

**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
SUBMISSION OF DISTRICT COURT MEMORANDUM AND ORDER**

COMES NOW the Office of Public Counsel (“Public Counsel”) and responds to Ameren Missouri’s submission of the **Memorandum and Order** Judge Rodney W. Sippel entered on June 14, 2024, in the case *United States of America and Sierra Club v. Ameren Missouri*, before the United States District Court for the Eastern District of Missouri, Eastern Division, docketed as Case No. 4:11-cv-00077-RWS that he ordered Ameren Missouri to submit to this Commission forthwith as follows:

Of particular import, on pages 16-22 of that **Memorandum and Order** Judge Sippel states:

Ameren's Representations to the Missouri Public Service Commission

In my liability order, I found that Ameren should have expected and did expect its modifications to increase and significantly improve unit availability. I also found that Ameren should have expected, and did expect, to use the increased availability to burn more coal, generate more electricity, and emit more SO₂ pollution. [*Ameren Missouri*, 229 F. Supp.3d at 915-916](#). As a result, I concluded that Ameren violated the PSD and Title V provisions of the CAA.

In my remedy order, I specifically concluded that "*a reasonable power plant operator* would have known that the modifications undertaken at Rush Island Units 1 and 2 would trigger PSD requirements. I have also concluded that *Ameren's failure to obtain PSD permits was not reasonable.*" [*Ameren Missouri*, 421 F. Supp. 3d at 794](#). (emphasis added). I reached that conclusion based my overall analysis of the case and on findings in my liability opinion, including that "Ameren's emissions calculations *are not reasonable analyses* under the PSD rules and therefore do not show that Ameren should not have expected an emissions increase;" "any qualitative analysis they did 'conduct' did not comply

with NSR requirements *and therefore was not reasonable under the law;*" and "[b]y limiting availability to 95%, Ameren failed to perform a reasonable analysis under the PSD rules." [*Ameren Missouri*, 229 F. Supp. 3d at 1010-14.](#)

In January of this year I read an article about Rush Island in the *Missouri Independent*.¹¹ The article addressed Ameren's securitization efforts before the Missouri Public Service Commission (MPSC) to recoup its investment at Rush Island based on its decision to retire that facility early. The article indicated that Ameren filed with the MPSC testimony from Ameren Missouri President Mark Birk in which he is quoted as stating that "Given the facts and circumstances as they existed at the time, no rational utility would have done anything differently with respect to Rush Island." That statement was directed at Ameren's decision not to seek permits for its major modifications at Rush Island.

On February 8, 2024, at a hearing in this matter regarding mitigation, I questioned Ameren's counsel about Mr. Birk's statement in the article. I reminded counsel that I specifically found that Ameren not only should have known, but actually knew its modifications triggered permit requirements of the CAA. I told counsel that if Mr. Birk's statement to the MPSC was correctly quoted his statement was not true as a matter of law. [ECF # 1283 at 19-21] To discover what statements about this case Ameren was making to the MPSC, I directed counsel to file with the Court any written materials that Ameren had presented to the MPSC concerning this case.

On March 14, 2024, Ameren filed the relevant materials it had submitted to the MPSC. Ameren's materials addressed the MPSC's inquiry into why Ameren had failed to obtain permits for its modifications at Rush Island. The materials showed that in August 2022, in response to the MPSC's inquiry, Mr. Birk testified, "we acted prudently because we made reasonable decisions in light of what we knew or should have known when we completed the projects in 2007 and 2010." [ECF # 1285-2 at 13] This representation is contradicted by the findings in this case that "*Ameren's failure to obtain PSD permits was not reasonable.*" [*421 F. Supp. 3d at 794*](#) (emphasis added). On November 21, 2023, Mr. Birk testified "[g]iven the facts and circumstances as they existed at the time, no rational utility would have done anything differently with respect to Rush Island." [ECF # 1285-3 at 8] That statement directly contradicts the factual finding, affirmed by the Eighth Circuit, that "*a reasonable power plant operator would have known that the modifications undertaken at Rush Island Units 1 and 2 would trigger PSD requirements.*" [*421 F. Supp. 3d at 794*](#). (emphasis added). As recently as March 2024, Mr. Birk testified "[w]e believe that permits were required only for projects that would increase potential

¹¹ Allison Kite, [Ameren Seeks To Shutter Missouri Coal Plant Early, Recoup Investment From Taxpayers](https://missouriindependent.com/2023/11/28/ameren-seeks-to-shutter-missouri-coal-plant-early-recoup-investment-from-ratepayers/), Mo. Independent (Nov. 28, 2023), <https://missouriindependent.com/2023/11/28/ameren-seeks-to-shutter-missouri-coal-plant-early-recoup-investment-from-ratepayers/> .

emissions from the unit, and none of the Rush Island projects were expected to increase potential emissions." [ECF # 1299-4 at 6] This testimony is in direct contradiction to my factual finding that Ameren "should have expected, and did expect, to use that increased availability (and for Unit 2, increased capacity) to burn more coal, generate more electricity, and emit more SO₂ pollution." [229 F. Supp. 3d at 915](#) (emphasis added). Mr. Birk also testified that "[s]everal years after the Rush Island Projects were completed, the courts told us that we were wrong about the law, and that the legal standards we applied to determine that the Rush Island Projects could proceed were not correct. But the courts did not find that our understanding of the law on either of those points was unreasonable at the time we made the relevant permitting decisions ..." [ECF # 1299-4 at 6] This representation is contradicted by my conclusion, as affirmed by the Eighth Circuit, that "*Ameren's failure to obtain PSD permits was not reasonable.*" [421 F. Supp. 3d at 794](#) (emphasis added).

On March 28, 2024, I held another mitigation status hearing. I asked Ameren's counsel why Ameren had represented to the MPSC that I had ruled that Ameren had violated the CAA but failed to tell the MPSC that I had found, as a matter of fact, that Ameren's should have known, and knew that its modifications would trigger the permit requirements of the CAA. I also reminded counsel that I had concluded that Ameren's failure to obtain PSD permits *was not reasonable*. To resolve this omission, I directed Ameren to file a copy of the hearing's transcript with the MPSC to correct the record of my rulings.

On April 10, 2024, Ameren filed notice with this Court that it had complied with my order and provided a copy of the transcript to the MPSC. What Ameren did not say was that Ameren's counsel submitted a memorandum to the MPSC along with the transcript in which Ameren conceded that I "found [Ameren] incorrectly, as a matter of law, concluded that it did not need NSR permits. But the District Court did not rule on ... the reasonableness of Ameren Missouri's decision at the time based on what it knew or reasonable should have known - and understood the law - to be." [ECF # 1299-1 at 2]¹² These representations are not correct. This memorandum undermined my direction to put the MPSC on notice that I had reached the factual determination that Ameren's decision not to get permits, based at the time what it knew or reasonably should have known, *was not a reasonable decision by a power plant operator*. Moreover, Ameren asserted in the memorandum that it "respectfully submits that the Court did not accurately remember the details of its factual findings. [] at no point in the liability ruling (or the remedy ruling) did the Court find that Ameren Missouri knew it would violate the Clean Air Act." *Id.* In my liability order and my remedy order I found that Ameren should have known, and knew, that its modifications would result in increased capacity and increased emissions that triggered permit requirements under the CAA. Similarly, I rejected

¹² For some unknown reason, Ameren included a footnote to its memorandum to the MPSC in which Ameren asserts it still has the right to relitigate the Otter Tail decision before the Eighth Circuit. [ECF # 1299-1 at 2]

Ameren's claims that the modifications were simply routine maintenance or that the increased emissions were simply the result of demand growth. I found that a reasonable power plan[t] operator would have known that the Rush Island modifications would trigger PSD requirements and that Ameren's failure to obtain PSD requirements was not reasonable. [229 F. Supp.3d at 916, 988, 997-998; 421 F. Supp.3d at 794.](#)

To correct Ameren's misrepresentations to the MPSC, I will order Ameren to submit a copy of this order to the MPSC. Ameren shall file a notice in this case of its compliance with my order. Ameren shall also file any memorandum it submits to the MPSC with this order. Ameren shall also file any other memorandum or testimony that it submits to the MPSC in the future that relates to my finding that Ameren should have known, and knew, its modifications triggered the permit requirements of the CAA and its decision not to do so was not a reasonable decision by a power plant operator.

[United States v. \[Ameren\] Missouri, No. 4:11 CV 77 RWS, 2024 U.S. Dist. LEXIS 106052 \(E.D. Mo. June 14, 2024\).](#)

Wherefore, Public Counsel responds to Ameren Missouri's submission of the **Memorandum and Order** Judge Rodney W. Sippel entered on June 14, 2024, in the case *United States of America and Sierra Club v. Ameren Missouri*, before the United States District Court for the Eastern District of Missouri, Eastern Division, docketed as Case No. 4:11-cv-00077-RWS, as set forth above.

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 18th day of June 2024.

/s/ Nathan Williams