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.	)))))	Case no. EA-2018-0202

PUBLIC COUNSEL'S APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel (OPC), by and through counsel, and files an Application for Rehearing pursuant to Section 386.500, RSMo. The Missouri Public Service Commission (Commission) should grant this request for a rehearing because the Commission's Report and Order is unlawful. The Commission should grant OPC's request and provide relief consistent with the arguments contained herein:

1. On December 12, 2018, the Commission issued its Report and Order in this case regarding the question of whether Ameren Missouri may account for depreciation expense and return within both a renewable energy standard rate adjustment mechanism (RESRAM) and a regulatory asset created through plant-in-service accounting (PISA). Both PISA and the RESRAM are interim rate mechanisms addressing costs traditionally lost to regulatory lag, such as depreciation expense and return. The RESRAM specifically secures all prudently incurred Renewable Energy Standard (RES) costs.[1] The PISA statute in question provides that:

> "*Notwithstanding any other provision of this chapter to the contrary*, electrical corporations shall defer to a regulatory asset *eighty-five percent of all depreciation expense and return associated with all qualifying electric plant* recorded to plant-in-service on the utility's books commencing on or after August 28, 2018, if the electrical corporation has made the election provided for by subsection 5 of this section by that date, or on the date such election is made if the election is made after August 28, 2018."[2]

[1] Section 393.1030.2(4) (2013); 4 CSR 240-20.100(1)(Q).
[2] Section 393.1400.2(1), RSMo (2018) (emphasis added).

The phrase "this chapter" refers to Chapter 393 of Missouri statutes where both the PISA and RES statutes are situated.[3] Despite this textual limitation of "eighty-five percent," the Commission ordered Ameren Missouri to recover the fifteen percent not addressed anywhere in statute through its RESRAM.

2. The Commission's Report and Order is unlawful because it enables Ameren Missouri to recover depreciation expense and return beyond explicit statutory limitations. The Commission is "purely a creature of statute", and therefore has powers only as far as those granted to it by legislative acts.[4] Such statutes are liberally interpreted in favor of the "public welfare."[5] However, no matter how liberal one views the statute at issue; the Commission cannot issue an order that ignores explicit text. The PISA statute limits recovery to "eight-five percent of all depreciation expense and return" notwithstanding "any other provision" of Chapter 393, including the RES' one hundred percent recovery guarantee of prudent RES costs.[6]

In response, the Commission states that the "notwithstanding" language does not apply because the "RES statute is not contrary to the PISA statute."[7] The RES statute is not contrary to the PISA statute when a utility utilizes one statute to the exclusion of the other. However, when a utility decides to mix-and-match two different statutory mechanisms to weaken consumer protections in both, there becomes an unavoidable conflict in law. One statute allowing for the recovery of one hundred percent of depreciation expense and return is necessarily contrary to a

[3] *Id.*; Sections 393.1020-1050, RSMo.
[4] *State ex rel. Utility Consumers Council v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979); *Pub. Serv. Comm'n v. Mo. Gas Energy*, 388 S.W.3d 221, 230 (Mo. Ct. App. 2012).
[5] *State ex rel. Laundry v. Pub. Serv. Comm'n*, 327 Mo. 93, 106, 34 S.W.2d 37, 41-43 (1931).
[6] Section 393.1400.
[7] *Report and Order*, Case No. EA-2018-0202 (Dec. 12, 2018).

later-in-time statute that secures instead eighty-five percent. The Commission has misapplied the law as written, and has thus acted unlawfully.

3. The Commission's Report and Order is also unlawful because it thwarts clear legislative intent. The Commission secures lawful action by effectuating legislative intent and state public policy.[8] The Commission correctly identifies legislative intent by turning to the legislative history of the PISA statute's passage and recognizing that "the eighty-five percent limitation on the utility's ability to defer costs is likely a legislative compromise intended to maintain some regulatory lag to protect ratepayer interests."[9] The Commission also observes that unlike "the RESRAM, which allows for an electric utility to immediately recover RES costs from its ratepayers through the RESRAM, the PISA statute does not allow for immediate recovery of depreciation expense and return."[10] However, the Commission's Report and Order contravenes legislative intent by unjustifiably eradicating PISA's remaining fifteen percent of regulatory lag without any statutory authority to so order. The Commission also fails to rationalize its view that the Missouri Legislature intended to divide RES costs and treat them differently absent language so clearly providing. There is no apparent justification for the immediate recovery of fifteen percent of depreciation expense while delaying the remaining eighty-five percent, and there is certainly no statute positively approving such treatment. If differing accounting were the Missouri Legislature's desired policy, such a result would be better drafted by amending the RES. Instead, the Legislature vociferously debated how much depreciation expense and return was to be recovered by utilities that elect PISA. The Commission's Report and Order has rendered the Missouri Legislature's actions meaningless.

[8] *State ex rel. Dalton v. Miles Laboratories*, 365 Mo. 350, 365, 282 S.W.2d 564, 573-74 (1955).
[9] *Report and Order*, Case No. EA-2018-0202 (Dec. 12, 2018).
[10] *Id.*

The Commission further undermines legislative intent by subverting the RES' one percent retail rate cap. Missouri's RES and associated RESRAM limit rate increases due to compliance costs to one percent based on the utility's cost of compliance.[11] By permitting electric utilities to split their depreciation expense and return between the RESRAM's one percent limitation and the higher 2.85 or three percent caps associated with PISA,[12] the Commission sets the precedent for the effective avoidance of the RESRAM's one percent cap. The Commission's Report and Order risks this result because nearly all of the costs that would be subject to the RESRAM's one percent boundary are instead measured under PISA's higher caps. Without an explicit statutory directive to undermine the RES' retail rate impact cap, the Commission cannot lawfully enable this behavior.

4. The Commission's Report and Order is additionally unlawful because the Commission read any ambiguity in the statute broadly in favor of the applying utility rather than narrowly with the public's interest at the forefront. When confronted with the PISA statute and its associated legislative history clearly signaling that some negligible amount of regulatory lag is to be preserved, the Commission responds that "the legislature could have written a provision into the PISA statute to forbid recovery of any portion of the fifteen percent by other means, but it did not do so."[13]

This analysis fails for three reasons. Firstly, the Legislature did indeed so write a provision into the PISA statute forbidding stacked recovery: the "notwithstanding" language making the PISA statute controlling over other statutes in Chapter 393.[14] Secondly, the Commission essentially endorses a view that an applicant's view prevails so long as a statute does not

[11] Section 393.1030.2, RSMo; 4 CSR 240-20.100(6)(A).
[12] Section 393.1655, RSMo.
[13] *Id.*
[14] Section 393.1400.2.

pedantically preclude every variant of a request. Ameren Missouri could have presumably requested for more than one hundred percent recovery under the Commission's reasoning. Thirdly, this reasoning impermissibly gives deference to Ameren Missouri's application for an interim rate mechanism contrary to the judicial history of interpreting mechanism statutes narrowly.[15] Missouri Courts have so narrowly construed rate mechanism provisions with a critical view of the private applicant's position because a "commission that attends only to these private requests puts the public interest on the sidelines."[16]

5. The Commission's Report and Order further compounds its unlawful nature by misapplying statutory canons of construction. The Commission is correct that a proper canon of statutory construction is to disfavor repeals or amendments by implication. However, this axiom is not at play when reading the PISA statute as no party to this case argued that the PISA statute repeals or modifies Missouri's RES by implication. Instead, the OPC plainly and repeatedly maintained that PISA is a distinct rate treatment option, separate and apart from other mechanisms that entail the same costs. Ameren Missouri knew of the possibility of recovering one hundred percent of regulatory lag associated with RES compliance through a RESRAM, but it chose to operate under a different statutory mechanism that prevails notwithstanding the RES' competing

[15] *See, e.g., Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Off. of Pub. Counsel*, 464 S.W.3d 520, (Mo. 2015) (admonishing the Commission for using an "expansive view of the definition of 'deteriorate'" when interpreting an infrastructure system replacement surcharge statute); *see also Pub. Serv. Comm'n v. Office of Pub. Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 839 (Mo. App. W.D. 2017) ("No party contests that the plastic mains and service lines were not in a worn out or deteriorated condition . . . This creates a challenge for Laclede because our Supreme Court has found this requirement to be mandatory and has interpreted it narrowly"); *State ex rel. Union Elec. Co.*, 399 S.W.3d 467, 492 (Mo. App. W.D. 2013) ("Ameren was not obligated to include a fuel adjustment clause in its tariff. It sought to do so. The *quid pro quo* for a fuel adjustment clause is its potential operation both to a utility's benefit and detriment").

[16] Scott Hempling, PRESIDE OR LEAD?: THE ATTRIBUTES AND ACTIONS OF EFFECTIVE REGULATORS 13 (2nd ed. 2013).

guarantees. The RESRAM and PISA are two separate tracks, and one cannot simultaneously ride in both carts and switch paths whenever consumer protections are seen as an obstruction.

WHEREFORE, the OPC requests that the Commission grant this application for rehearing to reconsider the Commission's Report and Order.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 21st day of December, 2018, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall