

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Petition of Union)
Electric Company d/b/a Ameren Missouri)
for a Financing Order Authorizing the)
Issue of Securitized Utility Tariff Bonds)
for Energy Transition Costs related to)
Rush Island Energy Center)

Case No. EF-2024-0021

PUBLIC COUNSEL’S RESPONSE TO AMEREN MISSOURI’S MOTION TO STRIKE

COMES NOW the Office of Public Counsel (“Public Counsel”) and for its response to Ameren Missouri’s “motion to strike improper evidence” states:

1. In its motion Ameren Missouri confuses argument with evidence.
2. What Public Counsel has included in its initial brief to which Ameren Missouri objects is argument, not evidence.
3. Ameren Missouri objects to Public Counsel quoting from the Commission’s August 31, 2000 Report and Order in *In the Matter of Missouri-American Water Company’s Tariff Sheets Designed to Implement General Rate Increase for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company*, Case No. WR-2000-281, the Commission published at 9 MoPSC3d 254; and from the Commission’s December 8, 2022, Amended Report and Order in *In the Matter of Evergy Missouri West, Inc. d/b/a Evergy Missouri West’s Request for Authority to Implement a General Rate Increase for Electric Service*, Case No. ER-2022-0130 (consolidated with *In the Matter of Evergy Metro, Inc. d/b/a Evergy Missouri Metro’s Request for Authority to Implement a General Rate Increase for Electric Service*, Case No. ER-2022-0129 for decision).
4. Public Counsel quoted from and cited to the former report and order to advance its argument that the Commission should adopt Public Counsel’s position that what Ameren Missouri’s customers would pay for Rush Island securitized bond charges should be compared to what they would pay through general rates for energy transition costs and financing costs, not a

comparison of a purely theoretical calculation based on a comparison of Rush Island securitized bond charges to applying an Ameren Missouri weighted average cost-of-capital to the aggregate of energy transition costs and financing costs.

5. Public Counsel cited to the latter report and order to advance its argument that the Commission should use OPC witness John Robinett's net plant-in-service balance for Rush Island when Ameren Missouri abandons Rush Island because he used the same methodology for arriving at that balance as the methodology he used to calculate the plant-in-service balance the Commission adopted for Sibley when Evergy West abandoned Sibley.

6. Citing prior Commission orders as *persuasive authority* to help guide future decisions is a common and important practice for briefs filed with the Commission. In its initial brief and in its reply brief, Ameren Missouri cites to prior Commission orders that were not entered as evidence. In other words, Ameren Missouri follows the same long-held and permissible practice of citing prior Commission orders to support its arguments as Public Counsel did in its initial brief.

7. While the Commission has issued many orders where it has addressed motions to strike portions of briefs, the Commission in its July 8, 1983, Report and Order in the consolidated cases *In the Matter of Kansas City Power & Light Company for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company*, *In the Matter of the filing of Kansas City Power & Light Company of proposed rules and regulations for electric space heating*, and *In the Matter of Kansas City Power & Light Company of Kansas City, Missouri, for authority to file a Levelized Payment Plan for residential customers in the Missouri service area of the company*, Case Nos. ER-83-49, ER-83-72 and EO-82-65,¹ articulated an appropriate approach when it said:

¹ 26 Mo.P.S.C.(N.S.) 104.

On May 12, 1983, the Staff of the Commission filed with the Commission a Motion to Strike Certain Portions of the Briefs of Kansas City Power & Light Company, The Office of the Public Counsel, and Jackson County, Missouri, et al. The motion recites that the transmittal letter attached to the Public Counsel's brief and the accompanying tariff are not exhibits in this proceeding or in any manner part of the record herein.

In the Commission's opinion the Staff's motion has merit and should be granted in part. Staff's motion acknowledges that the Commission has recently treated a similar issue in its order issued on October 25, 1982, in *Stapleton v. Missouri Public Service Company*, Case No. EC-82-213. ***As announced in that case, the Commission is still of the opinion that an order to strike improper argument in a brief is not necessary or proper, and a party, to protect itself from improper arguments, be it legal or factual, need only to bring it to the attention of the Commission in a reply brief. The Commission now adds that if improper comment is contained in a reply brief it will suffice for a party to point out the improprieties by letter to assist the Commission in determining which portions of the argument should be rejected.*** (Emphasis added).

In the instant case, however, the brief of Public Counsel has attached to it a document filed in another matter of record before the Commission. A motion to strike may be proper when a party attempts to improperly include in the record documents or exhibits from other cases. Since the objected to inclusion exceeds the scope of a factual or legal argument, the Commission finds the Staff's motion to strike has merit and should be granted. The furnishing of the questioned letter is an improper attempt to supplement the evidentiary record after it has been closed. As to the PGA tariff in question, the Staff's motion should be denied. The Commission is obligated to be aware of the contents of its own records and will be consider the PGA as hereinafter indicated.²

The Commission reiterated that approach in its November 18, 1993, *Report and Order in In the Matter of Missouri-American Water Company for authority to file tariffs reflecting increased rates for water service in the Missouri service area of the Company*, Case No. WR-93-212,³ as follows:

On October 5, 1993, after the submission of the reply briefs, the Industrial Intervenors filed a MOTION TO STRIKE PORTIONS OF THE MISSOURI-AMERICAN COMPANY'S REPLY BRIEF. Although the hearing has been completed it now appears that the parties continue to respond to each other and not

² Id. at 128.

³ 2 MPSC3d 446.

to the issues. As both the trier of fact and of law the Commissioners are charged with the responsibility to disregard information which does not constitute competent and substantial evidence. This applies to information which is admitted into the record just as forcefully as it applies to matters inadmissible. The fact that the Commission will discharge this duty without the necessity for prompting from the various parties does not remove the propriety and permissibility of objections under appropriate circumstances. Motions to strike briefs are not appropriate. Both the Federal Rules of Civil Procedure (12f) and the Missouri Rules of Civil Procedure (55.27) provide that a motion to strike may be directed at a pleading or at evidence before the jury, reply briefs are not included as pleadings or evidence to which a motion to strike may be directed. See [Hanraty v. Ostertag, 470 F.2d 1096, 1097 \(10th Cir. 1972\)](#) and [O'Connor v. State of Nevada, 507 F. Supp. 546, 548 \(D.Nev. 1981\)](#). The Industrial Intervenors' Motion To Strike shall be denied as a motion for which no relief may be granted. As with any evidence or argument offered, the Commission gives the material in question no more weight than it is due.⁴

8. As in the KCP&L cases, the report and order to which Ameren Missouri cites for support in its motion—the Commission’s February 13, 2001, Report and Order in *In the Matter of the Consideration of an Accounting Authority Order Designed to Accrue Infrastructure Replacement Costs for St. Louis County Water Company*, Case No. WO-98-223, involved citation to testimony from a different proceeding, and is inapposite here. In that same report and order the Commission said, “Company’s arguments, however, are unaffected. Arguments need not be supported with citations and, furthermore, Company has provided replacement citations to the record in this case.” *Id.* at p. 5.

9. What appear in Public Counsel’s initial brief are quotes from and cites to Commission report and orders in other cases, not evidence from those cases.

10. Moreover, because no one has requested the Commission to take notice of either the Commission’s August 31, 2000, Report and Order in Case No. WR-2000-281 or its December

⁴ *Id.* at 463-64.

8, 2022, Report and Order in ER-2022-0130, Ameren Missouri's straw argument that the Commission cannot take official notice of them fails.

11. While prior Commission decisions generally are not preclusive,⁵ they can be *persuasive*. Further, Commission decisions must not be arbitrary, capricious, or an abuse of the Commission's discretion.⁶

12. Although generally they are not binding, when advocating, Public Counsel is entitled to advance its arguments by referring to prior Commission decisions. It is also entitled to state the Commission's factual findings in those decisions, to bolster the weight of applying those decisions to the issues at hand. That is what Public Counsel did in its initial brief here.

Wherefore, the Office of Public Counsel prays the Commission to deny Ameren Missouri's motion to strike portions of Public Counsel's initial brief.

Respectfully,

/s/ Nathan Williams

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 29th day of May 2024.

/s/ Nathan Williams

⁵ [Spire Mo., Inc. v. Pub. Serv. Comm'n](#), 618 S.W.3d 225, 235 (Mo. 2021).

⁶ [Spire Mo., Inc. v. Pub. Serv. Comm'n](#), 618 S.W.3d 225, 235 (Mo. 2021).