BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Construct a Wind Generation Facility.	)))))	File No. EA-2018-0202

AMEREN MISSOURI'S INITIAL POST-HEARING BRIEF

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or the "Company"), and for its Initial Post-Hearing Brief, states as follows:

THE ISSUE

The matter remaining for decision in this docket is a purely legal issue that must be determined by the Commission as a matter of law. In resolving that legal issue, the Commission must follow principles of statutory interpretation laid down by Missouri appellate courts. That legal issue is as follows:

> *Does Ameren Missouri's election under Section 393.1400.5, RSMo, on September 1, 2018, which under Section 393.1400.2 requires that 85% of depreciation expense and return on the High Prairie project be deferred to a regulatory asset preclude the inclusion of 15% of said depreciation and return in Ameren Missouri's RESRAM?*

THE FACTS

Instead of reciting a detailed procedural and factual history that led to approval of a RESRAM and more specifically, the litigation on this narrow issue, the Company will confine itself to a brief recitation of only the key facts that bear directly on the legal issue to be resolved in this case.

- The Office of the Public Counsel ("OPC") concedes that the statute at issue, § 393.1400 (the "PISA" statute), is clear and unambiguous: "[the] clear statutory

directive ... [referring to subdivision (3) of subsection 1 and to subdivision (1) of subsection 2 of § 393.1400] is to defer 85%"[1]; "our argument is follow the plain reading of the [PISA] statute"[2]

- OPC concedes that S.B. 564[3] did not amend Missouri's Renewable Energy Standard (the "RES"), § 393.1030.[4]
- OPC concedes that the RES was not repealed by S.B. 564.[5]
- OPC concedes that return and depreciation on a wind facility used for RES compliance is a RES compliance cost under the rider (i.e., the RESRAM) mandated by the provisions of subdivision (4) of subsection 2 of § 393.1030,[6] and further concedes that had Ameren Missouri not made its PISA election, 100% of the return and depreciation would be included in the RESRAM.[7]
- All parties agree that S.B. 564 is now the law and that, relevant to the issue at bar, once Ameren Missouri made its PISA election two key obligations arose, as follows: (1) Ameren Missouri must defer 85% of the return and depreciation on all "qualifying electric plant" [including wind farms used for RES compliance] to the PISA regulatory asset, and (2) the Commission must include the regulatory asset balance (divided by 20) through an amortization in the Company's revenue requirement without consideration of any other factor.

[1] OPC's Position Statement, p. 2.
[2] Tr., Vol. 3, p. 45, ll. 8-9.
[3] 2018 Mo. Legis. Serv. S.B. 564 (Vernon's) (West No. 40).
[4] Tr., p. 53, ll. 11-13.
[5] *Id.* p. 45, ll. 6-7.
[6] *Id.* p. 54, l. 23 to p. 55, l. 7.
[7] *Id.* p. 56, ll. 13-18.

- All agree that under the RESRAM the Commission has approved, 100% of the RES compliance benefits will be passed back to customers either through the RESRAM or, in the case of market benefits which are already reflected in the fuel adjustment clause ("FAC"), through the FAC.[8] Moreover, the Company proposed from the inception of the case, and the Commission approved as part of approving the Third Stipulation and Agreement that resolved the certificate of convenience and necessity portion of this case, that the Company would not keep 5% of those market benefits via the sharing mechanism in the FAC.[9]
- OPC chose to inject this issue into this case via the testimony of Dr. Geoff Marke who relied upon earlier but unenacted versions of S.B. 564 and companion legislation in the Missouri House of Representatives.[10]

ARGUMENT

1. The Plain language of the applicable statute requires that OPC's argument be rejected.

Resolution of the legal issue in this case requires the Commission to apply the applicable law.[11] Under Missouri law, when the statute at issue is unambiguous, as here, it is to be interpreted solely based on the plain language of the statute at issue. *See, e.g., Spudich v. Dir. of Revenue,* 745 S.W.2d 677, 680 (Mo. 1988). Consequently, extrinsic evidence cannot be relied upon to interpret such a statute. Therefore, the Commission cannot consider Dr. Marke's suppositions about what the General Assembly intended (or Mr. Byrne's statements in response),

[8] Third Stipulation and Agreement, Appendix B or C (EFIS Item No. 92).
[9] Ex. 119, Wills Direct, p. 39, l. 6 to p. 40, l. 19.
[10] Ex. 123, Marke Rebuttal.
[11] Statutory interpretation is a question of law. *Conseco Fin. Servicing Corp. v. Mo. Dep't of Revenue,* 98 S.W.3d 540, 542 (Mo. *banc* 2003).

nor can the Commission consider prior and unenacted versions of S.B. 564 or any other draft bill.

The plain language of § 393.1400.2(1) mandates deferral "to a regulatory asset [of] eighty-five percent of all depreciation expense and return associated with all qualifying electric plant …." And just as plainly, a wind facility used for RES compliance constitutes "qualifying electric plant" under § 393.1400.1(3). The plain language of § 393.1030.2(4) requires that the Commission adopt a rule that provides for a rider (the RESRAM) for RES compliance costs and benefits. The Commission discharged its statutory duty and adopted such a rule when it created the RESRAM mechanism in 4 CSR 240-20.100(6). Notably, under that rule, RESRAMs are to be rebased in each rate case,[12] meaning that under the statute mandating the RESRAM and the RESRAM rule, it was and remains necessarily implied, without the statute explicitly so stating, that a RESRAM will of course only include RES compliance costs or benefits that *are not included in some other mechanism.* It was not before S.B. 564 was adopted (and is not now) the case that every dollar of RES compliance costs and benefits had to be included only in a RESRAM. As the Commission well knows, this is exactly how other statutory riders, like the FAC, work. Conceptually then, the fact that 85% of the return and depreciation on a given RES compliance asset is deferred to the PISA regulatory asset while the remaining 15% is included in the RESRAM makes perfect sense and implements both statutes per their plain and unambiguous terms, as written.

OPC clearly agrees that there can be alternative means of recovering RES compliance costs (and passing-back RES compliance benefits) apart from the rider required by § 393.1030.2(4) given that the RESRAM OPC agreed to in this case specifically excludes certain

[12] 4 CSR 240-20.100(6)13.

RES compliance costs from the RESRAM.[13] The bottom line is that S.B. 564's mandate that a certain percentage of some RES compliance costs (return and depreciation) is to be recovered apart from the statutorily-required rider has nothing to do with whether other RES compliance costs (i.e., the 15% of return/depreciation not subject to S.B. 564's mandate) can be included in the rider, just as it has always been the case that some RES compliance costs could be recovered through the rider and some via other means of cost recovery.

2. S.B. 564 did not appeal or amend § 393.1030.2(4).

The *only* way that OPC's position could prevail in this case would have been if S.B. 564 amended or repealed § 393.1030.2(4), but it didn't for several reasons. First and foremost, even OPC concedes that § 393.1030.2(4) was not repealed or amended, as indicated in the facts outlined above. Second, Missouri law does not allow the General Assembly to appeal or amend a statute by implication. *LeSage v. Dirt Cheap Cigarettes and Beer, Inc.*, 102 S.W.3d 1, 4 (Mo. *banc* 2003) ("Where the legislature amended a statute, it *must do so explicitly.* 'Amendments by implication are not favored.' *Fisher v. Waste Mgmt. of Missouri,* 58 S.W.3d 523, 525 (Mo. banc 2001)."); *Sours v. State,* 603 S.W.2d 592, 599 (Mo. *banc* 1980) (citing Mo. Const. Art 3, § 28, and stating (when rejecting the argument that it should construe a second statute as having amended several other statutes even though the second statute did not explicitly say so) that "We note that we are not free to construe the armed criminal action statute as a mere punishment-enhancement statute which *amends by implication* numerous felony statutes, because Mo. Const. art. III, s. 28 prohibits the General Assembly from amending statutes *without setting forth in full*

[13] The Commission-approved RESRAM agreed to by OPC states: "The RES costs and benefits subject to inclusion in this rider are costs incurred related to new RES investments placed into service or RES compliance activities initiated on or after the effective date of Mo. P.S.C. Schedule No. 6 Original Sheet No. 93." This necessarily excludes RES compliance costs arising from the Company's pre-January 1, 2019 RES compliance activities.

the statutes so amended" (emphasis added)). Notably, the enacting clause of S.B. 564 expressly contained the list of statutes that it did amend, and in each case set forth those statutes in full and then showed, as the Constitution requires, the insertions and deletions being made. S.B. 564 makes no mention of amending § 393.1030 nor was the statute set forth in the bill and amended.[14]

3. The "notwithstanding" language in S.B. 564 has no impact on § 393.1030.2(4) and certainly has nothing to do with recovery of the remaining 15% via a RESRAM.

OPC seems to recognize that its argument depends on an amendment to § 393.1030.2(4) that did not take place and thus attempts to avoid claiming an amendment by implication. Instead, OPC at least implicitly claims that the RESRAM statute has been explicitly changed by S.B. 564, as evidenced by its Position Statement, which says: "This operative deferral statute was enacted 'notwithstanding any other provision of [Chapter 393] to the contrary,' and thus *explicitly* excluded the recovery mechanism for Missouri's renewable energy standard under Section 393.1030, RSMo" (emphasis added). But that statement is simply not true. To "explicitly exclude"; to rip the 15% of the return and depreciation not included in the PISA regulatory asset from the RESRAM, the RES statute says the Commission must provide, would have required the General Assembly to *explicitly* say so. The General Assembly would have needed to have said something like "the 15% of return/depreciation not deferred under this subsection shall not be included in a rider authorized by § 393.1030.2(4)."

[14] The enacting clause of S.B. 564 reads in its entirety as follows: "BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, AS FOLLOWS: Section A. Sections 386.266, 386.390, and 393.170, RSMo, are repealed and twelve new sections enacted in lieu thereof, to be known as sections 386.266, 386.390, 393.137, 393.170, 393.1400, 393.1610, 393.1640, 393.1650, 393.1655, 393.1665, 393.1670, and 1, to read as follows: . . . " [§ 393.1030 is clearly not among the statutes amended].

Regardless, OPC argues that the "notwithstanding" (i.e., in spite of) language in § 393.1400.2(1) means that "in spite of" the RESRAM statute you don't include any depreciation and return on a RES compliance asset in the RESRAM but instead you include just 85% of it in the PISA regulatory asset. But a close examination of this contention shows that it is fatally flawed.

There is no question but that § 393.1400.2(1) mandates that 85% of the return and depreciation be deferred to the PISA regulatory asset. And there is no question that as with every single other deferral mechanism or rider that has ever been utilized in Missouri, a utility can't both defer certain dollars into a deferral mechanism and then turn right around and recover those same dollars in a different mechanism, here, a rider. As explained above, the mandate in § 393.1030.2(4) that the Commission create a RES compliance cost/benefit rider from the inception of that statute always had to mean that the rider would only cover RES compliance costs/benefits *not* being recovered elsewhere. Understanding that key legal principle, the "notwithstanding" language in § 393.1400.2(1) doesn't in any way "operate on" or "trump" § 393.1030.2(4). Put another way, had the notwithstanding language not been included in S.B. 564 at all, *exactly* the same result would have obtained: 85% of the return and depreciation would have been deferred to the PISA regulatory asset because there is no question but that such a deferral is mandated by S.B. 564, and that 85% could not also have been included in a RESRAM because the law was always that a utility can't recover the same cost twice. The "notwithstanding" language in S.B. 564 is simply not needed to avoid a conflict with 393.1030.2(4) because there is not, and never was, a conflict to begin with. This is made even more clear when one considers (as OPC concedes[15]) that 393.1030.2(4) does not itself create the

[15] Tr. p. 55, ll. 14-16,

rider, but instead, directs the Commission to create the rider by rule. For OPC's theory to hold water would have required that S.B. 564 have said "notwithstanding anything to the contrary *in the commission's rules*."

But imagine for argument's sake that somehow the notwithstanding language was needed to make sure that a utility could not double-dip and both defer the 85% to the PISA regulatory asset and then include that same 85% in a RESRAM. Even if that were the case, so what? We say "so what" because even if that were true (it is not), the notwithstanding language would still have had no impact on § 393.1030.2(4)'s requirement that the Commission adopt a rider by rule to allow for recovery of *otherwise unrecovered* RES compliance costs (and pass-back of benefits). Put another way, § 393.1400.2(1) does not speak to or affect the other 15% in any way, and it is the other 15% and the other 15% alone that is at issue here.

The "notwithstanding" language exists to ensure that if the mandate to defer 85% and to include the deferral in rates conflicts with another statute in Chapter 393, S.B. 564's mandate will control, and there is such a conflict: § 393.270's prohibition on single-issue ratemaking, which is clearly trumped by the PISA statute.[16]

Interpreting § 393.1400.2(1) in a manner that would impact the 15% would also lead to a nonsensical and absurd result, as Staff counsel pointed out during oral argument. This is because it makes no sense that a utility electing PISA, that consequently must *wait* until the conclusion of its next rate case to start recovering 85% of the capital costs on a RES compliance asset, would ultimately recover less than one hundred percent of its total RES compliance costs while a utility that only uses a RESRAM to recover RES compliance costs – and thus recovers them *immediately* – recovers 100% of its RES compliance costs. Both utilities were mandated to

[16] There could be other conflicts with other provisions of Chapter 393 but, as noted, § 393.1030.2(4) isn't one of them.

comply with the RES and the RES contemplates that through a combination of rate cases and a rider utilities are to receive 100% RES compliance cost recovery and are to pass-back 100% of the RES compliance benefits. But under OPC's construct, we end up with the nonsensical and absurd result that the utility only recovers 85% of the RES compliance costs between rate cases but passes back 100% of the RES compliance benefits.

OPC itself seems confused by what S.B. 564 did or did not do. On the one hand, OPC argues that the "notwithstanding" language does refer to § 393.1030.2(4); i.e., OPC's in spite of argument is that "in spite of §393.1030.2(4)" the 85% goes into the PISA regulatory asset and cannot go into the RESRAM.[17] We already explained why OPC is wrong on that point, but that is its argument. But then OPC turns around and points to two explicit references to the "rate adjustment mechanism under section 393.1030" (i.e., § 393.1030.2(4)) and tells the Commission that those references show that the legislature "knew how to cite to the RES" and that the legislature "chose not to cite to it in the operative PISA statute."[18] Well, which is it? Did the "notwithstanding" language in the "operative PISA statute" mean §393.1030.2(4) was inconsistent with the mandate in the PISA statute to defer the 85% to the PISA regulatory asset such that the PISA statute effectively is to be read "notwithstanding §393.1030.2(4) . . . 85% shall be deferred," or did the legislature "not cite to" § 393.1030.2(4)? It can't be both, yet OPC's argument logically indicates that it was both. To repeat: the "notwithstanding" language has nothing to do with § 393.1030.2(4) because that statute always necessarily meant that if a RES compliance cost was being recovered elsewhere it could not also be in the RES rider – the RESRAM (and because the rider is created by Commission rule in any event) – but even if it did

[17] Discussed by OPC's counsel at p. 47, ll. 7-11 of the Transcript.
[18] Tr. p. 48, ll. 15-17.

have something to do with it, it would only impact the 85% and would in no way speak to, or disturb, inclusion of the 15% in the RESRAM.

4. OPC's reliance on earlier, unenacted versions of S.B. 564 or unenacted companion bills is misplaced for an additional reason.

One last legal point must be made given the lack of ambiguity in the statute at issue. OPC offered as exhibits (and the Presiding Officer admitted) copies of unenacted earlier versions of S.B. 564 and of unenacted companion bills. OPC points to these materials as evidence of what OPC claims to be the General Assembly's intent when it adopted S.B. 564 and despite the lack of ambiguity, asks the Commission to rely on them. Given that lack of ambiguity and the legal prohibition on considering anything other than the four corners of the statute when the statute is unambiguous, the undersigned counsel objected to their admission. OPC's counsel indicated that the objection was "shocking," citing to what OPC's counsel indicated was a "seminal" 1930 decision involving the Commission and the City of Columbia.[19] OPC counsel's "shock" is clearly grounded in a misreading of the law, including specifically, a misreading of the cited case.

It is a virtual certainty that the decision to which OPC's counsel pointed is the Missouri Supreme Court's opinion in *City of Columbia v. State Public Service Commission,* 43 S.W.2d 813 (Mo. 1931). Ameren Missouri agrees that the *City of Columbia* case is an important case because it established once and for all that despite certain language in the Public Service Commission Law ("PSC Law") (specifically, the original version of § 393.110[20]) that could be argued to allow the Commission to regulate and set rates for municipally-owned utilities, the Commission in fact has no jurisdiction over municipally-owned utilities.

[19] Tr. p. 63, ll. 14-23.
[20] Formerly §5188, Rev. Stat. (1929).

But the case does not stand for the proposition OPC's counsel argues it does. Consequently, it provides absolutely no support for OPC's reliance on earlier, unenacted versions of S.B. 564 and companion bills in the House of Representatives to determine the intention of the General Assembly in adopting S.B. 564. Indeed, *City of Columbia* has absolutely nothing to do with the question of whether *earlier, unenacted* bill versions can be relied upon to determine the intent of the General Assembly when it passed a bill, as the Supreme Court's opinion in that case makes clear.

The question in *City of Columbia* was whether language in the original, enacted version of § 393.110, which referred to "municipalities," gave the Commission jurisdiction over municipally-owned utilities. Five arguments were advanced by the City against Commission jurisdiction, including the City's fifth argument that the title of the act that enacted the PSC Law was too narrow for the Law to apply to municipal utilities and that, therefore, a Court determination that the Commission could regulate a municipally-owned utility would necessarily mean that the PSC Law was enacted in violation of the Constitution, specifically, then section 28 of article 4 of the Missouri Constitution. *Id.* at 815.[21] Section 28, article 4 provided that "no bill, except general appropriation bills, shall contain more than one subject, which shall be clearly expressed in its title." But the title of the bill that enacted the PSC Law referred only to regulation of "public service corporations, persons, and public utilities," omitting any mention of municipal utilities. The Court framed the argument the City was making as follows: "Fifth, if it be said that the Public Service Commission Act contemplates supervision of municipally owned electric light plants, then such a provision of the Act is unconstitutional in that it is in violation of section 28, article 4 of the Constitution of Missouri, providing that no bill shall contain more

[21] A similar constitutional provision is in place today. *See* Mo. Const. art III, § 23.

than one subject which shall be clearly expressed in its title." *Id.* Having framed-up the argument, the Court then decided the case solely on the basis of the fifth argument: "If the fifth reason above assigned by respondent [the City] is sound, it is *dispositive of this case*, and it will be *unnecessary for us to determine whether the wording of the act itself, with the rule of interpretation noted above, confers jurisdiction . . .*" (emphasis added). *Id.*

In answering the dispositive question, the Court *did not examine the language of prior unenacted versions of the bill that was ultimately passed.* To the contrary, it only examined the title of the bill that *was passed* as well as the words in the statute that *was enacted* by that bill (applied to the case at bar, what the Court did would be analogous to the Commission here examining the title of *S.B. 564* and examining the statutes *enacted by* S.B. 564, which of course it is free to do). In doing so, the Court determined that the General Assembly did not intend for the Commission to have jurisdiction over municipally-owned utilities because while mentioning several other entities, the title made no mention of municipalities. The Court stated: "a title that omitted one subject [municipalities] would not be a 'fair forecast of the contents of the bill,'[22] if any of such contents undertook to regulate and control the omitted subject [municipalities], and such is the status of the act now under consideration [the PSC Law]. Such a title is obviously misleading and violative of the constitutional provision here invoked." *Id.* at 816. Though not expressly stated, given the well-established principle that the courts will interpret a statute to avoid invalidating it if possible,[23] the Supreme Court then concluded that municipally-owned utilities were not under the jurisdiction of the Commission: "For the reasons above stated, we are

[22] Applicable case law held that the constitutional provision at issue required the title provide such a fair forecast.
[23] *See, e.g., State ex rel. Union Elect. Co. v. Pub. Serv. Comm'n,* 399 S.W.2d 467, 481-82 (Mo. App. W.D. 2013) (*citing Simpson v. Kilcher,* 749 S.W.2d 386, 290 (Mo. *banc* 1988), stating the rule that an overriding rule of statutory construction is to construe legislative enactments to render them constitutional when possible).

constrained to hold that the power to fix rates [for municipally-owned utilities] has not been validly conferred upon . . . [the Commission]." *Id.* at 817.

The takeaway is that given the lack of ambiguity in S.B. 564, the Commission cannot consider these prior, unenacted bills and OPC's counsel's suggestion that *City of Columbia* allows the Commission to do so is simply wrong.

5. Even if the statute were ambiguous, OPC's argument fails.

As addressed during oral argument, the procedural posture by which the purely legal issue now before the Commission arose is via opinion (lay opinion at that) testimony from OPC giving Dr. Marke's interpretive perspective on what S.B. 564 means based on earlier unenacted versions of S.B. 564 and companion House bills. Perhaps the proper procedure would have been for the Company and the Staff to move to strike Dr. Marke's testimony as being incompetent as a matter of law (in offering opinion testimony on a purely legal issue; in offering "legislative history" when the statute is unambiguous), but the Company and the Staff chose not to preclude its admission given the Commission's history of rather liberally admitting testimony into the record.[24] Moreover, as is the case in any settlement, compromise is necessary and one of the terms agreed upon in order to gain OPC's support for the Third Stipulation and Agreement was that the testimony on this issue would be admitted and that OPC would be "given its day in court." As outlined during the hearing, therefore a hearing (beyond just an oral argument) became necessary or potentially necessary because with that testimony in the record, cross-examination (at least based on possible questions from the bench) may have been necessary. Regardless, none of the testimony on this issue, nor the exhibits showing what OPC claims is

[24] The Presiding Officer's admission of Exhibits 127 and 128 over Ameren Missouri's objection suggests that an attempt to preclude admission of the testimony would have failed in any event.

relevant legislative history that informs what the General Assembly intended, support OPC's argument.

As Commissioner Hall's questioning of the undersigned counsel suggested, Missouri has no official legislative history of the type seen in the federal system (a record of floor debates, etc.) and what history it has isn't very impactful. That is not to say, however, that an earlier version of a bill cannot be looked at by the courts when an *ambiguous* statute must be interpreted, but such evidence is not very persuasive. *See, e.g., Butler v. Mitchell-Hugeback,* 895 S.W.2d 15, 19 (Mo. *banc* 1995), where a plaintiff seeking damages from a contractor for a warehouse collapse claimed that removal of the word "knowingly" in an earlier unenacted version of a bill that ultimately enacted a 10-year statute of limitation on such a claim meant that the legislature intended to remove any culpability requirement for such claims. The Supreme Court rejected the conclusion that this "legislative history" established any such intent, stating "[w]ords may be deleted for many reasons, including because they are considered redundant, confusing, or erroneous. Because it is speculative why the house of representatives deleted the word 'knowingly' from the bill in question, reliance on such legislative history to construe the statute is not highly persuasive." *Accord Page v. Scavuzzo,* 412 S.W.3d 263, 268 (Mo. App. W.D. 2013). *See also Missouri Roundtable for Life, Inc. v. State,* 396 S.W.3d 348, 354 (Mo. *banc* 2013) ("It is true that it is often difficult to tell what the General Assembly would have done simply by looking at the legislative history of a given bill. And it is nearly impossible in most situations to tell why a given legislator voted, or did not vote, on a particular bill.").

Regardless, even OPC doesn't place primary reliance on these earlier unenacted versions of the bill. "[O]ur main argument is just reading the text."[25] And most and perhaps all the

[25] Tr. p. 49, ll. 19-20.

debate about the propriety of relying on earlier bill versions and the persuasiveness (or lack of it) of doing so is a red-herring in any event. *All* the large stack of paper formed by OPC Exhibits 127 and 128 show is that different legislators offered bills that would have mandated the deferral to the PISA regulatory asset of different percentages of return and depreciation on qualifying electric plant. None of those unenacted bill versions sought to amend § 393.1030.2(4). Aside from OPC's "in spite of" argument, which is equally flawed when applied to all those unenacted bill versions (as it is when applied to S.B. 564, as earlier discussed), OPC doesn't even argue that the PISA provisions of these unenacted bills referred to or amended § 393.1030.2(4). None of these unenacted bills say anything about the remaining 15%.

Dr. Marke's testimony reflects OPC's apparent recognition that a lot more would be needed to sustain its argument than pointing to these unenacted bills, as evidenced by Dr. Marke's two (flawed) policy arguments. Dr. Marke's first flawed policy argument is to claim that if Ameren Missouri is allowed to recover 100% of its RES compliance costs by including 85% of the return/depreciation in the PISA regulatory asset and the other 15% in a RESRAM, then Ameren Missouri will have "had it both ways."[26] To the contrary, Ameren Missouri will have had it the one way provided for the applicable statutes: recovery of not a penny more or less than 100% of its RES compliance costs and return of not a penny more or less than 100% of the RES compliance benefits. It is OPC that would have had it both ways if its position were to prevail: customers would get all the benefits but avoid 15% of the costs in question.

Dr. Marke's second flawed policy argument is that allowing that part of the return and depreciation not recorded to the PISA regulatory asset to be recovered in a RESRAM would "create inaccurate price signals."[27] That claim is irrelevant to what S.B. 564 means and, in any

[26] Ex. 123, Marke Rebuttal, p. 11, ll. 14-15.
[27] *Id.*, p. 14, ll. 8-9.

event, is simply wrong for two reasons. First (and aside from the fact that nothing in § 393.1030.2(4) indicates that sending a good price signal is required or even intended by the RES), OPC's approach, by this standard, sends an *even worse* price signal because the RESRAM will be understated even more since *none* of the return/depreciation will be included.[28] Second, with or without S.B. 564, the minute RES compliance costs are included in rate base when a RESRAM is rebased in each rate case, there is essentially no chance at all that customers paying a charge (or receiving a credit) under a RESRAM will receive an accurate price signal of the full cost of RES compliance since some portion of the RES compliance costs will lose transparency since they will be included in the revenue requirement used to set the base rates they are paying.[29]

Not only is Dr. Marke's "price signal" argument simply wrong for those reasons, but it is also simply wrong for another reason that demonstrates the inherent unfairness of OPC's position.

Under the RESRAM that all parties, including OPC, agree should be adopted in this docket, 100% of the very significant federal Production Tax Credit ("PTC") benefits to be received from energy production from the High Prairie project (approximately $400 million over 10 years[30]) will offset the RES compliance costs included in the RESRAM between rate cases. Yet, if OPC were right, less than 100% of the RES compliance costs will be included in those same RESRAM rates (whether a net charge or a net credit). Consequently, the RESRAM charge/credit will inaccurately understate the net REC compliance costs (or overstate the net benefits); i.e., the price signal will be inaccurate. Moreover, as earlier noted, customers would unfairly be receiving 100% of the benefit while paying just 85% of the capital costs. This is an illogical, unfair, and absurd result,

[28] Ex. 120, Wills Surrebuttal, p. 5, l. 9 to p. 6, l. 4.
[29] *Id.*
[30] Ex, 100, Arora Direct, p. 3, ll. 19-21; Ex. 120, Wills Surrebuttal, p. 3, l. 4 to p. 4, l. 6.

and further demonstrates that Dr. Marke's "interpretation" of S.B. 564 (even if it could properly be considered) runs directly counter to basic principles of statutory interpretation.[31]

6. SB 564 Reaffirms the Full Effectiveness of the RESRAM.

Apart from the many reasons outlined above that require the Commission to rule in the Company's and Staff's favor on the issue at bar, is the fact that S.B. 564 in fact completely reaffirms the full effectiveness of the RESRAM for RES compliance costs/benefits not reflected in another mechanism. This is shown by two statutory provisions within S.B. 564, § 393.1400 (PISA) and Section 393.1655 (the rate moratorium/rate cap provision). Subsections 3 and 4 of § 393.1655 impose rate caps on an electric utility electing to use PISA. Subsection 5 of § 393.1655 prevents rate riders approved under § 393.266 (a fuel adjustment clause, an environmental cost recovery mechanism, a conservation mechanism) or under § 393.1030 (the RESRAM) from causing a utility to exceed the applicable cap. Subsection 5 provides that if the rate under one of those riders would cause the average overall rate to exceed the cap, the rate charged to customers under that rider must be reduced to a level so that the cap is not breached. If that happens, a pool of dollars (the rider rate reduction necessary to prevent the breach times the units) will be created and those dollars will get added to the PISA regulatory asset created by § 393.1400.

The very existence of these two sections tell us that the General Assembly knew that riders (including the RESRAM) could be in place and that customers could be paying charges reflecting rates under *both* the RESRAM and base rates reflecting amounts recorded to the PISA regulatory asset if the utility elected PISA and had a RESRAM. The fact that only 85% of return and

[31] As earlier noted, the plain language of S.B. 564 does not support Dr. Marke's argument, but even if there were ambiguity in the language in some respect, basic principles of statutory construction tell us that the statute should not be construed in a manner that leads to unreasonable, illogical, or absurd results. *See, e.g., Aquila Foreign Qualifications Corp. v. Dir. Of Revenue*, 362 S.W.3d 1, 4 (Mo. *banc* 2012). Accepting Dr. Marke's argument would do just that, in violation of those basic statutory interpretation principles.

depreciation on plant-in-service (including wind) additions can be deferred to the PISA regulatory asset doesn't speak at all to the operation of a RESRAM, except that of course it must be the case that a utility can't *both* recover that 85% of return and depreciation through an amortization of the PISA regulatory asset balance in base rates and then double-recover it again in the RESRAM.

CONCLUSION

OPC's entire position on the issue presented has been fatally flawed from its inception. The statute at issue is unambiguous, and thus must be construed per its plain terms, yet OPC attempts to rely upon extrinsic evidence of what it means from unenacted bills and using a lay opinion of what those unenacted versions tell us. OPC further wrongly claims that a "seminal" Supreme Court decision supports OPC's reliance on such extrinsic evidence, when a simple reading of the decision relied upon shows that it does no such thing. And even if the statute were ambiguous, neither the extrinsic evidence nor the flawed policy positions advanced by OPC support the argument OPC is making.

The answer to the question presented at the beginning of this brief is clearly "no," and the Commission should so rule and order that the Company submit as compliance tariffs the tariff sheets submitted at the inception of this case, except for the original RESRAM tariff sheets, which instead should be submitted on the terms reflected in Appendix B to the Third Stipulation and Agreement approved by the Commission.

Respectfully submitted,

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ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

Dated: November 13, 2018.

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing have been e-mailed or mailed, via first-class United States Mail, postage pre-paid, to counsel of record this 13th day of November, 2018.

/s/ James B. Lowery
James B. Lowery