 22, ll. 3- 7. And in that case, paragraph 51 at page 24 of Staff's proposed financing order filed by Staff on April 11, 2024, should not be included in the final financing order.
[304] Id., p. 22, ll. 8 – 9.
[305] This also resolves Issue 20 from the Issues List.
[306] The Staff's proposed financing order language properly addresses this issue and the territorial agreement language in Staff witness Sara Lange's proposed tariff should not be adopted.

OPC also raised a couple of tariff issues. OPC recommended a specific naming convention for the securitization charge and recommended rounding to the nearest fifth decimal point.

With respect to naming issue, OPC first presented this recommendation in surrebuttal testimony, and the Company had no opportunity to develop and present pre-filed evidence on this question. While the Company recognizes that the charge must and will be broken out on a separate line item on the bill that clearly identifies the nature of the charge, the Company does not recommend that the Commission order specific wording for that line item at this time. This treatment would be consistent with past practices.

With respect to rounding to the nearest fifth decimal point, the Company does not object to OPC's recommendation.

I. DOE Loan (Issue 15)

Ameren Missouri believes this is no longer a live issue in the case, given that Renew Missouri's attorney indicated that it accepts Ameren Missouri's explanation that these funds are limited and are better used to fund renewable energy projects along with using securitization for the Energy Transition and Financing Costs for the early retirement of Rush Island. The Department of Energy will not incrementally fund both the securitized costs and the costs of eligible renewable energy projects, so it is better for customers if we fund the securitized costs through the securitized process and use of Energy Infrastructure Reinvestment ("EIR") funds for Ameren Missouri's renewable projects.[307] This makes the most of all available sources of lower cost debt.[308]

[307] Tr. (Vol. 3) p. 84, ll. 7-20.
[308] Tr. (Vol. 3) p. 84, ll. 20-23.

If any other party's initial brief raises a concern about the EIR funds and whether they are more appropriate to be used to fund the Rush Island costs, Ameren Missouri will address those concerns in its reply brief.

CONCLUSION

The Company has established that all of the Rush Island costs which it seeks to securitize in this case qualify as Energy Transition Costs or Upfront Financing Costs. With one exception,[309] Staff agrees.[310] To the extent OPC takes different positions, for the reasons discussed in this brief, OPC's positions are poorly supported and should be rejected.

The evidence also overwhelmingly establishes that retirement of Rush Island instead of retrofitting it was reasonable and prudent. And while for reasons discussed above the Commission may be in a position to avoid resolution of the prudence issues addressed in this docket related to NSR permitting, the evidence strongly supports both the conclusion that the Company did act prudently respecting its NSR permitting decisions and, even if hypothetically one concluded otherwise, there is no harm arising from such hypothetical imprudence. The evidence also completely fails to support Staff's "hold harmless" proposal which, in addition to being poorly supported, is inappropriate, as discussed above.

Given the foregoing, the following table provides the correct sums to be securitized. The Company requests that the Commission issue its financing order, reflecting the terms of Exhibit A hereto, and including a grant of authority to the Company to securitize either of the figures set forth below, depending upon the plant's actual retirement date:

[309] Community Transition Costs.
[310] There are two other issues between the Company and the Staff, involving the Rush Island scrubber studies and a portion of the ARO costs, both of which should be resolved in the Company's favor for the reasons discussed herein.

	September 1, 2024 Retirement	**October 15, 2024 Retirement**
Energy Transition Costs	**$512,209,577**	**$508,294,126**
Upfront Financing Costs[311]	**$6,604,272**	**$6,587,660**
Total Cost to be Financed with Securitized Utility Tariff Bonds	**$518,813,849**	**$514,881,786**

[311] Amounts do not include the costs of Commission advisors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing have been e-mailed to the attorneys of record for all parties to this case as specified on the certified service list for this case in EFIS, on this 10th day of May, 2024.

/s/ James B. Lowery

James B. Lowery