BEFORE THE PUBLIC SERVICE COMMISSION
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 Convenience and Necessity Authorizing it to Construct a Wind Generation Facility	)))))	**Case No. EA-2018-0202** Tariff No. YE-2018-0158

INITIAL BRIEF

Respectfully submitted,

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Attorney for the Staff of the
Missouri Public Service Commission

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TABLE OF CONTENTS

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INITIAL BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Initial Brief,* states herein as follows:

INTRODUCTION

On May 21, 2018, Union Electric Company d/b/a Ameren Missouri filed an application with the Missouri Public Service Commission ("Commission") requesting a certificate of convenience and necessity (CCN) to acquire 400 MWs of wind generation in Schuyler and Adair Counties.[1] Ameren Missouri also requested authority to merge with the special purpose entity that will complete construction of the wind generation facility.[2] Finally, Ameren Missouri requested approval of a Renewable Energy Standard Cost Recovery Mechanism (RESRAM), authorized in 393.1030.2 (4), RSMo., and codified in 4 CSR 240-20.100.[3]

The application results from Ameren Missouri's need to comply with the legal obligations of 393.1030, RSMo., ("RES Statute"). The RES statute is the result of a 2008 ballot initiative that Missouri voters passed.[4] The RES statute outlines the percentage of retail sales that Ameren Missouri must produce through owning or

[1] *See* *Application*, filed May 21, 2018, page 3 and page 5.
[2] *Id*. at page 1.
[3] *Id.* at page 9.
[4] Ex. 101, *Direct Testimony of Matt Michels*, page 3, line 3.

purchasing renewable generation.[5] Missouri sited renewable generation is also encouraged by crediting each 1 kilowatt hour (kWh) of Missouri generation at 1.25 kWh.[6] The statute requires that Ameren Missouri, by 2021, produce no less than 15% of its retail sales by renewable generation.[7] Currently, Ameren Missouri produces 1.4 million renewable energy credits (REC) annually, leaving a 3.1 million REC shortfall for compliance with the law.[8]

After modeling the levelized cost of energy, and taking into account the value of the production tax credits (PTCs), Ameren Missouri planned to acquire 700 to 800 megawatts (MW) of wind generation to meet the statutory obligations of 393.1030, RSMo.[9] In 10 of the 12 scenarios modeled, customers benefitted in the form of a lower net present value revenue requirement.[10]

Staff evaluated the project, and, due to the value of the PTCs, the economic analyses performed, the details of the build transfer agreement (BTA) and the need to comply with the legal obligations of the RES statute, among other considerations, concluded the application meet the Tartan Criteria.[11] Staff entered into a Stipulation and Agreement with Ameren Missouri on August 17, 2018, resolving all issues between Staff and Ameren Missouri. On September 24, 2018, Staff, Ameren Missouri, Renew Missouri, and the Missouri Industrial Energy Consumers agreed to a second Non-Unanimous Stipulation and Agreement, which resolved all issues among those parties. On October 12, 2018, all parties entered into a

[5] 393.1030, RSMo.
[6] *Id.*
[7] *Id.*
[8] Ex. 101, *Direct Testimony of Matt Michels*, page 3, lines 10 through 17.
[9] *Id.* at page 5, lines 6 through 10.
[10] *Id.* at page 9, lines 7 through 8.
[11] *In the Matter of the Application of Tartan Energy Company, LLC, d/b/a Southern Missouri Gas Company*, Mo P.S.C. 3d 173, 177 (1994).

third Stipulation and Agreement that incorporated and supersedes the prior two, and resolved all issues but one between the parties. On October 24, 2018, the Commission approved the third Stipulation and Agreement, which granted Ameren Missouri a CCN to acquire the wind generation, and approval to merge with the special purpose entity.[12] The order also approved the creation of a RESRAM in the form of the tariff labeled Appendix B or Appendix C, depending on the outcome of the hearing.[13] This left the Commission with a single issue to be heard regarding the total amount of renewable energy standard (RES) compliance costs that can be recovered through the RESRAM.

DISCUSSION

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?

No, Ameren Missouri's utilization of Section 393.1400.2, RSMo., also known as plant-in-service accounting (PISA), does not preclude Ameren Missouri from including the remaining 15% of prudently incurred depreciation (return of) and return on plant necessary to comply with the statutory requirements of 393.1030 RSMo., in an authorized RESRAM.[14]

The issue before the Commission is a legal one, regarding the statutory interpretation of 393.1400 RSMo., ("PISA statute") as well as interpreting, what, if any, implication that interpretation has on the RES statute. For the reasons discussed

[12] *Order Approving Third Stipulation and Agreement*, issued October 24, 2018, page 2.
[13] *Id.*
[14] *See generally*, Surrebuttal Testimony of Jamie S. Myers, page 4.

below, Staff's reading of the PISA statute and the RESRAM statute, according to the decisions of the United States and Missouri Supreme Courts on statutory interpretation and harmonizing statutes on the same subject, allows Ameren Missouri to do the following:

> *Ameren Missouri shall book 85% of return on and of any qualifying plant to a PISA deferral account under 393.1400, RSMo. For RES compliance costs, Ameren Missouri's utilization of a RESRAM under 393.1030.2 (4), RSMo., allows for only the remaining 15% of the return of and on prudent RES-compliant plant to flow through the RESRAM, along with any prudently incurred expenses and all benefits, except to the extent Ameren Missouri's variance allows them to flow through the FAC.*

A. The Legislature intended for utilities to recover 100% of prudently incurred costs.

Ameren Missouri is required, by law, to meet RES compliance. RES compliance is a statutory obligation imposed upon Ameren Missouri by the public, and enacted via the Legislature. When considering cost recovery, it is important to note Ameren Missouri has discretion in how to comply with the RES statute, but not discretion in if should comply with the RES statute. This means that Ameren Missouri is obligated to incur some costs to meet compliance, be it through owning generation, a purchase power agreement, or some other method. For typical costs that a utility incurs, the Uniform System of Accounts (USOA) only allows recovery of costs incurred during the test year, unless a deferral mechanism has been authorized. This means that for a typical item, the return on and of that item is not reflected in rates until a general rate proceeding.[15] This delay is often referred to as "regulatory lag." Regulatory lag can be beneficial, as it mimics the competitive environment that a traditional business operates in, which encourages utilities to operate efficiently and

[15] Ex. 119, *Direct Testimony of Steven M. Wills*, page 4, line 19 through page 5, line 6.

productively by controlling costs.[16] However, in a situation where the utility is obligated to incur costs that it would not incur but for the existence of a legal requirement, a disincentive arises in regards to compliance if the utility believes it will face financial losses between the time the generation is in service and the time the investment is reflected in rates. In recognition of this fact, in the same statute that requires Ameren Missouri to meet renewable energy requirements, the Legislature put in place a mechanism for the recovery, outside of a rate case, of prudently incurred costs.[17] This mechanism works to ensure the utility is fully compensated in a timely manner for going beyond what is needed for safe and adequate service and incurring costs to secure renewable generation. The RESRAM also benefits customers by allowing benefits to immediately flow to them,[18] instead of requiring the time and expense of a rate case. It is also important to note that, unlike costs a utility undertakes in its discretion, Ameren Missouri is required to incur the RES expense. Because the RES requirement is tied to a percentage of retail sales, and must be meet be prescribed generation resources, the opportunity for customer savings via regulatory lag incentivizing Ameren Missouri to control costs is limited. In addition, the more appropriate mechanism to remove excessive costs or imprudence is the RESRAM prudence review.

To conclude, 393.1030.2 (4), RSMo., has not been repealed by the Legislature and does not limit the utilities' ability to recover prudently incurred costs.

[16] In Matter of Kansas City Power & Light Co.'s Request for Auth. to Implement a Gen. Rate Increase for Elec. Serv. v. Missouri Pub. Serv. Comm'n, 509 S.W.3d 757, 769 (Mo. Ct. App. 2016), reh'g and/or transfer denied (Nov. 1, 2016), transfer denied (Feb. 28, 2017).
[17] (4) Provision for recovery outside the context of a regular rate case of prudently incurred costs and the pass-through of benefits to customers of any savings achieved by an electrical corporation in meeting the requirements of this section. 393.1030.2, RSMo.
[18] Ex. 119, *Direct Testimony of Steven M. Wills*, page 5, lines 8 through 9.

B. The PISA statute is clear and unambiguous; therefore, reliance on legislative history is improper.

Legislative history is "at best interesting, at worst distracting and misleading, and in neither case are authoritative" when statutes are straightforward and clear.[19] Senate Bill 564 is a complete legislative act, meant to be taken in total, and is unambiguous.

> When words of statute are unambiguous, first canon, that court must presume that Legislature says in statute what it means and means in statute what it says there, is also last canon; judicial inquiry is complete.[20]

The PISA statute explicitly requires electrical corporations who have elected to utilize PISA to defer[21] to a regulatory asset 85% of all depreciation expense and return associated with all qualifying electric plant.[22] Qualifying plant is defined as "all 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."[23] On its face, this statute means that 85% of wind generation investment must be booked following the PISA statute, if the utility has elected PISA. Ameren Missouri elected to make the deferrals under PISA on September 1, 2018.[24] This plainly means that Ameren Missouri must now defer 85% of its investments in wind generation to a PISA deferral account. The statute does not address how to treat any remaining costs. Nor does it discuss any other statutory accounting mechanisms.

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[19] N. States Power Co. v. United States, 73 F.3d 764 (8th Cir. 1996).
[20] Connecticut Nat. Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992).
[21] In fact, 393.1400.1, RSMo., states electrical corporations "shall" defer, making this an explicit mandate of how plant shall be booked. The courts recognizes that "shall" generally means "must, cf. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432 n. 9, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995).
[22] 393.1400.1, RSMo.
[23] *Id.*
[24] Ex. 126, *Notice*.

The Office of the Public Counsel (OPC) agrees that the statute is clear. OPC plainly states in its position statement "The clear statutory directive for "[q]ualifying electric plant" is to defer 85% of the depreciation expense and return for "all" rate-base additions."[25] OPC does not argue that the statute is ambiguous; therefore, the Commission has no need to turn to legislative history to discern the meaning of the statute. Turning to legislative history without arguing a statute is ambiguous is an attempt for OPC to argue what a statute should be without examining what the statute actually is. Because OPC has not made a showing that the PISA statute is ambiguous, and instead has asserted the statute is clear, OPC has ignored a canon of construction and used legislative history improperly to support its desired outcome.

C. Legislative history is a poor method to divine intent and meaning.

OPC has improperly turned to legislative history to support its desired outcome, and further yet, has failed to acknowledge that Missouri courts have found legislative history a poor indicator of what a statute means. OPC offered 109 pages of legislative history regarding the course of Senate Bill 564 in the Senate,[26] and 66 pages of legislative regarding the course of Senate Bill 564 in the House of Representatives.[27] The Commission can be assured that there is no need to review these documents. This is not only because it is improper to rely on them to interpret a statute, when all parties agree the statute is not ambiguous, but also because courts have found legislative history to be an unreliable indicator of intent.

[25] *OPC's Position Statement*, filed October 23, 2018.
[26] Ex. 127, *Senate Documents*.
[27] Ex. 128, *House Documents.*

The Missouri Supreme Court has found that legislative history is not highly persuasive, and words are routinely modified, for many reasons, during the course of the legislative process.[28] Like the Missouri Supreme Court, the Commission does not have to endure the arduous process of comparing different versions of a bill, which ultimately requires the Commission to speculate on why a word was deleted or changed.[29] This is especially true in a situation where the statute is not ambiguous.

D. It is a well-established canon of construction that statutes are to be read in harmony.

From the Missouri Supreme Court all the way to the United States Supreme Court, it is an oft-cited and well-established canon of construction that statutes are to be harmonized. Harmonizing statutes unless there is an explicit conflict allows the intent of legislators to be upheld by giving effect to both statutes; by giving effect to both statutes, courts are also following the canon of construction to strive to interpret statutes without rendering statutes or portions of statutes meaningless.

Starting with Epic Sys. Corp. v. Lewis,[30] a 2018 case regarding provisions of the National Labor Relations Act and the Arbitration Act, the United States Supreme Court stated "When confronted with two Acts of Congress allegedly touching on the same topic, the court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both."[31] Here, there is a RES statute and a PISA statute, and both touch on how to recover costs for investments in renewable

[28] Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15, 19 (Mo. 1995).
[29] "Because it is speculative as to 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." *Id.*
[30] 138 S. Ct. 1612, 1616, 200 L. Ed. 2d 889 (2018).
[31] *Id.*

generation. As the United States Supreme Court stated, a party suggesting that statutes cannot be harmonized bears a heavy burden of showing a clearly expressed intention, and that it is the job of Congress by legislation, not the United States Supreme Court by supposition, to write laws and repeal them.[32] OPC has not met that heavy burden. They have made no showing that there is a clearly expressed intention to disallow the recovery of the remaining 15% of return on and of RES compliant generation. As the United States Supreme Court held, respect for the Legislature as drafters cautions us against too easily finding irreconcilable conflicts in its work.[33] We must assume the legislators meant what they said in a statute, and said in a statute what they meant. Much like the United States Supreme Court, we must recognize that when the Legislature wants to mandate something, it knows exactly how to do so.[34] Moreover, we know this is true by referring to Senate Bill 564. It is clear that the Legislature knew how to explicitly disallow two rate mechanisms from operating at the same time by the language of 393.1400.5, RSMo., that states, "No electrical corporation shall file a notice with the commission under this subsection if such corporation has made an application under subsection 3 of section 386.266, and such application has been approved." This is an example of the Legislature giving clear, explicit direction that a utility cannot utilize both the PISA statute and the 386.266, RSMo., rate adjustment mechanism for weather and conservation.

Harmonizing statutes is also a strong command from the Missouri Supreme Court. In a case involving taxes, the Court found that statutes involving the assessment, levy, and payment of taxes should be construed in context with each

[32] *Id.*
[33] *Id.*
[34] *Id.*

other.[35] Here again, there is instruction to construe the statutes that involve the recovery of RES compliance costs in context with each other. Even when those statutes are passed at different times, the Missouri Supreme Court tells us that:

> . . .in interpreting statutes, it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times.[36]

In this case, examining the PISA statute, the RESRAM statute, and other provisions of Senate Bill 564 shows harmony among statutes and the legislators' intent for the provisions to work together. Beginning with Senate Bill 564, it enacts 393.1400 RSMo., which allows an electric utility to opt in to PISA, and book 85% of the depreciation and return on qualifying plant to a regulatory asset to be considered for inclusion in the utility's next general rate proceeding. Furthermore, if an electric utility opts in to 393.1400 RSMo., it is bound by the "rate cap" provisions of 393.1655 RSMo. The rate cap also includes language relating to rate adjustment mechanisms under 386.266 RSMo., (the fuel adjustment clause and environmental cost recovery mechanism) as well as 393.1030.4, RSMo., the RESRAM. By including the costs flowing through these rate adjustment mechanisms in calculating if a utility has exceeded the compound annual growth rate limitation, or rate cap, the Legislature has explicitly acknowledged that an electric utility can elect PISA as well as flow costs through a RESRAM.

Furthermore, in detailing how to treat the RESRAM if the costs flowed through would exceed the compound annual growth limitation, the legislature makes it clear that RES compliance costs can be included in the PISA deferral mechanism, while still

[35] Lane v. Lensmeyer, 158 S.W.3d 218 (Mo. 2005).
[36] *Id.*

allowing the RESRAM to operate. Again, when following the Missouri Supreme Court mandate to determine legislative intent by reading the statute "as a whole and in pari materia with related sections,"[37] these statutes are harmonized to show a clear intent to allow 100% recovery of RES compliance costs. First, it must be acknowledged that the rate caps under 393.1655, RSMo., only apply to utilities that have made an election under the PISA statute. There is no argument that those statutes cannot be harmonized, in fact, OPC's exemplar tariff also includes references to the rate cap.[38] The rate caps under 393.1655, RSMo., include a penalty provision that forfeits recovery of any general rate increase amount that exceeds the compound annual growth rate applicable. However, the Legislature explicitly exempted RESRAM recovery amounts from forfeiture, instead stating,

> Sums not recovered under any such mechanism because of any reduction in rates under such a mechanism pursuant to this subsection shall be deferred to and included in the regulatory asset arising under section 393.1400 or, if applicable, under the regulatory and ratemaking treatment ordered by the commission under section 393.1400, and recovered through an amortization in base rates in the same manner as deferrals under that section or order are recovered in base rates.[39]

This demonstrates a clear intention for all RESRAM compliance costs to be recovered, and acknowledgment of the ability to have RES compliance costs recovered in a RESRAM and a PISA deferral account. This reading harmonizes 393.1655, RSMo., with the RES statute's intention to allow recovery of all prudently incurred costs.[40]

[37] *Id.*
[38] *Third Stipulation and Agreement*, Appendix C, page 31 out of 33 pages total.
[39] 393.1655.5, RSMo.
[40] 393.1030.2 (4), RSMo.

E. OPC's argument regarding the use of the term "notwithstanding" ignores the plain reading of the statute.

OPC raised in its position statement an argument regarding the use of the term "notwithstanding". OPC argues, "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."[41] This argument misses the mark, and ignores the clear plain meaning of the statute. Turning to the PISA statute, the notwithstanding language appears in 393.1400.2 (1). That subsection reads, in part,

> 2. (1) **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. [42]

In the very same paragraph in which the notwithstanding language appears, the following language appears.

> In each general rate proceeding concluded after August 28, 2018, the balance of the regulatory asset as of the rate-base cutoff date shall be included in the electrical corporation's rate base **without any offset, reduction, or adjustment based upon consideration of any other factor**, other than as provided for in subdivision (2) of this subsection, with the regulatory asset balance arising from deferrals associated with qualifying electric plant placed in service after the rate-base cutoff date to be included in rate base in the next general rate proceeding.

This language is explicitly stating that all relevant factors do not have to be considered. The clear provision to the contrary of the above bolded language is found in 393.270, RSMo., that states,

[41] *OPC's Position Statement*, filed October 23, 2018.
[42] This chapter refers to Chapter 393.

> 4. In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

In other words, the courts have held that 393.270.4, RSMo., is the prohibition on single issue ratemaking, and all relevant factors are appropriate to consider when setting rates.[43] The plain reading of the PISA statute is "notwithstanding the language of 393.270 to the contrary, the value of the regulatory asset shall be placed into rates without consideration of all relevant factors." OPC's tortured reading of the statute has it backwards; they insist that the notwithstanding means that despite the language of 393.1030 to the contrary, a utility shall defer only 85% of costs, and nothing more. However, with the plain reading of "notwithstanding" as "despite", the notwithstanding should refer to something that would limit the effect of the PISA statute, not something the PISA statute would limit.

CONCLUSION

Staff recommends the Commission approve the tariff attached as Appendix B to the *Third Stipulation and Agreement*, as it is the tariff that complies with and best represents the legislative intent of the PISA statute and the RESRAM statute. All arguments concerning legislative history should be ignored as OPC's witness on the subject is not an attorney nor does he have any legal training or experience, OPC has not argued the statute is ambiguous, which contravenes well-established case law regarding the use of legislative history, and legislative history itself is a poor indicator of

[43] "Section 393.270 empowers the commission to investigate matters about which complaint may be made, or to investigate to ascertain facts necessary to the exercise of its powers and to fix Maximum rates after hearing and investigation upon consideration of all relevant factors." State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n, 585 S.W.2d 41, 56 (Mo. 1979).

intent. In opposition to OPC, Staff's reading of the statutes to allow 85% of all depreciation expense and return to be booked to a PISA deferral account and to allow the remaining 15% to flow through the RESRAM is based on the plain and ordinary language of the statute, and follows the well-established canon of construction to harmonize statutes, especially statutes on the similar subjects, and gives effect to both.

The United States Supreme Court has stated that the party arguing that statutes cannot be harmonized or that legislators meant something further than what is contained in the statute bears the burden of persuasion.[44] OPC has not met this burden. Nowhere in the 175 pages of differing versions of Senate Bill 564 that OPC introduced into evidence is there a clearly expressed intention to limit recovery. Yet, a clearly expressed intention is what must be shown if OPC's position is to survive.[45] All OPC can point to is that different versions of Senate Bill 564 had different language, including changes from all depreciation and expense to 85%. However, as the Missouri Supreme Court cautions, words can be deleted or modified for many different reasons during the course of the legislative process, making legislative history of limited persuasive value.[46] There is no clearly expressed intent to read from these changes. It is as equally likely that "all" was changed to "85%" to recognize that certain PISA eligible investments are discretionary, and should be subject to regulatory lag as a cost control incentive. Or it just could be that "85%" has no significance to how other statutes operate, but instead just happened to be the number all parties could agree, for this statute. The plain reading of the statutes should prevail, and Ameren Missouri

[44] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1616, 200 L. Ed. 2d 889 (2018).
[45] *Id.*
[46] Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15, 19 (Mo. 1995).

should recover all prudently incurred costs associated with meeting its legal obligations.

WHEREFORE, on the basis of all the foregoing, Staff prays that the Commission will resolve all contested issues as recommended herein by Staff by approving the tariff attached as Appendix B to the *Third Stipulation and Agreement*, and grant such other and further relief as the Commission deems just in the circumstances.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission, on this 13th day of November, 2018.

/s/ Nicole Mers