BEFORE THE PUBLIC SERVICE COMMISISON
OF THE STATE OF MISSOURI

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

REPLY 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 reply brief states as follows:

ARGUMENTS IN RESPONSE TO STAFF AND OPC INITIAL BRIEFS[1]

I. Office of the Public Council ("OPC") is Dead-Wrong: The Record Unequivocally Supports a Commission Determination that the Retirement of Rush Island is Reasonable and Prudent.

OPC's Initial Brief reflects what is obviously a strategic evolution of OPC's position on whether the Commission should allow securitization of undepreciated Rush Island investment. In OPC's rebuttal testimony, no OPC witness (aside from perhaps Mr. Murray, based on his "one can never show quantifiable NPV benefits from securitization" argument) opposed securitization outright. The only questions raised were the amounts to be securitized, with various OPC witnesses arguing that some amounts should be excluded, such as ignoring plant additions post 2021 (Mr. Robinett), ignoring or reducing decommissioning costs (Mr. Robinett and Ms.

[1] Ameren Missouri is not responding to other initial briefs filed by the parties because it takes no issue with the briefs filed by the Midwest Energy Consumers Group or the Missouri Industrial Energy Consumers and, with respect to the AARP and Consumers Council of Missouri Briefs, addressing OPC's arguments, which are supported by those two entities, effectively addresses their arguments.

Schaben), and similar miscellaneous items.[2] But under these witnesses' positions, hundreds of millions of dollars would still be securitized.

But as signaled in its Position Statement, OPC is taking a new tact, that is, OPC is arguing that it's just not clear whether Ameren Missouri acted prudently every step of the way for the past nearly 20 years and, as such, OPC claims, there is a failure of proof that the retirement is reasonable and prudent, precluding securitization of any sums at all.[3] This strawman theory is easily toppled because it entirely misses the point, and it fails to recognize the controlling law.

No party – not even OPC – claims that the *investments made in the plant over the past roughly 40 years* were imprudent investments. And it is *those investments* that produced the roughly $500 million of plant that has not yet been recovered through depreciation expense and that thus makes up almost all the Energy Transition Costs at issue in this case. Neither of the Staff's two proposed exclusions (Rush Island scrubber studies or Asset Retirement Obligation ("ARO")[4] costs) are based on an imprudence argument. None of OPC's proposed exclusions from Energy Transition Costs are based upon claimed imprudence. Consequently, setting aside Mr. Seaver's discredited $34 million imprudence disallowance proposal, to be addressed further below, the only question is whether the decision to retire the plant now was a prudent one. The claim that the record in this case does not allow a decision on that issue[5] is patently false.

As discussed in the Company's Initial Brief, both Mr. Michels' direct and surrebuttal testimonies are chock full of substantial and competent evidence supporting the prudence of the retirement decision. And Staff agrees – and has provided testimony of record expressing that

[2] OPC's rebuttal did propose a "disallowance" but as discussed below, it has nothing to do with the roughly $500 million of investment for which securitization is sought.
[3] As discussed below, OPC's own witness Mr. Seaver, contradicted this theory in his sworn testimony at the hearing.
[4] Capitalized terms or phrases not defined herein have the meaning given them in the Company's Initial Brief.
[5] See, e.g., OPC Initial Brief, p. 4 (first full sentence).

agreement – that the decision to retire the plant instead of retrofitting it with scrubbers was the right prudent decision for the Company to make.[6] That the decision was a prudent one is reinforced by all of the analyses of record in this case, which show that customers were far better off – by hundreds of millions or more than a billion dollars on a net present value of revenue requirement ("NPVRR") basis – due to the decision to retire the plant. That OPC may have attempted to offer contrary evidence about *other* decisions OPC says the Company could have made does not erase the record evidence that directly supports the prudence of the retirement decision. The record is more than sufficient for the Commission to find that the retirement of Rush Island is reasonable and prudent. OPC just doesn't want the Commission to do so.

Moreover, OPC improperly conflates harm that theoretically could exist arising from *other* allegedly imprudent decisions made prior to the retirement (whether relating to New Source Review ("NSR") permitting issues or otherwise), with the decisions that led to the investments in the plant that make up the roughly $500 million. Even if, hypothetically, an imprudent decision was made on, *e.g.*, the NSR permitting issue, any such imprudence did not lead to or cause the Company to build and invest in the plant over its life, *i.e.*, such hypothetical imprudence in making those decisions has nothing to do with the decisions that led to investing the $500 million. And there was and is no requirement that Ameren Missouri prove that the decisions that led to investing the $500 million were prudent decisions. This is because as a matter of law, the Company's roughly $500 million of unrecovered investment in Rush Island is presumed to be prudently incurred.[7] And given that presumption, Ameren Missouri had no burden to go forward with any evidence on that point absent some other party creating a serious doubt about the prudence of

[6] Mr. Majors, Tr. (Vol. 4) p. 96, ll. 6-15; Ms. Eubanks, Tr. (Vol. 4) p. 212, ll. 16-19.
[7] *See, e.g.*, ***State ex rel. Associated Natural Gas Co v. Pub. Serv. Comm'n***, 954 S.W2d 520, 528-529 (Mo. App. W.D. 1997)

making those investments, that is, the presumption provides all the proof needed.[8] No party, not even OPC, has put on any evidence that creates any doubt, let alone a serious doubt, about the prudence of the decisions to make the investments that have now lead to the approximately $500 million of undepreciated investment.

This makes OPC's claims to the effect that "the record in this case does not provide a sufficient basis for the Commission to opine that Ameren Missouri was 'reasonable' and 'prudent' in its decisions related to abandoning Rush Island…" false.[9] While in theory imprudent decisions relating to whether to obtain NSR permits, or imprudent decisions regarding whether to add scrubbers from 2010 to 2021, could have created harm (like Mr. Seaver's $34 million claim) that could allow a ratemaking disallowance in a rate case, absent any such imprudent decisions leading to imprudence in the investments that were made (that make up the roughly $500 million), there is no basis for the Commission to find the *retirement* decision to be imprudent or to otherwise disallow prudently incurred investments having nothing to do with such other hypothetically imprudent decisions.

OPC's theory also ignores another controlling legal principle, that is, the principle that no utility can suffer a cost disallowance, even if it is found to have acted imprudently, unless that imprudence caused harm to ratepayers. ***State ex rel. KCP&L Greater Missouri Operations Co v. Pub. Serv. Comm'n***, 408 S.W.3d 153, 163 (Mo. App. W.D. 2013) ("In order to disallow a utility's recovery of costs" the Commission must find imprudence and that "such imprudence resulted in harm to the utility's ratepayers."). While the Company vehemently disagrees with the Staff's claimed and speculative future harms arising from prior decisions other than the retirement decision itself – harms even Staff is not claiming have in fact occurred to-date – if hypothetically

[8] *Id.*
[9] OPC Initial Brief, p. 4.

such harms did arise from other decisions, the Commission would have the power to address them in a *rate case*. But such harms, again, have nothing to do with the unrecovered investment at issue here, which did not arise from any such other decisions.

So, what about Mr. Seaver's $34 million imprudence disallowance? First of all, it has been thoroughly discredited – see the Company's Initial Brief, pages 8 - 9. Even OPC seems to have abandoned it and Mr. Seaver's Wisconsin Electric Power Company ("WEPCo)-based argument on which it was based, as evidenced by the complete lack of mention of either the $34 million or WEPCo in OPC's Initial Brief. However, OPC's theory in proposing it appeared to be that if other imprudent decisions could be shown, and if harm could be shown, then that harm could offset the roughly $500 million. This theory is confirmed by Mr. Seaver himself, where he describes the $34 million as a "way to reduce the amount of securitization" but he also goes on to contradict OPC's new theory – that there is a failure of proof to securitize at all – saying "the Office of Public Counsel is not recommending – in my testimony, I'm not recommending that you don't securitize it."[10]

Regardless, and for reasons discussed above, OPC's theory is incorrect. But even assuming it was correct, and even assuming that Mr. Seaver's $34 million held water, the roughly $500 million would not become zero. To the contrary, it would become $500 million less $34 million. But even that result would have to overcome the proof that *is in the record in this case* that retiring instead of retrofitting the plant is expected to save customers $1.452 billion[11] (in the base case scenario) on an NPVRR basis, meaning that even if Mr. Seaver's $34 million of harm existed (it doesn't) it would provide no basis for any disallowance even if one were proper in this case (it wouldn't be) since $1.452 billion is obviously far more than $34 million. And if one were to

[10] Tr. (Vol. 4) p. 235, ll. 2-6
[11] Ameren Missouri's Initial Brief, pp. 7 – 9.

attribute the $34 million to claimed imprudence relating to NSR permitting decisions, there still would be no harm and no disallowance since the evidence in this case is that customer rates would have been expected to be far higher on an NPVRR basis, higher in an amount ranging from $531 million to as much as $1.122 billion.[12]

II. OPC's Attempt to Bifurcate the Required Reasonable and Prudence Determination Fails.

The Company will endeavor not to repeat its discussion of this topic contained in its Initial Brief (pages 3 to 6). In summary, longstanding Commission and court interpretations and the historical application of the prudence standard, as well as the General Assembly's use of "reasonable and prudent" and "prudent and reasonable" interchangeably in the legislation that produced the securitization statute, demonstrate that there is no two-pronged or two-step inquiry into "reasonableness" and then separately into "prudence." And as noted in the Company's Initial Brief, the General Assembly is deemed to have an understanding that the two terms were used and applied without there being any meaningful distinction between the two when it, in Section 393.1700, required a finding that the retirement be "reasonable and prudent."

OPC, however, seeks to manufacture a distinction in an obvious attempt to shore-up its fledgling "but a prudent utility would have gone and asked Environmental Protection Agency ("EPA")" theory, despite the utility's "reasonable" interpretation of the law. As discussed in the Company's Initial Brief (pages 30 -31), no utility would have done that, especially a Missouri utility operating under the Missouri State Implementation Plan ("SIP"); it would neither have been reasonable nor prudent, even if the two terms were somehow distinct, to have done so. But more fundamentally, for several reasons there are not two separate tests:

- First, citations to *Black's Law Dictionary* to definitions of the two terms separately do not control over the historical use of the two terms

[12] Ex. 15, Matt Michels Surrebuttal Testimony, p. 39, l. 9 to p. 43, l. 14.

interchangeably, both before the securitization statute was adopted and thereafter, as the Commission itself did in the Empire Order;

- Second, even OPC does not engage in a two-step analysis but instead, concludes that Ameren Missouri's decision was "unreasonable and imprudent." And OPC applies no particular test of "prudency" as distinguished from the "reasonableness" of Ameren Missouri's decision-making.

- Third, if Section 393.1700.1(7)'s inclusion of the terms "and prudent" was intended to indicate that the standard for analysis is somehow different than the standard of reasonableness, "reasonableness" becomes a redundancy. Put another way, if that were the case the General Assembly should merely have used the term "prudent" in the statute because in OPC's world, "prudent" is presumably more stringent than reasonable and, if that were true, then even if one acted reasonably, one could not pass OPC's test because they would also have to meet the supposedly more stringent prudence standard.

III. Staff's and OPC's Claims of Imprudence Relating to NSR Permitting, Focused Only on the Annual Emissions Evaluation, Fail.

Before getting into Staff's and OPC's specific points, it is important to keep in mind, as discussed in the Company's Initial Brief, that there are three independent reasons the Company concluded it did not need NSR permits: (1) because under the Missouri SIP projects did not require a permit if they did not increase potential emissions (it is undisputed that the Rush Island Projects did not); (2) because the Company concluded that actual annual emissions would not increase because of the Rush Island Projects; and (3) because the Rush Island Projects were routine maintenance, replacement, and repair exclusion ("RMRR"). In their Initial Briefs, Staff and OPC do not address reason one (potential emissions) and three (RMRR) at all. But Staff and OPC would have to prove that Ameren Missouri acted unreasonably *with respect to all three* in order to show that the permitting decisions were not prudent.[13] There is no dispute that Ameren Missouri reasonably concluded the Rush Island Projects did not require NSR permitting under the Missouri

[13] Ameren Missouri Initial Brief, p. 23.

SIP because they would not increase potential emissions.[14] And there is no dispute that Ameren Missouri reasonably concluded that the Rush Island Projects did not require NSR permitting because they were RMRR.[15] The Commission must therefore conclude that Ameren Missouri's permitting decisions were prudent, no matter what it would conclude about Company decisions concerning actual annual emissions (the second reason).[16]

We now turn to Staff's and OPC's specific arguments.

A. Joint arguments by Staff and OPC.

Staff and OPC have four overlapping arguments, all of which are based on the District Court's liability decision. None of these shows that Ameren Missouri was imprudent in its NSR permitting decisions.

First, Staff and, to a lesser extent, OPC argue that because Ameren Missouri lost the NSR case, its actions must have been imprudent.[17] Ameren Missouri has already explained why this results-oriented approach impermissibly relies on hindsight and therefore has no place in a prudence review.[18] And more broadly, Ameren Missouri has also explained why the NSR litigation has no relevance to the issue of prudence.[19] Ameren Missouri will not repeat those arguments here. Instead, Ameren Missouri notes that if looking at the outcomes of cases were the

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[14] Ameren Missouri Initial Brief, pp. 24-26.
[15] Ameren Missouri Initial Brief. pp. 27-28.
[16] As discussed earlier in this brief and as recognized by Staff (Staff Initial Brief, pp. 9 – 10), utility decisions are presumed to be prudent absent a party producing evidence creating a serious doubt about the decision. Neither Staff nor OPC have presented evidence that raises *any* doubt about the Company's conclusions about potential emissions or RMRR, let alone a serious one. With respect to the second reason offered by Ameren Missouri—and the only one questioned by Staff and OPC, the facts demonstrate that here too Ameren Missouri made prudent and reasonable decisions. Ameren Missouri Initial Brief, pp. 26-27.
[17] Staff Initial Brief, p. 9; OPC Initial Brief, p. 10.
[18] Ameren Missouri Initial Brief, pp. 36-37; Ex. 11, Jeffrey R. Holmstead Surrebuttal Testimony, p. 32, l. 14 to p. 33, l. 18 (quoting Majors deposition testimony); Ex. 13, Karl Moore Surrebuttal Testimony, p. 8, l. 28 to p. 10, l. 24 (quoting Majors deposition testimony).
[19] Ameren Missouri Initial Brief, pp. 32-41.

standard for prudence, more utilities have won NSR cases than have lost them.[20] The post-hoc, results-driven approach advocated by Staff and OPC not only conflicts with the existing prudence standard—it points toward the conclusion that Ameren Missouri acted reasonably.

Second, Staff and OPC make the inflammatory and baseless allegation that Ameren Missouri "knew" the Rush Island Projects would require NSR permits.[21] Neither Staff nor OPC cite any evidence for a knowing violation, because none exists. Ameren Missouri's President Mark Birk testified unequivocally that it was the Company's intent to comply with the law.[22] That testimony is entirely unrebutted. In fact, Staff witnesses do not question the Company's good faith and its intent to comply with the law with respect to the Rush Island Projects.[23]

Nor can Staff or OPC find any support in the District Court's opinions for this serious but unsupported charge of a knowing violation.[24] No opinion issued by the District Court says that Ameren Missouri "knew" that its projects required NSR permits—or even that Ameren Missouri "should have known" that its projects required such permits. As Ameren Missouri has explained in great detail, its permitting decisions were based upon an understanding of the law that was widely shared by regulators and industry, but later rejected by the District Court.[25] And as Ameren Missouri has also explained in great detail, the District Court never found that understanding to be unreasonable.[26] The District Court thus never held, and indeed, could not have held, that Ameren

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[20] Ex. 8, Steven C. Whitworth Direct Testimony, p. 19, ll. 24-25 ("Utilities were generally prevailing in the cases brought in the enforcement initiative"); Ex. 12, Karl R. Moor Direct Testimony, p. 16, ll. 9-10 (same); id., p. 48, l. 1 to p. 51, l. 2 (detailing the utility victories in the NSR enforcement initiative); Tr. Vol. 2, p. 85, ll. 12-13 (CAA expert Jeffrey Holmstead explaining that "in the EPA NSR enforcement cases, the Agency was losing more than it was winning").
[21] Staff Initial Brief, pp. 9, 13; OPC Initial Brief, pp. 4-5 and 7-8. *See also* OPC Initial Brief, p. 14 (suggesting that Ameren Missouri made a "choice not to comply" with the law).
[22] Ex. 6, Mark C. Birk Direct Testimony, p. 2, ll. 18-22.
[23] Supra, Ex. 13, p. 1, l. 14 to p. 2, l. 14 (quoting Eubanks deposition testimony).
[24] A knowing violation of the CAA would be a criminal offense. 42 U.S.C. § 7413(c)(1).
[25] Ameren Missouri Initial Brief, p. 22.
[26] Ameren Missouri Initial Brief, p. 34.

Missouri "knew or should have known" that the Rush Island Projects would trigger NSR. The claims by Staff and OPC that the District Court did so are dead wrong.

Although Staff and OPC cite heavily to the District Court's liability opinion in an attempt to establish what Ameren Missouri "knew or should have known," the passages cited are concerned only with (1) the expectation that availability would increase and (2) the requirements for the actual annual emissions evaluations under the federal NSR rules—not the potential emissions trigger for NSR permitting under the Missouri SIP, or the RMRR exclusion for NSR permitting requirements.[27] The cited portions of the District Court's liability opinion do not, therefore, establish that Ameren Missouri knew or should have known that its projects would trigger NSR under the Missouri SIP.

No finding by the District Court concerning expectations around availability improvement, and what that might mean for actual annual emissions, shows that Ameren Missouri should have known that its projects would trigger NSR permitting under the Missouri SIP, for which the trigger was understood by Ameren Missouri and Missouri Department of Natural Resources ("MDNR") itself to be potential emissions. Whether Ameren Missouri knew or should have known that availability would improve is not the question. Indeed, Ameren Missouri President Mark Birk testified that the purpose of the Rush Island Projects was to improve availability.[28] The point is that under the established criteria employed by Environmental Services Department ("ESD") in assessing the permitting requirements, availability improvement was irrelevant. That is because

[27] For example, when Staff cites the District Court's liability opinion as stating Ameren Missouri "should have expected an emissions increase related to each project, and such an emissions increase occurred," Staff Initial Brief, p. 11 (internal quotation marks omitted), the District Court is talking about actual annual emissions, not potential emissions. Potential emissions were not expected to increase, and did not increase.
[28]Ex. 7, Mark C. Birk Surrebuttal Testimony, p. 13, ll. 23-24.

availability has nothing to do with potential emissions, which was the established trigger for NSR review.[29]

Staff recognizes that under the criteria employed by Ameren Missouri to determine when NSR permitting was required, availability improvement was irrelevant.[30] So too did the District Court.[31] Any discussion about whether it was reasonable to expect availability or capacity to increase because of the project is therefore beside the point when it comes to prudence.

Similarly, nothing that the District Court said about the "well established" or "well-known" manner for calculating *actual annual emissions* increases under the federal NSR rules has any bearing on whether Ameren Missouri "should have known" that its projects would trigger NSR under the *potential emissions* test in the Missouri SIP. And the same is true for the "well-known" Koppe-Sahu methodology for calculating emissions increases, used by EPA in its enforcement cases. Before this case, that methodology had never been applied to the Missouri SIP, because it has nothing to do with measuring changes in potential emissions.[32] Nor had it been successfully used under any similar SIP with a potential emissions trigger for NSR permitting. *See* ***United States v. Cinergy Corp.***, 623 F.3d 455, 460 (7th Cir. 2010) (rejecting use of the Koppe-Sahu methodology under the Indiana SIP, which had a potential emissions trigger for NSR permitting).

Thus, the District Court never stated—and could not have found—that Ameren Missouri "should have known" that the Missouri SIP required NSR permits in the absence of an increase in potential emissions. The construction given the Missouri SIP by the District Court in its *2016* summary judgment decision and applied in the *2017* liability decision was not "well-established,"

[29] Id., p. 35, l. 8 to p. 36, l. 27 (quoting Eubanks deposition testimony).
[30] Supra, Ex. 7, p. 34, ll. 3-6 (quoting Eubanks's Rebuttal Testimony); id., p. 38, ll. 3-15; supra, Ex. 13, p. 47, l. 1 to p. 48, l. 9 (quoting Eubanks deposition testimony).
[31] Ex. 9, Steven C. Whitworth Surrebuttal Testimony, p. 13, ll. 5-8.
[32] Supra, Ex. 11, p. 12, l. 18 to p. 13, l. 6.

it was—in the District Court's own words—a matter "of first impression."[33] Thus, as explained by ESD Manager Steven Whitworth, "at the time ESD performed its pre-project review of the Rush Island Projects, we had no idea that a court would subsequently interpret the Missouri SIP differently" than MDNR, the rest of industry, and Ameren Missouri.[34]

And MDNR certainly did not think the construction given the Missouri SIP by the District Court was "well-established" in 2005-2010, when Ameren Missouri made its permitting decisions.[35] Indeed, long after that MDNR continued to address an increase in potential emissions as the first step in permitting under the Missouri SIP.[36] The passages cited by Staff and OPC from the District Court opinion therefore have nothing to do with the reasonableness of Ameren Missouri's application of the Missouri SIP from 2005 to 2010.[37]

These quoted passages similarly have nothing to do with the reasonableness of Ameren Missouri's RMRR determinations.[38] The District Court applied a narrower standard for RMRR than that which Ameren Missouri had understood, based upon EPA's many public statements over the years. But the District Court never said Ameren Missouri should have known that its projects would not qualify as RMRR. In fact, when given the chance to resolve the RMRR issue on summary judgment, the District Court denied EPA's motion, underscoring that reasonable minds could differ on whether the Rush Island Projects were excluded from NSR as RMRR.[39]

Third, Staff and OPC cite the District Court's finding on the absence of pre-project emissions calculations for Unit 1 and Unit 2 and the content of the post-project Hutcheson

[33] Ex. 10, Jeffrey R. Holmstead Direct Testimony, p. 52, ll. 14-19 (quoting the District Court's stay order).
[34] Supra, Ex. 9, p. 22, ll. 9-13.
[35] Supra, Ex. 11, p. 18, ll. 7-22.
[36] Supra, Schedule SCW-D20 (2011 guidance document).
[37] Supra, Ex. 11, p. 6, l. 16 to p. 9, l. 8.
[38] Supra, Ex. 9, p. 20, l. 27 to p. 22, l. 13 (quoting Eubanks deposition testimony).
[39] Ameren Missouri Initial Brief, p. 33.

calculations for Unit 2.[40] The absence of any pre-project emissions calculations has no relevance for prudence because no such calculations were required at the time.[41] Moreover, EPA's program office opined (without calculations) that actual annual emissions are not likely to increase unless a project increases the hourly emissions rate.[42] Many other utilities were following this same "qualitative" approach to evaluating projects for NSR applicability as did Ameren Missouri.[43] Likewise, the post-project calculations for Unit 2, criticized by the District Court, were not actually part of the permitting decision and therefore are not relevant to a prudence inquiry.

Fourth, both Staff and OPC cite the finding from the District Court that Ameren Missouri did not report the Rush Island Projects to the EPA.[44] That has no relevance for prudence, however, because MDNR—not EPA—is the permitting authority in Missouri.[45] Mr. Majors admitted this in his deposition.[46] Moreover, there was no requirement to report the Rush Island Projects under the rules that existed at the time.[47] Nor was it necessary for Ameren Missouri to do so in order to know that MDNR's position was. As a result of constant dialogue over the years, in various settings, ESD was well aware of MDNR's interpretation of the Missouri SIP.[48]

And in any event, these projects were no secret. MDNR inspected the Rush Island plant during the relevant outages, witnessed the work, and certified the plant as in compliance with all applicable requirements.[49] MDNR would not have done so if it had held concerns over whether permits were required for the Rush Island Projects. And the fact that MDNR witnessed the work

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[40] Staff Initial Brief, p. 11; OPC Initial Brief, pp. 8-9.
[41] See supra, Ex. 13, p. 52, ll. 13 – 26.
[42] Ameren Missouri Initial Brief, p. 26.
[43] Supra, Ex. 11, p. 23, ll. 10-20.
[44] Staff Initial Brief, p. 11; OPC Initial Brief, p. 8.
[45] Ameren Missouri Initial Brief, p. 20.
[46] Supra, Ex. 13, p. 22, l. 14 to p. 23, l. 22 (quoting Majors deposition testimony).
[47] Supra, Ex. 9, p. 6, ll. 5-9.
[48] Ameren Initial Brief, p. 21; supra, Ex. 9, p. 15, l. 17 to p. 16, l. 22.
[49] Supra, Ex. 9, p. 16, ll. 17-19.

and certified the plant as in compliance confirmed for Ameren Missouri that it had made the right permitting decision for the Rush Island Projects.[50]

B. Staff's Additional Arguments

Staff makes a few unique arguments in its Initial Brief, which can be dispensed easily.

First, citing the District Court's 2017 liability opinion, Staff states that Ameren Missouri had a fundamental misunderstanding of the law, and that this meant it did not have a legitimate process to review projects for NSR permits.[51] What Staff misses by focusing on this sentence from the District Court's opinion is that MDNR and the rest of industry had the same "misunderstanding" as Ameren Missouri.[52] The construction of regulations such as the Missouri SIP or the federal NSR rules is a legal question over which reasonable minds can differ. As Ameren Missouri has already explained, one can be wrong without having been unreasonable in that understanding.[53] Such is the case here—for Ameren Missouri, for the rest of Missouri industry, and for MDNR.

Second, Staff quotes from the District Court liability decision that the ESD compliance process "does not comply with the rules, EPA's instructions, or case law."[54] Here again, the District Court is referring to the actual annual emissions evaluation under the federal NSR rules. And even there, the Court does not refer to the case law *at the time of Ameren Missouri's permitting decisions*. For example, the District Court relied heavily on its own 2016 summary judgment decisions and the *2013* ***Alabama Power*** decision concerning the requirements for evaluating changes in actual annual emissions under the federal NSR rules. There were many results handed

[50] Supra, Ex. 8, p. 14, l. 6-20.
[51] Staff Initial Brief, p. 13.
[52] Ameren Missouri Initial Brief, pp. 22-23. This statement from the District Court also contradicts Staff's and OPC's claim of knowing violations.
[53] Ameren Missouri Initial Brief, p. 36; see also supra, Ex. 11, p. 2, ll. 11-18.
[54] Staff Initial Brief, p. 13 (internal quotation marks omitted).

down by courts during the time that Ameren Missouri made its permitting decisions which supported the reasonableness of those decisions.[55]

Third, Staff suggests that Ameren Missouri acted unreasonably because the Company appreciated some risk of triggering NSR with the Rush Island Projects yet proceeded anyway.[56] Staff cites several documents produced by Ameren Missouri and implies that they reflect some "guilty knowledge" about the likelihood that the Rush Island Projects triggered NSR review. Staff Initial Brief, pp. 14-15. That is not the case.

The internal Ameren Missouri documents cited by Staff on pages 14-15 of its Initial Brief concern Ameren Missouri's plan for complying with the Clean Air Interstate Rule ("CAIR") and its successor the Cross-State Air Pollution Rule ("CSAPR").[57] This "Environmental Compliance Plan" evolved over time and the selection of a final compliance strategy was delayed for years as these rules made their way through the courts and underwent changes. At various points in time, Ameren Missouri planned for installing scrubbers on Rush Island in order to comply with these regulations.[58] When these Environmental Compliance Plan documents addressed the possibility of installing scrubbers on Rush Island, the driver was always CAIR/CSAPR, not NSR.[59] The topic of NSR arose only in relation to the tentative schedule for installation of scrubbers under CAIR/CSAPR, because Ameren Missouri knew that if it was planning to install scrubbers anyway, it could moot any future NSR claim by moving up the schedule for any targeted plant.[60]

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[55] Supra, Ex. 12, p. 47, l. 23 to p. 51, l. 18.
[56] Staff Initial Brief, pp. 14-15.
[57] These include the May 27, 2007 memo on the Environmental Compliance Strategy Analysis Kick-off Meeting, the October 17, 2008 Rush Island Flue Gas Desulfurization Project memo, the May 13, 2009 conference memorandum, and the June 11, 2009 email from Anthony Artman to Susan Knowles.
[58] Supra, Ex. 7, p. 43, ll. 13-22.
[59] Supra, Ex. 6, p. 18, ll. 13-21; supra, Ex. 8, p. 50, l. 9 to p. 51, l. 7.
[60] Supra, Ex. 7, p. 47, l. 2 to p. 49, l. 9 (discussing the May, 13, 2009 Black & Veatch document).

None of the documents Staff cite shows that Ameren Missouri perceived some risk in concluding, as it did, that the Rush Island Projects would not trigger NSR.

- March 11, 2004 PowerPoint Presentation by Hunton & Williams, LLP. This presentation confirmed the large number of boiler component replacement projects, like those at Rush Island, which took place across industry prior to 2004 and for which utilities had not sought NSR permits. It also confirmed that the EPA allegations of violations conflicted with the settled understanding of the scope of the NSR regulations. It is true that Ameren Missouri was aware of the claims made in the NSR enforcement initiative, and Ameren Missouri has never contended otherwise. But Staff ignores the fact that most of these allegations came to naught.[61]

- May 27, 2007 memo on the Environmental Compliance Strategy Analysis Kick-off Meeting. This document does not suggest that any project has or would trigger NSR. Mr. Birk has already explained why it does not support the argument Staff tries to make here.[62]

- July 16, 2008 PowerPoint Presentations ("Coal Risks" and "Fuel Risks") discussing a potential settlement of NSR claims with EPA, without reference to any particular claim or plant. These documents do not suggest that any project at Rush Island has or would trigger NSR. Mr. Birk has already explained why these documents do not support the argument Staff tries to make here.[63]

- May 13, 2009 conference memorandum. This document does not suggest that any project at Rush Island has or would trigger NSR. Mr. Birk has already explained why this document does not support the argument Staff tries to make here.[64]

- June 11, 2009 email from Anthony Artman to Susan Knowles. This document does not suggest that any project at Rush Island has or would trigger NSR. Mr. Birk has already explained why this document does not support the argument Staff tries to make here.[65]

The bottom line is that none of these documents suggests any worry about risk over the Rush Island Projects. Instead, they "do nothing more than show we were aware of what the

[61] Supra, Ex. 12, p. 57, ll. 7-17 and Schedule KRM-D16 (describing how most EPA allegations went unresolved during the relevant time period).
[62] Supra, Ex. 7, p. 43, l. 23 to p. 45, l. 8.
[63] Id., p. 40, l. 13 to p. 43, l. 22 (quoting Eubanks deposition testimony).
[64] Id., p. 47, l. 2 to p. 48, l. 4.
[65] Id., p. 44, l. 17 to p. 45, l. 8.

consequences for violating NSR would be—not that we believed any project had or would trigger NSR."[66] The documents do not reflect some sort of guilty knowledge, as Staff concedes.[67]

Finally, Staff makes the bold claim that its assertions of imprudence are not based on hindsight. Staff Initial Brief, p. 9. That is patently untrue, as Ameren Missouri has already explained.[68]

C. OPC's Additional Arguments

Much like Staff, OPC spends a great deal of time arguing on the basis of hindsight. For example, OPC quotes several times the total number of "excess emissions" found by the District Court to have resulted from the NSR violations at issue.[69] OPC must think that harping on the results of the NSR violations will prejudice this Commission against Ameren Missouri; the resulting emissions (*i.e.*, how things turned out) certainly has no relevance to the prudence inquiry on Ameren Missouri's permitting decisions.

OPC's argument that this Commission is bound by collateral estoppel argument is equally flawed.[70] Ameren Missouri's research reveals no instance in which the Commission has applied the doctrine of collateral estoppel to find that a *judicial* decision on any issue bound the Commission in its *administrative proceedings*. The Commission is not even bound by the doctrine of collateral estoppel *with regard to its own prior decisions*. ***In re Union Elec. Co. d/b/a Ameren Missouri***, Case Nos. ER-2012-0028, YE-2012-0065, 2011 WL 4348351 (Mo. P.S.C.), Sept. 7, 2011 ("Moreover, while MIEC will be free to argue in a future prudence review proceeding that the Commission should apply principles of collateral estoppel, it is not true (as MIEC suggests)

[66] Id., p. 46, ll. 21-24.
[67] Id., p. 40, l. 13 to p. 43, l. 5 (quoting Eubanks deposition testimony).
[68] Ameren Missouri Initial Brief, p. 38.
[69] OPC Initial Brief, pp. 5, 7.
[70] OPC Initial Brief, p. 10.

that the Commission must do so because the Commission is not bound by the doctrine of collateral estoppel.")

The ***Landowners*** case, cited by OPC, does not suggest that the Commission must apply collateral estoppel here. That case involved the application of a prior *judicial appellate opinion* to a *subsequent judicial appellate court case*—and *not* the application of a judicial opinion to an administrative proceeding—the result OPC advocates here.

Even if the Commission were inclined to invoke the doctrine of collateral estoppel here, it would not apply by its own terms. "Collateral estoppel, or issue preclusion, is used to preclude the re-litigation of an issue *that already has been decided* in a different cause of action." ***Brown v. Carnahan***, 370 S.W.3d 637, 658 (Mo. 2012) (emphasis added).

> Before giving preclusive effect to a prior adjudication under collateral estoppel principles, the Court must consider four factors: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. The doctrine of collateral estoppel will not be applied where to do so would be inequitable. Each case must be analyzed on its own facts.

Matter of Invenergy Transmission LLC., 604 S.W.3d 634, 639 (Mo. App. W.D. 2020).

Application of collateral estoppel here would stumble at the first step: *identical* issues must be presented in the two proceedings. The mere overlap of underlying facts is insufficient. The "exact" issues must be identical in order for collateral estoppel to apply. ***Salsberry v. Archibald Plumbing & Heating Co.***, 587 S.W.2d 907, 914 (Mo. App. K.C. 1979) ("It is certain that collateral estoppel forecloses a party from litigating an issue *only if that exact issue was unambiguously decided* in the earlier case.") (emphasis added); ***Ziade v. Quality Bus. Solutions, Inc.***, 618 S.W.3d 537, 550 (Mo. App. W.D. 2021) ("It is not enough that two claims share common

facts if the prior action does not *necessarily and unambiguously resolve the same question* presented in the second proceeding.") (emphasis added).

The prudence issue was not before the courts. "The courts did not consider the question of whether the Company had a reasonable basis for believing that it was not required to obtain such [NSR] permits, because as a matter of law, that question was not before them."[71] There is therefore no holding from the District Court on the reasonableness or prudence of the permitting decision to which collateral estoppel could apply.[72]

Nor is there any holding from the District Court concerning the key issue for the Commission's prudence inquiry. The essential question for determining the prudence of Ameren Missouri's permitting decisions is whether the criteria the Company employed to make those decisions reflected a reasonable understanding of the law *at the time*. Staff's environmental engineer, Claire Eubanks, agrees.[73] But the District Court never made any finding of fact (or reached a conclusion of any sort) on that question in either its 2017 liability decision or its 2019 remedy decision.[74] As discussed on our Initial Brief (pages 33, 34-35), the only opinions that come close to that topic actually underscore the reasonableness of Ameren Missouri's position on the legal requirements. Because there are no findings on the critical question this Commission has to resolve in evaluating the prudence of Ameren Missouri's permitting decisions—the reasonableness of the criteria the Company used in making these decisions—there is nothing in the NSR enforcement litigation that creates any binding collateral estoppel effect here. "[T]he

[71] Supra, Ex. 11, p. 4, ll. 9-12; id., p. 6, ll. 7-10; id., p. 12, ll. 14-17.
[72] Id., p. 6, ll. 10-15.
[73] Tr. (Vol. 4) p. 56, l. 24 to p. 57, l. 5. Notably, Ms. Eubanks does not offer an opinion on that essential question. Id., p. 57, ll. 6-14.
[74] Supra, Ex. 11, p. 31, ll. 14-16; Tr. (Vol. 2) p. 114, ll. 3-10 (testimony of CAA expert Jeffrey Holmstead); id., p. 125, ll. 15-18 (same); Tr. (Vol. 3) p. 337, ll. 1-8 (testimony of Mark Birk).

question for this Commission is whether it was unreasonable, *i.e.*, imprudent, for Ameren Missouri to have understood the law as it did. The District Court made no ruling on that question."[75]

Next, citing the testimony of NSR expert Karl Moor, OPC suggests it was unreasonable for Ameren Missouri to proceed with the projects given that EPA was divided on the proper scope and interpretation of NSR.[76] But OPC misses the point of Mr. Moor's testimony. Mr. Moor opined that Ameren Missouri's understanding of the legal requirements, from which it developed the three criteria the Company employed to identify projects requiring NSR permits, was a reasonable one. One piece of evidence that Mr. Moor cited for the reasonableness of Ameren Missouri's views was the fact that they were the same views of the EPA program office in charge of the NSR program.[77] The fact that EPA's program office held the same view of the law as did Ameren Missouri means that Ameren Missouri's position was a reasonable one.[78] That EPA's enforcement office held a different view does not make the EPA program office position unreasonable, nor can it make Ameren Missouri's position unreasonable.

OPC next suggests that it was unreasonable for Ameren Missouri to proceed with the projects given its awareness of the NSR enforcement initiative and how it shifted across different presidential administrations.[79] But mere "awareness" of the NSR enforcement initiative does not tell the whole story and cannot, therefore, establish imprudence.[80] As CAA expert Jeffrey Holmstead explained, awareness of the NSR enforcement cases does not suggest it was imprudent to proceed with the Rush Island Projects without getting NSR permits for two principal reasons. First, EPA was generally losing those cases. Second, those cases did not involve the protections

[75] Ex. 24, John J. Reed Surrebuttal Testimony, p. 10, ll. 16-18.
[76] OPC Initial Brief, pp. 10-11.
[77] Supra, Ex. 12, p. 6, ll. 1-4.
[78] Supra, Ex. 13, p. 40, ll. 1-23 (quoting Eubanks deposition testimony); id., p. 43, l. 19 to p. 44, l. 2.
[79] OPC Initial Brief, pp. 12-13.
[80] Ameren Missouri Initial Brief, p. 29.

of the Missouri SIP, which required NSR permitting only for "modifications" (i.e., a project increasing potential emissions) that are also "major modifications" under the NSR rules.[81] Ameren Missouri therefore reasonably concluded that the risks of an NSR enforcement action in Missouri were low.

OPC then argues that Ameren Missouri took a "calculated risk" that EPA's views of NSR during the Bush Administration—under which the Rush Island Projects would not trigger NSR—would continue to prevail.[82] That argument has two significant legal flaws, and an additional logical flaw. First, as NSR expert Karl Moor has pointed out, subsequent changes in the way EPA interprets the NSR regulations actually lowers the risk of NSR enforcement, because it eliminates the argument for any deference to such interpretation.[83] Second, OPC's argument unlawfully minimizes the significance of the Missouri SIP and the role of MDNR as the permitting authority. Whatever opinion might prevail at EPA on the meaning of the federal NSR rules, this cannot change the law in Missouri. The text of an approved SIP, not EPA's interpretation, controls. *See* ***United States v. Cinergy Corp***., 623 F.3d 455 (7th Cir. 2010); ***Florida Power & Light Co. v. Costle***, 650 F.2d 579, 588 (5th Cir. 1981) (holding "EPA is to be accorded no discretion in interpreting state law" such as a SIP). If EPA becomes dissatisfied with a SIP or how the state applies it, EPA has remedies under the Clean Air Act. For example, 42 U.S.C. §7410(k)(5) gives EPA the authority to call for a state to revise a SIP to address any inadequacies. EPA cannot, however, overrule a state interpretation of its SIP that is consistent with the text of the SIP and the text of the Clean Air Act. *See* ***United States v. General Motors Corp***., 702 F. Supp. 133, 138 (N.D. Tex. 1988).

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[81] Supra, Ex. 11, p. 15, l. 3 to p. 16, l. 5.
[82] OPC Initial Brief, pp. 13-14.
[83] Supra, Ex. 13, p. 34, l. 25 to p. 35, l. 15.

The logical flaw with OPC's argument is that if taken to its logical conclusion, one would have to conclude that, at a minimum, the Unit 1 permitting decisions (made 2005-2006) were reasonable because they were consistent with the then-current views on NSR. Beginning in 2005, the Bush Administration acknowledged the trend in the courts holding that NSR should not apply unless there was an increase in potential emissions, and shifted the NSR enforcement initiative to that effect. Later, in April 2007—after the Unit 1 permitting decision had been made and most of the work completed—the Supreme Court decided that NSR *could* (but was not required to be) based on availability improvement, rather than increases in potential emissions. But the Bush Administration nevertheless continued to maintain its position, and re-proposed a rule that would make the potential emissions trigger for NSR explicit.[84] The logical implication of OPC's focus on the changing views at EPA across administrations is that Ameren Missouri's decisions concerning Unit 1 must have been reasonable, because they were consistent with the then-prevailing EPA program office view.

The fact is that Ameren Missouri did not find either the 2007 or the 2010 Rush Island Projects to present a significant risk, considering: the text of the Missouri SIP; its application by MDNR; the public statements by EPA excluding large utility life extension projects from NSR; and the prevailing case law that rejected EPA's NSR claims in the 2005-2010 period.[85] If the massive, $70 million, multi-year, multi-unit, multi-component rebuild of the Sibley Generating Station did not trigger permitting requirements under the Missouri SIP, as MDNR concluded, then there was no reason to believe that the smaller and simpler Rush Island Projects presented a significant risk.[86]

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[84] Supra, Ex. 12, p. 24, l. 22 to p. 26, l. 6.
[85] Supra, Ex. 7, p. 49, ll. 1-9.
[86] Supra, Ex. 9, p. 43, l. 22 to p, 46, l. 16 and SCW-S1.

OPC suggests that Ameren Missouri should have sought an applicability determination from EPA, which would have made the question of NSR applicability "unambiguous."[87] Ameren Missouri's Initial Brief has already explained the reasons why a company need not get an applicability determination from EPA in order to be prudent.[88] Ameren Missouri will not repeat all those arguments here.

On pages 11-12 of its Initial Brief, OPC identifies four "possibilities" that were available to Ameren Missouri when it needed to perform the work on the Rush Island units: 1) get the NSR permits and add scrubbers; 2) don't make any change (*i.e.*, don't do any work); 3) do "different projects that qualified" as RMRR; or 4) retire the plant. There is no basis in the record for OPC's list of "possibilities." It is just a lawyer argument unattached to any actual evidence. Unsurprisingly, OPC professes not to know which of these was a reasonable "option".[89]

In reality, none of these were reasonable options, as the record evidence shows. First, no other utility would have sought NSR permits for such projects.[90] That was therefore not a reasonable option. In fact, it would have harmed consumers.[91] Second, foregoing all work on the units was no option at all. Coal-fired units require regular maintenance in order to be able to operate.[92] Third, it is not clear what OPC means by suggesting "different projects that qualified" as RMRR.[93] If OPC is suggesting that these components (economizer, reheater, lower slope, air preheater) should not have been replaced, that ignores the fact that these replacements were

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[87] OPC Initial Brief, pp. 11, 13.
[88] Ameren Missouri Initial Brief, p. 30-31.
[89] OPC Initial Brief, p. 13.
[90] Supra, Ex. 11, p. 31, ll. 19-21.
[91] Supra, Ex. 6, p. 12, ll. 10-14, 15-20 (Pointing out that greater availability produces greater off-system sales that in turn flow back to customers). *See also Id.,* p. 15, ll. 16-20 ("Ameren Missouri has an obligation to maintain its generating units in good working order, so we can meet the reliability demands of our customers and sell excess energy into the MISO market to *help offset costs for customers.*" (emphasis added)).
[92] Supra, Ex. 6, p. 10, l. 21 to p. 11, l. 13.
[93] OPC Initial Brief, p. 12.

necessary to ensure system reliability.[94] The projects were included in plant in service in subsequent rate reviews, and nobody has questioned their prudence.[95] Projects like these "are critical to the continued operation of vital power infrastructure and required by prudent utility practice."[96] So surely OPC does not mean to suggest that replacement of these components was off-limits. If OPC means to suggest that these replacements should have been spread out over multiple outages, rather than performed all at once, then that would ignore the fact that performing the projects at the same time was best for consumers.[97] OPC's fourth suggestion—early retirement—is laughable. As Mr. Birk explained, replacement of various boiler tube assemblies, like those at issue in the Rush Island Projects, "occurs several times over the life of a unit."[98] No utility retires a unit the first time a set of tubes needs to be replaced. Doing so would be the very definition of imprudence.

OPC's list of "options" omits the obvious one: after identifying the necessary projects, assess them for NSR applicability and then proceed. That is the typical utility industry approach: do the projects as required, "consistent with the guidance provided by EPA's program office, the agency's senior leaders, and the relevant state authorities."[99] In following that typical industry practice, Ameren Missouri acted reasonably.[100]

Finally, OPC suggests—without citation to the record—that self-interest drove Ameren Missouri's decisions.[101] But the record evidence here is unambiguous and does not support OPC's innuendo. Ameren Missouri's testimony is uncontradicted: the Company sought to comply with

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[94] Id., p. 2, l. 23 to p. 3, l. 9.
[95] Id., p. 16, l. 18 to p. 17, l. 7.
[96] Supra, Ex. 12, p. 47, ll. 14-16.
[97] Supra, Ex. 6, p. 12, l. 3 to p. 13, l. 11.
[98] Id., p. 13, ll. 22-23.
[99] Supra, Ex. 12, p. 47, ll. 16-18; supra, Ex. 13, p. 7, ll. 7-20.
[100] Supra, Ex. 12, p. 46, ll. 13-24; id., p. 47, ll. 10-18.
[101] OPC Initial Brief, pp. 13-14.

the law.[102] Ameren Missouri did not seek NSR permits for the Rush Island Projects because they were not required under the legal standards as Ameren Missouri (and MDNR and the rest of industry) understood them at the time.[103] Neither Staff nor OPC presented any evidence to the contrary.[104] Even Staff agrees that these permitting decisions had nothing to do with money.[105] Here again, OPC's arguments have no basis in the record and must be rejected.

IV. The Staff Ignores the Record Regarding Its Poorly Supported and Speculative Claims Relating to "Planning for NSR Outcome."

There is little to add to this topic in response to the just under two pages of discussion of this topic in Staff's Initial Brief (pages 17-18). Nothing the Staff says there creates any issue that the Commission needs to or should decide in this case (see the Company's Initial Brief, pp. 10-12). Staff's claims are still speculative, as the record discussed in the Company's Initial Brief shows, and none of the planning Staff says "may" have led to X or Y would have changed anything because no "situation" was anticipated, despite planning that *did* evaluate Rush Island's retirement in 2024 across three different IRPs submitted over nearly a decade, in 2014, 2017, and 2020 (see Company's Initial Brief, pp. 12 – 17). In summary, most of Staff's statements in its Initial Brief are simply not true and/or amount to rank speculation, as shown by the record, which was discussed in detail in the Company's Initial Brief.[106]

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[102] Supra, Ex. 7, p. 2, ll. 9-20 (quoting Eubanks deposition testimony); supra, Ex. 13, p. 1, l. 14 to p. 2, l. 14 (quoting Eubanks deposition testimony).
[103] Supra, Ex. 7, p. 2, l. 21 to p. 3, l. 7.
[104] Supra, Ex. 13, p. 2, l. 19 to p. 3, l. 8 (quoting Eubanks deposition testimony); id., p. 3, ll. 12-17.
[105] Supra, Ex. 7, p. 34, ll. 7-30 (quoting Eubanks deposition testimony).
[106] The Staff's heart certainly isn't in the points it makes, qualifying its arguments in its brief argument by use of the term "may" on five separate occasions, and speculating that "[p]resumably", different planning might have led to different outcomes. As the Company's Initial Brief shows, Staff's presumptions are not reasonable and are not supported by the record.

The Company has also addressed the supposed impact of different planning on transmission system upgrades, including the "tighter expectation" on costs, that the Staff discusses in its Initial Brief (at p. 18).[107]

Finally, like many of Staff's contentions in this area, Staff's Initial Brief paints an especially misleading picture when it states that "Ameren Missouri understood that its resource adequacy capacity position after the retirement of Rush Island would be tight in coming years"[108] without making clear that the statement is not in reference to the supposed lack of planning prior to loss of the NSR litigation. Specifically, what Staff's Initial Brief fails to make clear in this regard is that the knowledge of a tight capacity position was unknown until very recently, that is, not until the Company filed its 2023 IRP (less than a year ago) *after* the many changes to its capacity position, as shown in Table 1 in Mr. Michels' Surrebuttal Testimony, had occurred. These changes were not anticipated (and that certainly could not have been anticipated by planning differently for Rush Island's retirement prior to its retirement) when the retirement decision was made. The Company discusses these factors at page 15 of its Initial Brief, where it addresses the third reason that Staff's contentions are not true.

In summary, Staff's planning related speculation is both wrong and irrelevant.

V. The Record Establishes the Existence of Quantifiable NPV Benefits.

OPC's Initial Brief confirms what the Company said in its Initial Brief: under OPC's position, the General Assembly's adoption of the securitization statute for retired or to be retired plants was a meaningless act, since adoption of that position would make it impossible to ever show quantifiable net present value benefits since the Commission would be constrained to only compare the net present value of using securitization to the net present value of receiving a return

[107] See, specifically, pages 18 – 19 of the Company's Initial Brief.
[108] Staff Initial Brief, p. 18 (citing Ex. 102, Claire Eubanks Rebuttal, p. 22).

of the asset costs through a regulatory asset with no return on those amounts. But OPC ignores two key facts. First, the statutory language specifically requires a comparison that involves not just recovery of the costs but also includes the financing costs of doing so. Second, to accept OPC's position would be to violate basic principles of statutory interpretation, as discussed in the Company's Initial Brief.

The statute specifies the required comparison, as follows:

> A comparison between the net present value of the costs to customers that are estimated to result from the issuance of securitized utility tariff bonds and the costs that would result from the application of the *traditional method of financing and recovering* the undepreciated investment of facilities that may become securitized utility tariff costs from customers.[109]

This is exactly the comparison the Commission made in the Empire case. In that case, the Commission held, "The 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 it's carrying costs during the period of amortization*."[110]

Mr. Lansford makes the same comparison for Ameren Missouri, a comparison supported by Staff witnesses Majors and Davis.[111] Mr. Lansford testified that carrying costs and the cost of financing a utility's assets can generally be thought of as synonymous. The Company would traditionally finance its remaining unrecovered costs of the Rush Island Energy Center through a mix of common equity and debt, consistent with how the Company finances all its other assets. This is another way of saying that absent securitization, the Company would traditionally incur carrying (financing) costs at its weighted average cost of capital ("WACC") for the Energy

[109] Section 393.1700.2(1)(f) (emphasis added).
[110] Ex. 2, Mitchell Lansford Surrebuttal Testimony, p. 10, ll. 1-4, quoting File No. EO-2022-0193, *Report and Order*, pp. 39-40, issued August 18, 2022 (emphasis added).
[111] Ex. 110, Keith Majors Rebuttal Testimony, p. 19, ll. 7-19; Ex. 112., Mark Davis Surrebuttal, p. 5, ll. 1-10.

Transition Costs at issue in this case.[112] Ameren Missouri's WACC is 6.88%.[113] Using this information, Mr. Lansford calculates the net present value of savings to customers, with the results showing securitization provides quantifiable net present value benefits to customers.[114]

Despite OPC's protests to the contrary, it is simply not true that the Commission always does or must ignore financing costs of unrecovered costs associated with investment in a retired asset. While there are likely many such examples in the history of the Commission's rate case decisions over the past 100 plus years, one such example can be found when the Montrose plant was retired (by an Evergy predecessor). In that case, the remaining undepreciated balance for the plant was included in rate base, earned a return (and thus covered financing costs) at the utility's WACC, and was recovered, all occurring after the retirement of the plant. Such occurred by debiting the depreciation reserve in an amount equal to the amount removed from the original cost of plant, which reduced the overall reserve (and thus increased rate base), meaning that customer rates reflected the cost of financing that balance as it was recovered at the utility's WACC.[115] While this approach is mechanically different than amortizing a regulatory asset and including that regulatory asset in rate base or otherwise providing for carrying costs, it functions economically in precisely the same manner: it allows recovery through rates of the undepreciated balance, including the return on the investment necessary to finance the recovery.

OPC's reliance on three appellate opinions also does not establish that a utility seeking to securitize Energy Transition Costs cannot show quantifiable net present value benefits from securitization. This is because none of the cases establish what the ratemaking treatment of such

[112] Supra, Ex. 2, p. 10, ll. 6-13.
[113] Supra, Ex. 2, p. 11, l. 10.
[114] Id., Schedule S8.
[115] Tr. (Vol. 3) p. 283, l. 1 to p. 284, l. 7.

costs would necessarily have been had the securitization statute not been enacted by the General Assembly.

OPC's argument is that the courts have ruled that "[a]ssets that are not used and useful are excluded from rate base upon which a utility is allowed a return." OPC Initial Brief, p. 18. OPC's contention rests on the Western District Court of Appeals opinion involving Ameren Missouri's abandoned Callaway Unit II project.[116] OPC goes on to point to two later Court of Appeals' decisions. However, neither the Callaway II decision nor the other two decisions cited by OPC stand for the proposition OPC claims they do because none of those decisions hold as a matter of law that a return on cannot be allowed by the Commission in a rate case where the ratemaking treatment of retired assets is at issue. Indeed, as discussed below, to the extent those decisions discuss the return on question at all, the discussions are mere *obiter dicta* because they were not necessary to the courts' decisions and are not binding or precedential.

Callaway II was the second appellate opinion involving the Callaway Unit II cancellation. The first, ***State ex rel. Union Elect. Co v. Pub. Serv. Comm'n and Missouri Public Interest Research Group***, 687 S.W.2d 162 (Mo. *banc* 1985), had ruled that the Commission erred when it concluded that Proposition One (*i.e.,* Section 393.135) prohibited recovery of a utility's investment in a project that was abandoned before it was ever placed in service. The Western District's Callaway II decision was an appeal from the Commission's later decision after remand from the Supreme Court, wherein the Commission determined, in light of the Supreme Court's opinion, that Ameren Missouri should be able to recover its investment in the abandoned project.[117] Notably, Ameren

[116] ***State ex rel. Union Elect. Co v. Pub. Serv. Comm'n***, 765 S.W.2d 618 (Mo. App. W.D. 1988) ("Callaway II").
[117] Technically, Callaway II was an appeal from the Circuit Court of Cole County's Writ of Review proceeding, in which the Circuit Court had ruled (on grounds irrelevant here) that the Commission's decision to allow recovery was erroneous. At the time, judicial review of Commission decisions was in the circuit court but that changed in 2011 when Section 385.510 was amended to provide for direct review in the Court of Appeals.

Missouri had *not* sought a return on the abandoned investment so the question of whether a return on should or should not be allowed was simply not before the Commission at all.[118]

It is true that the Callaway II opinion contains the statement "the utility property upon which a return can be earned must be utilized to provide service to customers. That is, it must be used and useful."[119] But it is also true that (a) the Court of Appeals was simply providing background on the ratemaking process, which it described as a "balancing process," and it was doing so by quoting a law review article that dealt with excess power plant capacity. Specifically, the background was provided by reference to a 1983 article written by a lawyer for the Community Action Research Group, Inc. that set forth a point of view regarding whether ratepayers should pay for excess capacity (*e.g.,* when a large baseload unit is built in anticipation of future load but not all of the capacity was yet needed).[120] And in that article, "borrowed liberally"[121] by the Western District, the author did make the equivalent of the statement quoted above about return on used and useful property. The Western District did not, however, rule on the question of whether the Commission was precluded from allowing a return on, nor was there any discussion or evidence about what the Commission had or had not done on such questions in its then more than 70-year history. In short, the entire discussion about "return on" is *obiter dicta*, that is, the discussion is a "'gratuitous opinion'" that was not at all essential to the Callaway II opinion.[122] Indeed, it could not have been since the question of whether a return could or should be allowed wasn't before the Commission, the circuit court, or the Court of Appeals.

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[118] Callaway II, 765 S.W.2d at 620 ("Union Electric sought the Commission's permission to recovery its shareholders' investment in the cancelled Callaway II nuclear unit but not a return on its investment.").
[119] Id., 765 S.W.2d at 622.
[120] Id., citing Colton, *Excess Capacity*, *Who Gets the Charge from the Power Plant?*, 34 Hastings L.J. 1133 (1983).
[121] 765 S.W.2d at 622.
[122] *See, e.g.,* ***Dubuc v. Treasurer of the State Custodian of the Second Injury Fund,*** 597 S.W.2d 372 (Mo. App. W.D. 2020) ("Obiter dicta" is, by definition, a "gratuitous opinion" and is "not essential to the court's decision before it" (citing *Richardson v. QuikTrip Corp.*, 81 S.W.3d 54, 59 (Mo. *banc* 2002)).

OPC again pointed to that *dicta* in ***State ex rel. Office of the Pub. Counsel v. Pub. Serv. Comm'n***, 293 S.W.3d 63, 74-76 (Mo. App. S.D. 2009), where OPC opposed a return *of* an investment in software that had been replaced by gas company Southern Union d/b/a Missouri Gas Energy. Again, however, the question of whether a return on should be allowed was not before the Court of Appeals because the utility (and the Commission's Staff) had been in agreement before the Commission that the $1.23 million investment would not be included in rate base.[123] In describing OPC's position ("OPC opposed the amortization [*i.e.,* the return of] based upon …[Callaway II]…"), the Court of Appeals did quote the *dicta* from Callaway II but its quotation of it was, in effect, double-*dicta* given that, just as was the case in Callaway II, there simply was no question before it regarding return on. So again, no court has ruled on the question.[124]

Finally, we get to ***Pub. Serv. Comm'n v. Office of Public Counsel*,** 677 S.W.3d 526 (Mo. App. W.D. 2023), where the issue on appeal was not whether a return on the remaining investment in the retired Sibley plant could be allowed but rather, whether the amortization *period* (duration) approved by the Commission was unreasonable under the reasonableness prong of the standard of review applicable to Commission decisions.[125] OPC apparently cites this case because there was a dispute before the Commission as to whether it should allow a return on, with the Commission deciding on the facts of that case that it should not. But as the Court of Appeals recognized, "the

[123] Id., 293 S.W.2d at 75 ("Southern Union also indicated that MGE has removed the remaining … [software] value from its rate base calculations.").

[124] The Company is cognizant of the fact that the Commission, in the Empire Order, also on two other issues cited to the Callaway II and the Southern Union decisions, going so far as to state that the Court of Appeals "held" that return on applies to used and useful property. Empire Order, p. 67. Respectfully, as discussed herein, no court in Missouri has ever so *held* but has rather simply included such statements, which were unnecessary to resolve any issue the court and are thus *dicta* and establish no binding precedent or law respecting the Commission's ability to include a return on in a rate case.

[125] 677 S.W.3d at 536, 537 (The Court of Appeals explained that there are two prongs to its review, was the decision lawful (*i.e.,* did the Commission have statutory authority – no one claimed it didn't) and the second prong, was the decision "reasonable," that is supported by substantial and competent evidence, not arbitrary, capricious, or unreasonable, and not an abuse of discretion).

fact that Evergy was not allowed a return *on* the investment because the plant was not used and useful does not mean that its inability to receive such could not influence the Commission's decision to provide a return *of* the investment as soon as practicable while avoiding performance penalties."[126] The Court explained that the entire issue about Sibley was "just one small piece of a very large general rate case" and reiterated the law that has been declared in this state, that is, the reviewing courts consider the "total effect" of rate orders and not the method employed to arrive at them.[127] In summing up what the Commission decides in a rate case, the Court stated that the Commission's responsibility is to "consider the evidence in the whole record, balance the utility's investor's interest with the consumer interests, and issue a rate order that is just and reasonable."[128]

The point is that OPC over-relies upon and over-reads these three appellate opinions, none of which come anywhere close to establishing that Mr. Murray's "traditional method of recovery" means financing costs for retired plant must be ignored. Indeed, given the nature of rate case decisions, as discussed in the 2023 opinion involving Sibley, the Commission might deny a return on the unamortized balance of a retired plant in a given case, but that decision could affect its rulings on other issues, as it balances utility and consumer interests. Or it might allow a return on a similar balance in another case, again impacting its exercise of balancing stakeholders' interests, but in the end, whatever it does depends on the facts and circumstances of each case – on a consideration of all relevant factors in each case, as it must.[129]

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[126] Id. at 539 (emphasis in original).
[127] Id. at 538.
[128] Id.
[129] *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).

For OPC to be right in this case would necessarily mean that the Commission was wrong in the Asbury securitization case where it did find there were quantifiable net present value benefits from securitization which, as discussed in the Company's Initial Brief (page 43), would simply have been an impossible finding to make if Mr. Murray were correct. And as also discussed in the Company's Initial Brief, this would render the securitization statute meaningless and would ignore that the General Assembly expressly recognized that both traditional *financing* and recovery must be considered when making the quantifiable net present value benefits determination.

As it's also addressed in the Company's Initial Brief, OPC's interpretation would violate basic principles of statutory construction, since no utility could ever meet OPC's net present value of benefit standard. And as also discussed in the Company's Initial Brief, OPC's interpretation would render the securitization statute's mandate that both the cost of recovering the undepreciated balance *and* the cost of financing that recovery be considered in the comparison. OPC's interpretation must be rejected by this Commission.

OPC's fallback position is that traditional financing and recovery could mean the application of carrying costs at the cost of long-term debt. The Commission should note that this approach contradicts all of OPC's original and flawed arguments that a return on "cannot" be applied to an asset that is not used and useful. But the application of OPC's fallback position would also render the securitization statute meaningless in the present rising interest rate environment.[130] OPCs willingness to contradict its own arguments with this fallback position makes it clear that OPC recognizes the weakness of its own argument.

[130] Ex. 3, Mitchell Lansford Sur-Surrebuttal Testimony, p. 3, l. 23 to p. 4, l. 2.

VI. Energy Transition Costs Should be Offset by the NPV Tax Benefits Supported by the Company and the Staff.

OPC takes a different approach than the approach supported by the Company and the Staff on how Accumulated Deferred Income Taxes ("ADIT") should be handled in this case.[131] The Company's Initial Brief explains how ADIT should be handled in this case and we will not repeat that explanation here.

OPC does not argue that Ameren Missouri's approach cannot work. Rather, it rests its argument on reliance on the methodology used in the Empire securitization case.[132] As part of its argument, OPC provided a quotation from the Missouri Court of Appeals, which heard and decided the appeal of the ADIT issue in Empire's Asbury securitization case. Interestingly, the very quote used by OPC starts out by saying, "The record supports…"[133] And that is Ameren Missouri's very point. The Commission's decision on ADIT in the Empire case was based upon the record developed *in that case*. And, of course, the same is true for the Court of Appeals' decision. In this case, Ameren Missouri provided evidence that was not present in the Empire case that led to the development of a very different record. Ameren Missouri submits the following partial list of such additional evidence:

- Ameren Missouri clearly defined ADIT in Mr. Lansford's direct testimony.[134]
- Ameren Missouri included a detailed explanation of how ADIT is treated in traditional ratemaking.[135]
- Ameren Missouri provided a step-by-step, detailed example of how ADIT is treated in traditional ratemaking, with a supporting schedule that demonstrated step-by-step how the calculation works.[136]

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[131] Staff Initial Brief, p. 22.
[132] OPC Initial Brief, p., 23.
[133] OPC Initial Brief, p. 25, quoting Empire Dist. Elec. Co. v. PSC, 672 S.W.3d 868, 878 (Mo. Ct. App. 2023).
[134] Supra, Ex. 1, p. 15.
[135] Supra, Ex. 1, p. 16.
[136] Supra, Ex. 1, p. 16 and Schedule MJL-D5.

- Ameren Missouri included an example of the calculation of the income tax liability the Company will owe, with a supporting schedule, so that the Commission could see and understand exactly how the calculation would impact the tax return.[137]
- Mr. Lansford applied the applicable securitization statute language through the lens of these additional and clearly outlined facts of record, providing expert testimony on the topic that did not exist in the Empire case.[138]

While it might be the case that the Commission could act "unlawfully, arbitrarily, and capriciously"[139] if it were to take an approach different from the Empire case if the record in this case was the same as the Empire record, OPC's bluster that the Commission would err if it does so here fails because, as noted, the record here is *far different* than in Empire.

VII. Other Issues Affecting the Amount to Securitize.

A. Asset Retirement Obligations, Including Costs for Water Treatment and Monitoring, should be Securitized.

The record reflects some initial confusion as to whether water treatment and monitoring costs are or are not a component of the Company's Asset Retirement Obligations ("ARO"s) resulting from the operation of the Rush Island Energy Center. The Company is partially responsible for creating this confusion because it inadvertently double-counted these costs in its direct testimony by including separate cost line items for both AROs and water treatment and monitoring, when in fact they are the same thing. The Company corrected this mistake in response to several data requests and further corrected the evidentiary record in its surrebuttal testimony.

An ARO is an "obligation to return a piece of property back to its original condition upon retirement of an asset."[140] The Coal Combustion Residuals ("CCR") Rule requires that the Company restore the site (specifically the ash ponds at the site) by specific means. One component

[137] Ex. 1, Lansford direct testimony, p. 19 and Schedule MJL-D5.
[138] Id., p. 20.
[139] OPC Initial Brief, p. 25.
[140] Supra, Ex. 2, p. 34, l. 13-14.

of the CCR Rule necessitates the water treatment and monitoring costs that are at issue in this case. While Staff and OPC acknowledge the CCR Rule obligates the Company to treat and monitor the groundwater at the site after the ash ponds have been closed[141] (all the criteria necessary to conclude these costs must be accounted for as AROs, which is exactly how they are accounted for on the Company's books), the parties are ignoring the fact that these obligations are AROs. The parties are also ignoring that these ARO costs are the same costs the Commission determined are Energy Transition Costs in Liberty's Asbury securitization case. Neither Staff nor OPC has created a record that would justify a different result on this topic.

Staff's Initial Brief also admits that ash pond costs are related to the retirement of Rush Island, but then argues the water treatment and groundwater monitoring costs are not.[142] Again, these costs are one and the same – Ameren Missouri seeks to include all ARO costs, including for groundwater treatment and monitoring at its ash ponds, in compliance with federal and state requirements.[143]

There appears to be a misstatement in Staff's Initial Brief in stating that the ash ponds in question currently do not exist,[144] as Staff witness Majors clearly identified the ash ponds as existing while testifying live at the hearing, stating "Because those ash ponds do exist…".[145] Beyond Mr. Majors' statements at the hearing, there is evidence in the record to show that not only do the ash ponds already exist, but the Rush Island ash ponds have also already been capped and closed. Mitch Lansford testified that, "Numerous ash ponds are located at the Rush Island Energy Center site that resulted from its historical operations."[146] Mr. Williams' testimony puts forth an

[141] *See* Ex. 26, OPC data request 1105 (OPC asking how long is Company required to treat water and monitor groundwater for contaminants from the Rushe Island site).
[142] Staff Initial Brief, p. 23-24.
[143] Supra, Ex. 26.
[144] Staff Initial Brief, p. 23.
[145] Tr. (Vol. 6), p. 231, l. 5.
[146] Ex. 1, Mitchell Lansford Direct Testimony, p. 6, l. 22 to p. 7, l. 1.

illustration of the area for demolition after the plant is closed.[147] In the bottom, right hand portion of the illustration, it shows multiple, closed ash ponds.[148] The decommissioning study attached to Mr. Williams' testimony contains the same illustration with the same caption information.[149] And, the decommissioning report continues on to describe the ash ponds as being the subject of the ARO and as having been capped and closed in 2020.[150]

Staff asserts that these costs are better treated as routine costs in a rate case and that they do not qualify as securitization costs because they are not an obligation triggered by the early retirement of Rush Island.[151] OPC's Initial Brief makes a similar claim, stating that the plant closing "does not initiate these obligations", so the costs can't be securitized and cites Section 393.1700.1(7)(a).[152]

These arguments completely miss the point. The question the Commission must consider is not whether a certain cost *could* be handled in a rate case, the question is whether that cost *qualifies as an Energy Transition Cost*. OPC's brief directs us to the statutory definition of Energy Transition Costs but that definition contains nothing to make these ARO costs fall outside of the definition of Energy Transition Costs. Merely referencing the statutory definition doesn't prove OPC's statement true. A closer look at the statutory definition shows that it does not include limiting language. There is nothing to define recoverable costs as those "triggered" or "caused" by the early retirement. Instead, the statute defines Energy Transition Costs associated with an early retirement of an electric generation facility, to include "pretax costs includ[ing]…other applicable capital and operating costs…"[153] This describes ARO costs. These ARO costs are at a plant that is

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[147] Ex. 17, Jim Williams Direct Testimony, p. 9, l. 1.
[148] Id.
[149] Id., Schedule JW-D2, p. 2.
[150] Id. at p.3.
[151] Staff Initial Brief, p. 23-24.
[152] OPC Initial Brief, p. 27.
[153] Section 393.17001.1 (7)(a).

"to be retired." ARO costs are pretax costs associated with an electric generation plant. It does not matter when the cost began, when the cost will end or what caused the cost. These costs fit the definition of Energy Transition Costs and should be included in the securitized amount. Indeed, as noted at page 62 of the Company's Initial Brief, the Commission directly ruled in the Empire securitization case involving the Asbury Plant that ARO costs are Energy Transition Costs and thus should be securitized.

Finally, in an attempt to apply rate setting logic to a securitization case, OPC claims a mismatch between when the costs will be incurred and when customer will pay them as a reason to not securitize these costs.[154] OPC is again applying its own made-up restriction, one which is not found in the statute. This is not a rate case, where the Commission is attempting to match revenues with when the costs are to be incurred. This is a securitization case, and the securitization statute allows the utility to securitize all Energy Transition Costs, the definition of which does not contain a time restriction.

B. OPC Ignores the Record on Basemat Coal. Staff's Initial Brief is Not Entirely Consistent with the Testimony of Its Own Witness.

OPC's Initial Brief is simply a summary of OPC witness Riley's rebuttal testimony on this point, with OPC acting like Mr. Riley's point of view was not rebutted in any way. As discussed in the Company's Initial Brief, Mr. Riley was shown to have been wrong on both of his theories, that is he was wrong that the Company has received a return of its investment (it hasn't[155]) and was wrong when he contended that the basemat coal consists of vintage 1976-77

[154] OPC Initial Brief, p. 27-28.
[155] Company's Initial Brief p. 56; Tr. (Vol. 6) p. 135, l. 3 – 10 (Staff witness Majors confirming there is a difference between a return of costs and a return on them, that is, the financing costs for the investment that has been made).

coal (it doesn't[156]). The evidence of record rebutting both of these points is contained in the just-referenced pages of the Company's Initial Brief.

With respect to the Staff, the Staff supports inclusion of basemat coal costs in Energy Transition Costs. But its Initial Brief contains two statements that contradict at least some testimony from its own witness. First, the Initial Brief claims that that a $1.4 million valuation is "more accurate."[157] On cross-examination, Mr. Majors, when directly asked, confirmed that his recommendation remained $1.9 million: "Q. [By Commissioner Holsman] Do you still recommend $1.9 million? A. I think given the response to the data request that it's not '77 coal in its entirety, I think that's fair."[158]

Second, Staff's Initial Brief arguably contradicts its own witness when it states that "the original cost of $0.5 million is an appropriate alternative…"[159] That statement was from Mr. Major's rebuttal testimony, but when he made it, he did not know about Exhibit 25, which demonstrates that the basemat primarily consists of coal that the Company did not even start to use until 2011 or 2012, and thus the basemat has nothing to do with the cost of the original 1970's vintage coal.[160]

C. Abandoned Capital Project Costs Are Energy Transition Costs Here, Just as They Were in the Asbury Securitization Case.

The Commission already ruled that the cost of abandoned projects – much like those at issue here, that is, environmental project studies and other projects that were started but abandoned due to retirement of the plant, – *are* Energy Transition Costs.[161] If OPC were right,

[156] Company's Initial Brief, p. 57.
[157] Staff Initial Brief, p. 20.
[158] Tr. (Vol. 6) p. 141, ll. 17- 20. To be fair, Commissioner Holsman later asked him about the $1.4 million versus the $1.9 million again, and Mr. Majors said he would "probably" go with the $1.4 million. Tr. (Vol. 6) p. 143, ll. 2-15.
[159] Staff's Initial Brief, p. 20.
[160] Tr. (Vol. 6) p. 133, l. 7, to p. 134, l. 6.
[161] File No. EO-2022-0193, Amended Report & Order, October 2, 2022, p. 67.

then the Commission was wrong there. It wasn't. These costs are costs "with respect to a … to be retired plant" and as the Commission pointed out in the Asbury case, reflect undepreciated investment in the plant.[162]

OPC's Initial Brief indicates OPC opposes recovery of these costs "without first examining the prudence of Ameren Missouri incurring them."[163] The prudency of Ameren Missouri incurring them *has* been examined *in this case* for two reasons. First, as discussed earlier, Ameren Missouri is entitled to a presumption of prudence – it need not have put on any evidence about the prudence of incurring the study costs. Second, while it need not have put on such evidence as it turned out it did so as to the Rush Island scrubber studies. [164] OPC made no attempt to question Company witness Birk about the studies or the prudence of the Company's conduct of them yet had the opportunity to do so at the hearing. Based upon the presumption of prudence – and here, affirmative evidence relating to prudence that was introduced, prudence has been examined. And the only other witness in this case that addressed the studies, Staff witness Majors, was clear: he is not challenging the prudence of the studies.[165]

D. *OPC Ignores the Record on Decommissioning Costs.*

OPC incorrectly claims that the Black & Veatch estimate cannot be relied upon because Schedule JS-D2 is the "only source" of the estimate. The sworn testimony in this case is contrary in two key respects. First, Company witness Williams expressed that in *his opinion* the estimate that appears in the Black & Veatch report[166] was a reasonable estimate of the decommissioning costs.[167] Second, his opinion does not solely rest on Black & Veatch's

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[162] File No. EO-2022-0193, Amended Report & Order, October 2, 2022, p. 67, Conclusion of Law UU.
[163] OPC Initial Brief, p. 33
[164] Supra, Ex. 7, p. 51, l. 13 to p. 52, l. 10.
[165] Tr. (Vol. 4) p. 295, ll. 1-9 (Staff is "not challenging prudence of obtaining those studies.").
[166] The dollar figure is not listed here because it is confidential.
[167] Tr. (Vol. 7) p. 2, ll. 5 -10.

estimate. To the contrary, Mr. Williams personally had input into the estimate that Black & Veatch included in its report based on his experience in decommissioning other plants.[168] Does the Black & Veatch report inform Mr. Williams' opinion? Yes, and it may do so under Section 490.065. But Mr. Williams' opinion, which was subject to cross-examination by OPC, is by itself enough to support the estimated decommissioning costs. The Commission concluded that a Black & Veatch level four estimate was sufficient to include in Energy Transition Costs in the Asbury securitization case. There is no reason not to do so here, including because the estimate is also validated by Mr. Williams' own opinion.

OPC also continues to rely on an argument made by OPC witness Schaben based upon the range around a level four estimate. However, the range around a level four estimate is not +/- 30% but is instead plus 50% to minus 30%.[169] This means that if anything, there is a greater likelihood that the estimate is too low (could go 50% higher) than that it is too high (because it could go lower just 30%).

The only witness that has actual experience with decommissioning a coal plant (neither of OPC's witnesses do), Mr. Williams, has expressed the opinion that the estimate is reasonable. To the extent the actual costs vary from the estimate, the difference will be reconciled in a future rate case – customers will pay neither more nor less than they should. And since financing the costs at a securitized bond rate is more cost-effective for customers than financing them as other utility costs are financed, at the utility's WACC, it makes more sense to include the estimated costs, and to reconcile the differences.[170]

[168] Tr. (Vol. 7) p. 2, ll. 11 – 19.
[169] Tr. (Vol. 6) p. 269, l. 15 to p. 270, l. 6 (While it may not have been OPC's "fault" for not understanding the range initially, by the time it filed its brief, it knew that the range had been corrected).
[170] File No. EO-2022-0193, Amended Report & Order, October 22, 2022, Findings of Fact, p. 9, para. 5; Ex. 2, Lansford Surrebuttal, p. 8, ll. 4 – 16.

E. Whether Materials and Supplies Costs are "Known and Measurable" Has Nothing to do with Whether They Qualify as Energy Transition Costs.

OPC's Initial Brief states that the actual materials and supplies costs will not be known and measurable until the plant is retired.[171] This observation is irrelevant to the question before the Commission in this case. Very few of the dollars reflecting Energy Transition Costs are "known and measurable" as of today. That is precisely why the securitization statute mandates a reconciliation process. "Known and measurable" is a rate case concept applied to determine which cost of service items can be included in the revenue requirement used to set rates because, in Missouri, we do not have formula rates and there is no reconciliation when actual costs (and revenues) vary from those assumed when rates were set – which they always do.

While it is true that the precise, final figures will not be known until after the plant's retirement, we have a pretty good idea as to what that figure will be. As Company witness Williams testified, the Company actually reviewed 80 to 85 percent of the materials and supplies inventory and knows that all but one or two million dollars cannot be used elsewhere.[172]

F. Upfront Financing Costs Should Include the Costs for Company Witnesses Holmstead and Moor, just as they include other Costs of Presenting and Processing This Case.

Inexplicably given Staff's sworn evidentiary testimony, Staff's Initial Brief continues to argue for exclusion of the expenses for Ameren Missouri witnesses Jeff Holmstead and Karl Moor from Upfront Financing Costs to be securitized in this case.[173] Staff's Initial Brief is contradicted by its sole witness on this issue. Multiple times, Mr. Majors agreed that it would not be "fair to the company to completely exclude these [Holmstead and Moor] costs."[174] Mr.

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[171] OPC's Initial Brief, p. 34.
[172] Tr. (Vol. 6) p. 282, ll. 12-23.
[173] Staff Initial Brief, p. 26-27.
[174] Tr. (Vol. 8) p. 47, ll. 17-25.

Majors testified that it was not unreasonable for Ameren Missouri to submit direct testimony from Mr. Holmstead and Mr. Moor.[175] After further questioning, Mr. Majors indicated that he was no longer challenging whether those costs were reasonable and prudent. [176] Mr. Majors was the only witness on this topic.[177]

After making these admissions during cross examination, Mr. Majors went on to propose, on the stand, 50/50 sharing of the Company's outside consultant and attorney fees.[178] A proposal, it appears, that Staff now abandons.

There is no doubt that Ameren Missouri's decision to hire expert witnesses Jeffrey Holmstead and Karl Moor to provide expert testimony as part of its direct case was justified, as explained by Mr. Wills in his surrebuttal testimony and as discussed by Mr. Wills with Chair Hahn during the hearings.[179] First, Ameren Missouri had every reason to believe that the prudence of its underlying NSR decisions would be challenged. Specifically, Mr. Wills points to Ms. Eubanks' testimony in Ameren Missouri's most recent rate case:

> At the end of the relevant section of Staff witness Claire Eubanks' rebuttal testimony in that [Ameren Missouri rate] case, a section of testimony where she had thoroughly recounted the long history of the NSR case, witness Eubanks stated:
>
> > 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 c**onsider the prudency of Ameren Missouri's decision-making** and ultimate recovery of the stranded asset.15
>
> > In the context of Ms. Eubanks' rebuttal testimony and its many, many pages recounting the history and results of the NSR litigation, it is virtually impossible to read her recommendation that the securitization case was the most appropriate case to "consider the prudency of Ameren Missouri's decision-making" as referring to anything but consideration of the entirety of that NSR process within this docket. Given that backdrop, it would have been downright foolish for a Company with an interest in demonstrating its prudence – which

[175] Tr. (Vol. 8) p. 49, l. 18 to p. 50, l. 1.
[176] Tr. (Vol. 8) p. 50, ll. 13-23.
[177] Tr. (Vol. 8) p. 50, ll. 2-4.
[178] Tr. (Vol. 8) p. 48, ll. 1-21.
[179] Tr. (Vol. 8) p. 41, l. 6 to p. 44, l. 13.

> had already been called into question by Staff – to not file the testimony of highly relevant expert witnesses.[180]

Additionally, Staff's underlying argument that these costs have already been paid by customers is factually inaccurate. First, Ameren Missouri's requested level of rate case expense in its last rate case did not include any amount for either Mr. Holmstead or Mr. Moor. That is because the Company proposed using a five-case average to set rate case expense and the rate case at issue (the 0337 case in which the Holmstead and Moor expenses were incurred) was *not included as part of the average.*[181] Staff's proposal in the rate case was to only include 50% of a three-case average, which included costs from the 0337 case.[182] Since neither Staff nor the Company proposed to include all of the expert costs in the last rate case, Staff's statement that these costs have already been paid is, on its face, factually inaccurate. But there is one last point to be made about that rate case. The case was settled by a black box settlement, meaning that did not specify what costs were explicitly included or excluded in the agreed upon revenue requirement from the stipulation that resolved the revenue requirement in that case. So, it cannot be demonstrated by Staff, or anyone else, that these costs were included in the revenue requirement, as Staff 's Initial Brief wrongly claims.[183] When questioned about the black box settlement of Ameren Missouri's last rate case, Mr. Majors agreed it was not possible to know if the costs of Mr. Holmstead or Mr. Moor were included in the settlement amount.[184]

Each and every one of Staff's Initial Brief arguments underlying the position to not include the costs of Mr. Holmstead or Mr. Moor as part of the upfront financing costs are inaccurate and,

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[180] Ex. 20, Steven M. Wills Surrebuttal Testimony, p. 14, ll. 5-19.
[181] Supra, Ex. 20, p. 11, ll. 11-14.
[182] Supra, Ex. 20, p. 11, ll. 8-11.
[183] Supra, Ex. 20, p. 11, l. 17-22.
[184] Tr. (Vol. 8) p. 54, l. 12 to p. 55, l. 16.

when confronted with the actual facts while on the stand, were abandoned by Staff's own witness at hearing.

VIII. Carrying Costs Should Be Authorized at the Company's Actual Cost of Financing, its WACC.

Staff's Initial Brief simply says that, if the Commission decides to allow carrying costs, the rate should be set at the Company's most current rate of long-term debt, which Staff claims is currently 4.051%.[185]

OPC argues that because no capital issuance is identifiable to "carry" Rush Island costs, no carrying costs should be allowed.[186] OPC then argues that if the Commission were to allow carrying costs, the rate should be no higher than the projected interest rate of the securitized debt.[187]

The Commission should note that, after touting the Commission's approach in the Empire case for ADIT and how the Commission should not change from that approach, OPC's position here conveniently ignores the carrying cost portion of the Empire decision.[188]

Carrying costs should be allowed in the Commission's order in this case. Adopting the deferral mechanism proposed by Ameren Missouri, which no party opposed, carrying costs are only needed for the time between when the costs of Rush Island are removed from the Company's rates in its next rate case and when the securitized utility tariff bonds are issued. Until the Company has issued the bonds and repaid its investors, Ameren Missouri will continue to incur the costs of financing, which are the carrying costs the Company seeks in its request and the reason it is appropriate for the Commission to set the carrying cost rate at its WACC.[189]

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[185] Staff Initial Brief, p. 36.
[186] OPC Initial Brief, p. 35.
[187] Id.
[188] Ameren Missouri has also asked the Commission to adopt a different approach on certain issues in this case but has demonstrated a different basis for that different decision when it has made that ask.
[189] Supra, Ex. 2, p. 16, ll. 1-14.

Ameren Missouri does not ignore the fact that the Commission's Empire order granted carrying costs at Empire's long-term cost of debt. There are factual differences between the record in the Empire case and the record here that justify different treatment. First, the generation plant at issue in the Empire case was already retired and removed from rates since June of 2022.[190] Empire was seeking carrying costs for multiple years. Second, as Mr. Lansford testified, Ameren Missouri intentionally filed its request for securitization so that, absent an appeal of the Commission's order, there will be minimal time between when the costs are removed from rates and when the securitized utility tariff bond proceeds are received.[191] But however long the time between removal from rates and bond issuance is, Ameren Missouri will still be required to pay the financing costs related to the underlying financing.[192] Ameren Missouri's WACC is 6.82% but, after updating it as Mr. Murray suggested in his rebuttal testimony, is now 6.88%.[193]

OPC's suggestion that the Commission order carrying costs at no more than the expected securitized tariff bond rate is nonsensical. The Company cannot access proceeds from the securitized utility bond until the bonds are issued. Carrying costs are to address costs incurred in the time period before the bond proceeds are received, and the eventual interest rate attached to those bonds is entirely irrelevant to that period before the bonds are even issued.[194]

Staff recommends that carrying costs be at Ameren Missouri's long-term debt costs, a recommendation that is also flawed. First, Staff's brief points to 4.051% as the appropriate long term debt rate. Mr. Sagel testified at the hearing that recent issuances have been and are expected to be higher than that level. In March of 2023, an issuance was done at 5.045%.[195] There have

[190] File No. EO-2022-0193, Amended Report & Order, October 2, 2022, p. 72.
[191] Supra, Ex. 2, p. 15, ll. 2-18.
[192] Supra, Ex. 2, p. 16, ll. 3-6.
[193] Supra, Ex. 2, p. 11, ll. 1-11.
[194] Supra, Ex. 2, p. 16, ll. 10-1.
[195] Tr. (Vol 3), p. 244, ll. 2-4.

been two pricings performed by Ameren Missouri in 2024. One in January of 2024, with a 5.25% coupon and one in March, with a 5.20% coupon rate.[196] If the Commission decides to only allow carrying costs in the amount of long-term debt costs, it should use a recent rate. It would not be possible for Ameren Missouri to finance (presuming the Company would refinance) long-term debt at a lower, historical rate in the current interest rate environment.[197]

Finally, the Company would point out that carrying costs become especially important in a scenario where one party appeals the outcome of this case. Since the bonds cannot be issued until there is a final and unappealable order, any appeal greatly increases the costs Ameren Missouri will incur in order to pay the additional financing costs forced upon it by the appeal process. Those financing costs will be incurred in the same exact manner as the Company's costs are financed today, at the Company's WACC. Authorization of any carrying cost rate lower than the Company's WACC (the actual carrying cost incurred) will result in loss.[198] No party has provided any evidence that even suggests authorizing such a loss is just and reasonable. Conversely, no party has provided any evidence that even suggests authorizing carrying costs at the Company's WACC would be unjust or unreasonable.

IX. The Post-Financing Order Process Should Not Be Expanded Beyond the Process Contemplated by Section 393.1700.

OPC's Initial Brief repeats the requests set forth in the testimony of David Murray, where he seeks for OPC to be given a role in the post-financing order process that is not contemplated in the statute. Ameren Missouri's Initial Brief addressed each and every request and will not repeat those arguments here other than to remind the Commission that there is a statute governing the post-financing order process and a role for OPC is not included in that process.

[196] Tr. (Vol 3) p. 244, ll. 5-12.
[197] Supra, Ex. 3, p. 5, ll. 1-7.
[198] Supra Ex. 2, p. 16, ll. 3-7.

OPC points to the Empire case and the fact that OPC found the inputs used for the NPV calculation were not the same as the inputs set forth in the Commission's order,[199] is not a sufficient basis to expand the statutory process. Presuming for a moment that this discovery was significant (it likely was not as the correction of the issue did not change the fact the securitization was beneficial to customers), this occurred under the current, statutory process. So rather than being a reason to change the statutory process, it demonstrates that changing that process is not necessary.

OPC wants a bond issuance process that is more like a Commission process – largely public and with lots of time to review items, but that type of process doesn't and can't exist when issuing these securitized utility tariff bonds, just as it does not exist when the Company otherwise has issued debt in the past.[200] There is no evidence that changing the statutory process as suggested by OPC would improve the process while there is reason to believe that adopting these changes would increase the costs of the bond issuance.[201]

X. The Proposed Financing Order's Handling of Nonbypassable Charges is Appropriate.

OPC's position on nonbypassable charges (OPC Initial Brief, pp. 41-42) would mean that even if there we a fundamental change in Ameren Missouri's service territory (*e.g.,* a large municipality condemned Ameren Missouri's assets and took over the territory), such former Company and new municipal customers would avoid the securitized utility tariff charge. Such an interpretation could very well concern potential bondholders such that securitization could become infeasible (perhaps OPC's objective) or more expensive. As discussed in the Company's Initial Brief (page 79), the Company agrees with Staff's proposed financing order

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[199] OPC Initial Brief, p. 37.
[200] See discussion at hearing with Ameren Missouri witness Katrina Niehaus regarding deviation from "industry standard" practices for underwriter processes, Tr. (Vol 3), p.147, l. 17 to p.150, l. 25 and p. 142, l. 1 to p. 144, l. 25.
[201] Tr. (Vol 3) p. 153, l. 18 to p. 154, l. 10.

language on this topic, which suggests that customers are not absolved of the requirement to pay securitization charges by virtue of a change of supplier to their service account that occurs by any means (*i.e.*, municipalization as discussed above, territorial agreement, sale of some portion of the service territory, or whatever means by which a current customer could end up with their premises being served by a different electric service provider in the future).

Respectfully submitted,

/s/ James B. Lowery
James B. Lowery, Mo. Bar #40503
JBL LAW, LLC
9020 S. Barry Road
Columbia, MO 65201
(T) 573-476-0050
lowery@jbllawllc.com

/s/ Wendy K. Tatro
Wendy K. Tatro, #60261
Director & Assistant General Counsel
Ameren Missouri
1901 Chouteau Avenue, MC 1310
St. Louis, MO 63103
(314) 554-3484 (phone)
(314) 554-4014 (fax)
AmerenMOService@ameren.com

/s/ Nash Long
Nash Long
Hunton Andrews Kurth, LLP.
Bank of America Plaza, Suite 3500
101 S. Tryon Street
Charlotte, NC 28280
(704)378-4728 (phone)
nlong@hunton.com

Attorneys for Union Electric Company d/b/a Ameren Missouri

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 17th day of May, 2024.

/s/ James B. Lowery

James B. Lowery