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 INITIAL POST-HEARING BRIEF

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COMES NOW the Office of the Public Counsel (OPC or Public Counsel), by and through counsel, and for its Initial Post-Hearing Brief states as follows:

I. Introduction

The only contested issue before the Public Service Commission (Commission) at this time is the legal permissibility of stacking 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). Alternatively, the question is whether the deferral of eighty-five percent of all depreciation expense and return through PISA excludes recovery of the remaining fifteen percent. The OPC requests that the Commission limit the RESRAM by not including any depreciation in accordance with statute.

Missouri's Renewable Energy Standard (RES) requires that electrical energy originate from renewable energy sources at staggered amounts, increasing until renewable energy composes at least fifteen percent of an electrical corporation's energy portfolio by 2021.[1] Following this renewable energy directive, on May 21, 2018, Union Electric Company, d/b/a Ameren Missouri (Ameren Missouri), applied for a Certificate of Convenience and Necessity (CCN) for the construction and operation of a wind energy facility. The High Prairie Wind Farm is projected to

[1] Section 393.1030, RSMo (2013).

produce 400 megawatts of energy, and Ameren Missouri is proposing to locate the facility in the northern Missouri counties of Schuyler and Adair. The CCN application also requests a RESRAM to recover the RES compliance costs from the wind energy facility. Ameren Missouri has also elected to utilize the newly created PISA deferral mechanism for the wind energy facility and other qualifying electric plants on September 1, 2018.[2] Accordingly, Ameren Missouri intends to place eighty-five percent of all depreciation expense and return into PISA, with the remainder flowing through the RESRAM.

After much deliberation, the OPC entered into a stipulation and agreement with Ameren Missouri and other parties on October 12, 2018.[3] This stipulation voices approval for Ameren's CCN, but carves out the argument as to the application of PISA in conjunction with RESRAM. That argument is whether Ameren Missouri gets to start recovering eighty-five or one hundred percent of its depreciation expense and return on a qualifying electric plant shortly after making the investment rather than recovering none of it until Ameren Missouri's next general electric rate case.

II. Legal Standard

Traditionally the CCN applicant bears the burden of proof to demonstrate that the CCN should be approved based upon the *Tartan* criteria.[4] However, no party to this case has objected to Ameren Missouri's satisfaction of any particular *Tartan* factor. To the contrary, Public Counsel is a signatory to the third stipulation agreeing that the *Tartan* factors have been satisfied. Instead

[2] Exhibit 126, *Notice*, Case No. EO-2019-0044 (Sept. 1, 2018).
[3] *Third Stipulation and Agreement*, Case No. EA-2018-0202 (Oct. 12, 2018).
[4] The *Tartan* factors for a CCN include 1) a need for the proposed service, 2) the applicant being qualified to provide the proposed service, 3) the applicant having the financial ability to provide the service, 4) the economic feasibility of the applicant's proposal, and 5) satisfactory promotion of the public interest via the proposed service. *In re Tartan Energy, Report and Order*, Case No. GA-94-127 (Sept. 16, 1994).

the only remaining issue is the concurrent application of legal instruments, PISA and RESRAM. Accordingly, as the applicant, Ameren Missouri must instead demonstrate that its proposed PISA treatment for depreciation expense and return is "just and reasonable" in light of its treatment of those same costs under the RES.[5] Ameren Missouri's request must be lawful and comport with the Commission's statutory authority.[6] For the reasons discussed below, Ameren Missouri's request fails this lawfulness standard.

III. Argument

Electing to defer and recover depreciation expense and return through PISA limits such recovery to eighty-five percent of all depreciation expense and return, and this limitation stands notwithstanding the recovery of all such sums through the RESRAM. This conclusion naturally flows from a plain reading of statute, and legislative history supports the deductions from a plain reading.

A. A Plain Reading of the PISA Statute Naturally Leads to the Exclusion of Depreciation Expense and Return Through a RESRAM When Depreciation is Collected Through PISA.

It is incumbent upon the Executive and Judiciary to "give effect to legislative intent as reflected in the plain language of the statute at issue" when implementing statute.[7] To the extent possible, legislative intent is to be effectuated by using the plain and ordinary meaning of statutory

[5] Section 393.150, RSMo (1967); "The burden of proof, meaning the obligation to establish the truth of the claim by the preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue." *Clapper v. Lakin*, 343 Mo. 710, 723, 123 S.W.2d 27, 33 (1938).
[6] *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. 2003); *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 477 (Mo. Ct. App. 2013); *Union Elec. Co. v. Pub. Serv. Comm'n*, 136 S.W.3d 146, 151 (Mo. Ct. App. 2004).
[7] *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. 2014) (quoting *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. 2009); *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. 1995); *Stiffelman v. Abrams*, 655 S.W.2d 522, 528 (Mo. 1983); *State v. White*, 622 S.W.2d 939, 944 (Mo. 1981) *cert. denied*, 456 U.S. 963 (1982).

text.[8] Every word in the text must be presumed to have meaning, and it should be understood that the "legislature did not insert superfluous language."[9] The two statutes directly implicated in this analysis are the operative statute of the RES,[10] and the newly enacted language authorizing PISA.[11]

The former statute directs the Commission to create rules necessary for the enforcement of the RES.[12] Such rules shall create a mechanism for the recovery outside a regular rate case of "prudently incurred costs" incurred to comply with RES.[13] The RESRAM was thus created by the Commission in furtherance of the RES. Depreciation expense and return accrued before a plant is recorded into base rates are considered RES compliance costs.[14] The RESRAM then collects the value that would otherwise be lost due to regulatory lag in between rate cases when new electric plants are then incorporated into base rates. With the only statutory qualifier on incurred RES costs being "prudently," it has been understood that all costs are to be recovered unless those costs are later found to be imprudent.[15]

The recovery of all costs is not so inferred from the latter mentioned PISA statute. PISA is another interim rate mechanism addressing the costs traditionally lost to regulatory lag by securing the otherwise foregone depreciation expense and return. Section 393.1400 authorizes PISA for a broad range of qualifying electric plant including:

> "[A]ll rate-base additions, except rate-base additions for new coal-fired generating units, new nuclear generating units, new natural gas units, or rate-base additions that increase revenues by allowing service to new customer premises;"[16]

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[8] *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (J. Scalia dissenting); *Butler*, 895 S.W.2d at 19.
[9] *Missouri American Water Co. v. Office of Pub. Counsel*, 2016 Mo. App. LEXIS 204, 22-23 (quoting *In Matter of Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 524-25 (Mo. 2015)).
[10] Section 393.1030, RSMo.
[11] Section 393.1400, RSMo (2018).
[12] Section 393.1030.2, RSMo.
[13] *Id.*
[14] 4 CSR 240-20.100(1)(Q).
[15] *See* Section 393.1030.2, RSMo.
[16] Section 393.1400.1(3), RSMo.

This definition of "qualifying electric plant" is noticeably broad, limited only by specific exceptions. PISA is available for a vast variety of rate base additions, including all rate base additions not specifically excluded. Renewable energy development is not excluded from PISA by either reference or inference. The PISA statute continues 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."[17]

The phrase "this chapter" refers to Chapter 393 of Missouri statutes where the PISA statute was housed by the Legislature.[18] Consider that the RES and its fraternal RESRAM likewise stem from Chapter 393.[19] This quoted subdivision of the PISA statute refers to "all" available depreciation expense and return for "all" qualifying electric plant, but does not address the remaining fifteen percent of depreciation accounted for from the whole. Nowhere else in Section 393.1400 is the fifteen percent referenced to, nor does any other provision of law that was enacted within PISA's originating legislation.[20] Instead, the PISA statute continues in a later subsection that the depreciation expense deferred under PISA shall "account for all qualifying electric plant placed into service" thereby preventing a qualifying facility from escaping PISA once an electrical corporation has so elected to use PISA.[21]

Read plainly, Section 393.1400 commands that notwithstanding the guaranteed recovery of all prudently incurred RES compliance costs otherwise provided for in Chapter 393, the

[17] Section 393.1400.2(1), RSMo (emphasis added).
[18] *Id.*
[19] Sections 393.1020-1050, RSMo.
[20] Exhibit 127, Mo. S.S. #5 S.B. 564 (5027S.11T), 99th Gen. Assem. (2018).
[21] Section 393.1400.3, RSMo.

recovery of depreciation expense and return shall be limited to eighty-five percent of the total. The Missouri Supreme Court's first case interpreting the RES is particular instructive in so reading Section 393.1400.

In *Earth Island Institute v. Union Electric Company*, Ameren Missouri failed to defend an unconstitutional addition to the RES exempting it from the RES portfolio requirements.[22] The Court explained that when "two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect."[23] The Court noted the conflict between the legislatively enacted Section 393.1050 and the other provisions of the RES created by voter referendum.[24] The conflict was because Section 393.1050 contained the language "notwithstanding any other provision of law,"[25] whereas the rest of the RES lacks such a guarantee.[26] The Court clearly instructed on how to read such statutory language so as to harmonize two statutes:

> "[W]ere this Court construing two legislatively adopted statutes to see which prevailed when their terms were inconsistent, the prefatory "notwithstanding any other provision of law" language in section 393.1050 would eliminate any potential conflict with the competing statute. As noted in [*State ex rel. City of Jennings v.] Riley*, "to say that a statute applies 'notwithstanding any other provision of the law' is to say that no other provisions of law can be held in conflict with it. ... the 'Notwithstanding' clause does not create a conflict, but eliminates the conflict that would have occurred in the absence of the clause." *236 S.W.3d at 632*."[27]

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[22] 456 S.W.3d 27, 34-35 (Mo. 2015).
[23] *Id.* at 33 (quoting *South Metro. Fire Prot. Dist. v. City of Lees's Summit*, 278 S.W.3d 659, 666 (Mo. 2009)).
[24] *Id.*
[25] *See* Section 393.1050, RSMo.
[26] The only comparable phrasing is found in subdivision (1) of subsection 2 of Section 393.1030, RSMo. However, the words "[n]otwithstanding the foregoing" and "[n]otwithstanding the any provision to the contrary in this section" do not go so far as to guarantee the RES or RESRAM despite any other law to the contrary. Rather, those phrases are only contained within a subdivision guaranteeing solar energy rebates regardless of the maximum retail rate impact cap of one percent.
[27] *Earth Island Inst.*, 456 S.W.3d at 33-34.

The Court continued:

> "[I]f the later-adopted statute contains the "notwithstanding any other provision of law" language, it clearly indicates an intent for that later-adopted statute to prevail to the extent that the two statutes are inconsistent. If the earlier-adopted statute contains the "notwithstanding any other provision of law" language, the legislature's decision to leave that language in place rather than repealing it at the time of the adoption of the later, partially inconsistent statute also indicates an intent that the earlier statute is to continue to be given effect to the extent that the two are inconsistent."[28]

PISA, having just been enacted by Senate Bill (SB) 564 this year, is the later-adopted statute containing "notwithstanding any other provision" language.[29] Aside from the "notwithstanding" verbiage contained in a now defunct Section 393.1050, no such guarantees exist in the earlier adopted RES. Both PISA and RESRAM address depreciation expense and return that is traditionally not counted for electric plants until they are put into base rates. As both RESRAM and PISA touch upon the same sums, a plain reading leads to an apparent inconsistency. Therefore, PISA must prevail to the extent there is a conflict with the RES and RESRAM.

Whereas the RESRAM allows recovery of all prudently incurred RES compliance costs, but PISA explicitly limits the recovery of depreciation expense and return to eighty-five percent of the whole, the recoupment of depreciation is thus limited by PISA and excluded from RESRAM. This is not to say that electrical corporations that elect to use PISA are then completely barred from using RESRAM, but rather that one subset of RES compliance costs, the depreciation expense and return on qualifying electric plant, that is addressed by PISA cannot then be stacked in a RESRAM. Plant-in-service accounting and the RES are thereby harmonized, as both exist in totality yet separately, and electrical corporations are still free to receive all depreciation expense and return through the RESRAM alone until they elect PISA.

[28] *Id.* at 34.
[29] Section 393.1400, RSMo.

If instead the remaining fifteen percent of all depreciation expense and return is recovered through a RESRAM, then the eighty-five percent demarcation becomes unnecessary verbiage as utility consumers pay for all depreciation expense and return regardless of the language of Section 393.1400. A reader must wonder why the eighty-five number was selected by the legislature if PISA was simply meant to serve as another collection vessel for regulatory lag that is already addressed by RESRAM. Especially since there is nothing within Section 393.1400, or SB 564 clearly securing the remaining fifteen percent.

Public Counsel offers that the "eighty-five percent" threshold represents a modest customer protection. By securing the eighty-five percent depreciation expense and return that a utility would normally not recover, coupled with a broad definition of "qualifying plant" PISA incentives electric companies to build such plants without the hardship of a rate case.[30] However, the remaining fifteen percent of regulatory lag not gained thus moderately insulates consumers, while also encouraging electric corporations to return to the Commission soon after construction in order start recovering all depreciation expense and return. Having electric utilities come before the Commission in other to forestall regulatory lag loss also protects consumers, by inviting a critical eye from stakeholders during the prudence review process.

One may attempt to justify the recapture of the missing fifteen percent through a RESRAM based on the PISA statute's silence as to the remainder of eighty-five, but such logic is extremely disfavored by Missouri and the United States' highest courts. When reading a statute, the Commission and courts simply lack the authority of adding text where none exists. Instead, we must interpret "the statutory language as written by the legislature."[31] It is also "at best treacherous

[30] *See id.*
[31] *Peters v. Wady Indus.*, 489 S.W.3d 784, 792 (Mo. 2016) (quoting *Frye v. Levy*, 440 S.W.3d 405, 424 (Mo. 2014)).

to find in congressional silence alone the adoption of a controlling rule of law."[32] There is no language in Section 393.1400, or elsewhere, directing electrical corporations to place the remaining fifteen percent of depreciation expense and return in any recovery mechanism, let alone RESRAM. The decision not to include such language cautions against allowing concurrent capture of depreciation through RESRAM and PISA because had the legislature intended to do so, "it could have inserted different language into the statute to effectuate that intent."[33]

To the contrary, Section 393.1400 additionally states that the balance of the expense and return collected through PISA shall be included in rate base at an electing electrical corporation's next general rate proceeding "without any offset, reduction, or *adjustment* based upon any other factor, other than as provided in subdivision (2) of this section" regarding the disallowance of imprudent costs.[34] This language clearly manifests that the legislature did not wish for the PISA balances to be used in concert with any adjustment such as a RESRAM. To deny that the "eighty-five percent" language is limiting is to in effect devalue the text and the Legislature's actions, and, absent statutory guidance to the contrary, we simply should not assume that an arrow can be simultaneously fired from two bows.

B. Concurrently Enacted Law in SB 564 Evidences a Legislative Intent to Not Allow the Stacking of RESRAM and PISA.

When performing a plain reading of the PISA statute it is also "appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light

[32] *NLRB v. Plasters' Local Union No. 79*, 404 U.S. 116, 129-30 (1971) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)).
[33] *Midstates Corp.*, 464 S.W.3d at 525; *see also Midlantic Nat'l Bank v. N.J. Dep't of Envt. Prot.*, 474 U.S. 494, 501 (1986) (concluding that if Congress had wished to exempt certain matters from bankruptcy law, then such an intent would be "clearly expressed") (citations omitted).
[34] Section 393.1400.2(1), RSMo (emphasis added).

upon the meaning of the statute being construed."[35] Accordingly, attention may be paid towards other provisions of law enacted by SB 564. Section 393.1655 was passed within SB 564 as a companion section for Section 393.1400. Section 393.1655 institutes rate increase caps for those utilities that elect to use PISA.[36] Section 393.1655 also contains two references to Missouri's RES. The first is the second subsection reading as follows:

> "Notwithstanding any other provision of law and except as otherwise provided for by this section, an electrical corporation's base rates shall be held constant for a period starting on the date new base rates were established in the electrical corporation's last general rate proceeding concluded prior to the date the electrical corporation gave notice under subsection 5 of section 393.1400 and ending on the third anniversary of that date, unless a force majeure event as determined by the commission occurs . . . This subsection shall not affect the electrical corporation's ability to adjust its nonbase rates during the three-year period provided for in this subsection as authorized by its commission-approved rate adjustment mechanisms arising under section 386.266, 393.1030, or 393.1075, or as authorized by any other rate adjustment mechanism authorized by law."[37]

Accordingly, if an electrical corporation elects PISA under Section 393.1400, then base rates shall be held constant, and that static nature shall not affect nonbase rates through various rate adjustment mechanisms such as RESRAM. This subsection could have been an opportune time for the Missouri Legislature to clearly state that PISA's operation with the rate caps was not to otherwise change costs flowing through the RESRAM, but instead, this "shall not affect" reference is overtly limited to subsection two of Section 393.1655, rather than implicating the entirety of Section 393.1400 where the "eighty-five percent" restriction resides.

The second instance of Section 393.1655 contemplating the RES is subsection five where electrical corporations are directed to reduce rates charged under the RESRAM if the RESRAM causes average overall rates to exceed the Section 393.1655 rate caps.[38] Again, there is no clear

[35] *Ivie*, 439 S.W.3d at 204 fn 16 (quoting *Cook Tractor Co. v. Dir. of Rev.*, 187 S.W.3d 870, 873 (Mo. 2006)).
[36] Section 393.1655, RSMo (2018).
[37] *Id.*
[38] *Id.*

directive that RESRAM is to envelop the remaining fifteen percent not covered by PISA. Instead, any money not recovered by the RESRAM due to a rate reduction under section five shall be "included in the regulatory asset arising under section 393.1400."[39] Rather than saying that depreciation expense and return may be split amongst a RESRAM and PISA, the Legislature openly identified that the RESRAM retail rate impact cap is included within the retail rate impact cap of PISA. Plant-in-service accounting may be used to collect costs not recovered through the RESRAM, but at no point is the reverse endorsed that a RESRAM may take on costs not ensnared by PISA.

Other sections of law within SB 564 also expressly implicate the RESRAM. Section 393.1665 requires various amounts of solar energy investments by electrical corporations based on their amount of customers served.[40] Included in subsection two therein is the sentence:

> "Carrying costs at the electrical corporation's weighted average cost of capital shall be added to the regulatory asset balance and the regulatory asset shall be recovered through rates set under section 393.150 or through *a rate adjustment mechanism under section 393.1030*, as soon as is practical."[41]

The same phrase "rate adjustment mechanism under section 393.1030" is also included within SB 564's reauthorization of solar energy rebates from the RES' enactment that were otherwise expended.[42] Since these two sections were drafted within the same bill that legislated PISA, it is obvious that the Missouri General Assembly knew how to clearly reference the RESRAM, but chose to not place any such reference within Section 393.1400. This choice should then be informative when reading the PISA statute. The position that RESRAM may cover the fifteen percent of sums not in PISA, would have far more logical basis if the words "rate adjustment

[39] *Id.*
[40] Section 393.1665, RSMo (2018).
[41] *Id.* (emphasis added).
[42] Section 393.1670, RSMo (2018).

mechanism under section 393.1030" were used within Section 393.1400 to so provide that flexibility for electric utilities. However, that is not the case, and since post hoc text cannot be added once a bill leaves the Governor's desk, positions that so rely on added language should be disregarded.[43]

C. Public Counsel's Conclusion from a Plain Reading is Buttressed by Legislative Intent as Made Apparent in Legislative History.

Although a plain reading of the PISA statute is sufficient to conclude that it controls over the depreciation expense and return that would otherwise apply in a RESRAM, legislative intent to bar the stacking of RESRAM and PISA is also made patently apparent from the history of SB 564's drafting. In some cases, legislative history may not be "highly persuasive" but this does not mean that the Commission should refuse to consider prior drafts of the PISA statute altogether.[44] In fact, Missouri case law is replete with considerations of prior legislative versions, and the courts have repeatedly endorsed the consideration of un-enacted bills in their opinions.[45] In the case of public utilities law, legislative drafting has played a unique part in Missouri's judicial decisions

[43] *Peters*, 489 S.W.3d at 792.
[44] *Contra Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. 1995).
[45] *See, e.g., Humane Soc'y of the United States v. State*, 405 S.W.3d 532, 534 (Mo. 2013) (comparing the titles of introduced and passed versions of bills); *see also United Pharm. Co. of Mo. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 911-12 (Mo. 2006) ("To discern legislative intent, the Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem the statute was enacted to remedy"); *Pollard v. Board of Police Comm'rs*, 665 S.W.2d 333, 337 (Mo. 1984) ("Even if a reader of the bare language might have some question as to the scope of the express preemption, the legislative history shows clearly that Congress did not intend the preemption language of § 453 to annul state little Hatch Acts, and other state laws, such as § 84.830, having similar incidence and purpose"); *Laughlin*, 432 S.W.2d at 312 ("The significance of this legislative history, particularly that beginning with the year 1921, is that it shows clearly a legislative intent to treat particularly with medical malpractice actions and fix a specific date when the statute of limitation shall begin to run against those actions, a date different from the date and time when the statute begins to run against other actions covered by what is now § 516.140"); *Missouri-American Water Co.*, 2016 Mo. App. LEXIS 204 at 24 ("Although we recognize that we do not resort to statutory interpretation where the language is plain and unambiguous, we find that the legislative history of section 1.100 supports and bolsters our finding as to the plain meaning of the statutory language"); *State ex rel. Union Elec. Co.*, 399 S.W.3d at 481 ("Thus, before we resort to dictionary and industry definitions to determine the meaning of terms not defined in the Ameren tariff, we must first appreciate the constraints imposed by the legislature on the PSC with respect to approval and interpretation of fuel adjustment clauses").

stemming all the way back to at least the seminal case of *Columbia v. Public Service Commission*, where the Missouri Supreme Court interpreted the very bill that created the Commission.[46] The U.S. Supreme Court has likewise found legislative history to be instructive and relevant.[47] Furthermore, the Missouri Supreme Court also sees the implementation of an entirely new legal scheme as one instance where a review of legislative history is particularly "justified."[48] Since PISA literally did not exist until August 2018, a review of prior bill versions is certainly warranted. There is simply no reason to omit competing versions of PISA unless one were afraid of the resulting implications.

Within both the Missouri House of Representatives and Senate, there were at least five competing versions of PISA, each with conflicting amounts of recoverable depreciation expense and return. When first introduced in the Missouri House, the operative PISA statute stated that:

> "Notwithstanding any other provision of chapter 393 to the contrary, electrical corporations shall defer to a regulatory asset *all depreciation expense and return* associated with all qualifying electric plant"[49]

Had this version of PISA been passed into law, then there would be no debate as to how much depreciation expense and return may be collected. It clearly secures "all" such sums. However, this language was rejected by the General Assembly. The House Standing Committee on Utilities created House Committee Substitute for House Bill 2265, which read that electrical corporations instead receive "one hundred percent of all depreciation expense and return associated with half

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[46] 329 Mo. 38, 45, 43 S.W.2d 813, 816 (1931) (reviewing the title of the enacting bill to infer legislative intent).
[47] *E.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (J. Scalia, concurring) ("I think it is entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify what seems to us an unthinkable disposition"); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) ("From the sum of the legislative history relevant in this case, the conclusion is inescapable that the [Equal Employment Opportunity Commission's] construction of § 703(h) to require that employment tests be job related comports with congressional intent").
[48] *See Stiffelman v. Abrams*, 655 S.W.2d 522, 528 (Mo. 1983) ("Defendants' arguments against applicability of the new statutory remedy to plaintiffs' Count I justify a brief review of the scheme of the Act as a whole and the concerns from which it emerged").
[49] Exhibit 128, Mo. H.B. 2265 (6103H.02I), 99th Gen. Assem. (2018) (emphasis added).

of all qualifying electric plant."[50] The Committee thus limited recovery to all depreciation for half of any qualifying plants. This version was later amended before leaving the Missouri House as perfected bill. The perfected version read as follows:

> "[E]lectrical corporation shall . . . defer to a regulatory asset *fifty percent of the depreciation expense and return on the electrical corporation's monthly gross investment* in qualifying electric plant[51]

The Missouri House thus firmly established a position that half of the depreciation expense and return normally lost to regulatory lag was to be secured by PISA.

The Missouri Senate countered with their own versions. Like the House, the Missouri Senate started from the position that electrical corporations were to receive "all depreciation expense and return associated with all qualifying plant."[52] That guarantee faced immense opposition within the Senate, enduring a twenty-four hour-long filibuster.[53] In order to placate the political bloc of consumer interests, an olive branch was extended in the form of an offered Senate Substitute #5 for SB 564. The offered language limited the amount of captured regulatory lag to "ninety percent of all depreciation expense and return."[54] However, that alone could not quell the filibuster effort. The cap on depreciation was then lowered by Floor amendment from ninety percent to eighty-five.[55] The "eighty-five percent" limit was enough of a compromise to then pass out of the Missouri Senate, where it then sat in the Missouri House in opposition to the House's "fifty percent" figure.[56] Ultimately, the Senate's "eighty-five percent" was accepted by the House after nearly one hundred days with no amendments, and then became law.[57]

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[50] *Id.*, Mo. H.C.S. H.B. 2265 (6103H.04C).
[51] *Id.*, Mo. H.C.S. H.B. 2265 (6103H.04P) (emphasis added).
[52] Exhibit 127, Mo. S.B. 564 (5027S.01I).
[53] Exhibit 123, *Rebuttal Testimony of Geoff Marke*, Case No. EA-2018-0202 (Aug. 20, 2018).
[54] Exhibit 127, S.S. #5 S.B. 564 (5027S.11F).
[55] *Id.*, Senate Amendment 1 to S.S. #5 S.B. 564 (5027S11.03S).
[56] *Id.*, S.S. #5 S.B. 564 (5027S.11P).
[57] *See id.*, S.S. #5 S.B. 564 (5027S.11T).

"When determining legislative intent, legislative action is far more indicative of intent than mere inaction."[58] One should also ask why the Legislature found the "eighty-five percent" language fitting to pass after so many revisions, but did not so provide commensurate edits that made clear that the remainder was to be recovered regardless of Section 393.1400's language. At no point during this prolonged and focused amendment process was it made clear that the Legislature was debating how much depreciation expense and return was to flow through PISA in conjunction with a RESRAM. To so read the PISA statute as enabling stacked accounting in the RESRAM is to rely upon inferences and inaction alone. Despite Section 393.1400 being perhaps the most modified portion of SB 564, at no point was Missouri's RES even referenced therein. Instead, we see obvious action and debate surrounding the amount recoverable through PISA, as if this was the total amount of depreciation involved. The "eighty-five percent" was plainly offered as a consumer protection compromise to pass through the Missouri Senate, representing the midway negotiation between the offered language of "all depreciation expense and return" and "fifty percent."

IV. Commission Raised Issues

Two particular issues were raised by the Commission during this case's evidentiary hearing that Public Counsel will further address at this time. The first is an inquiry into a provision of the Commission's RES rules that prevent RES compliance costs from flowing through other adjustment mechanisms.[59] The OPC agreed to find this citation for the Commission, and accordingly highlights that Commission Rule provides that:

[58] *State v. Grubb*, 120 S.W.3d 737, 740-41 (Mo. 2003) (citing *L & R Dist., Inc. v. Mo Dep't of Rev.*, 529 S.W.2d 375 (Mo. 1975)).
[59] *Transcript of Proceedings Evidentiary Hearing*, Case No. EA-2018-0202, p. 56 (Oct. 31, 2018).

> "RES compliance costs shall only be recovered through a RESRAM or as part of a general rate proceeding and shall not be considered for cost recovery through an environmental cost recovery mechanism, fuel adjustment clause, or interim energy charge."[60]

Commission Rules are created to implement statute, and are subservient thereto. Since the PISA statute was passed after the RES Rule was developed, the OPC agrees that the PISA statute controls over regulatory language that would literally bar RES compliance costs from being included in PISA. However, Ameren Missouri's failure to request a variance from this language does not speak well to their duty to meet their burden as a CCN applicant.[61]

The second Commission raised issue that the OPC responds to at this time is the purported distinction between the RESRAM and PISA that supposedly enables concurrent recovery of depreciation through both mechanisms. During the evidentiary hearing, the Commission voiced that PISA is a regulatory asset deferral mechanism, whereas a RESRAM is a surcharge.[62] The argument was then raised that this distinction resolves the "notwithstanding any other provision of this chapter" language from the PISA statute. In response, the OPC notes that nowhere in statute is this saving distinction made, both the RESRAM and PISA address the same RES compliance costs, and that the RESRAM actually does indeed involve regulatory asset deferrals just as PISA does.[63] Therefore, reliance on an extra-statutory division between the RESRAM and PISA should not be persuasive.

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[60] 4 CSR 240-20.100(6)(A)16.
[61] *See* Exhibit 119, *Direct Testimony of Steven M. Wills*, Case No. EA-2018-0202 (May 21, 2018) (requesting several variances from 4 CSR 240-20.100(6), but not from the phrasing that "RES compliance costs shall only be recovered through a RESRAM or as part of a general rate proceeding").
[62] *Transcript of Proceedings Evidentiary Hearing*, Case No. EA-2018-0202, p. 57.
[63] *See* 4 CSR 240-20.100(6)(D) ("In the interim between general rate proceedings the electric utility may defer the costs in a regulatory asset account, and monthly calculate a carrying charge on the balance in that regulatory asset account equal to its short-term cost of borrowing").

V. Conclusion

Ameren Missouri has requested all regulatory lag associated with their proposed wind energy facility be captured, but the amount of regulatory lag regained once an electrical corporation elects PISA is explicitly allowed only up to "eighty-five percent of all depreciation expense and return."[64] Missouri statutes do not provide for the recovery of the remainder through any other cost recovery mechanism, and to the contrary the PISA statute is clear that the regulatory asset created by PISA controls despite the one hundred percent recovery granted by the RES.[65] Not only is the text clear, but the multitude of focus on the PISA statute during SB 564's drafting and debate makes it abundantly clear that the "eighty-five percent" language is a boundary for total recoupment. Ameren Missouri's request is therefore unlawful.

WHEREFORE, the OPC presents its Initial Post-Hearing Brief arguing that Ameren Missouri has failed to meet legal burden of proof, and requests that the Commission approve a RESRAM on the terms reflected in the tariff sheets attached to the Third Stipulation and Agreement as Appendix C.

Respectfully,

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[64] Section 393.1400, RSMo.
[65] *Id.*

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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 13th day of November, 2018, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall
/s/ Ryan Smith