BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filings of Union Electric Company d/b/a Ameren Missouri, to Increase Its Revenues for Retail Electric Service.	)))	File No. ER-2014-0258

REPLY BRIEF OF AMEREN MISSOURI

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REPLY BRIEF OF AMEREN MISSOURI

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), by and through counsel, and for its Reply Brief states as follows:

PART ONE: AMEREN MISSOURI'S RATE INCREASE AND RATE DESIGN REQUESTS

I. Solar Rebate Costs, Fukushima Flood Study Costs and Energy Efficiency Costs Regulatory Asset Amortizations

Missouri Industrial Energy Consumers ("MIEC")[1] makes no bones about it – it is opposed to deferral mechanisms.[2] Apart from its discussion of ROE[3] and Noranda Aluminum, Inc.'s ("Noranda")'s rate subsidy proposal, the rest of MIEC's Initial Brief is an all-out attack on the amortization in rates of regulatory asset balances arising from Commission-authorized AAOs (indeed, MIEC's position is a full frontal attack on AAOs in general). MIEC's position in this regard reveals that it clearly views the ROE used to set rates – the targeted ROE – as a ceiling, complaining that whenever a utility's unadjusted actual earnings are above the target, the Commission should in effect retroactively act to seize the "over-earnings," and this view has not been limited to objections to amortization of deferred sums. In the Noranda earnings complaint from last summer, the requested action was a finding that the Company's current rates (as reflected by past unadjusted earnings above the target) were unjust and unreasonably high.

[1] Later, as needed, we will address any separate points made by CCM or OPC on these issues. While they mount some opposition to some of these amortizations, MIEC is leading that charge.
[2] Tr. Vol. 18, p. 693, l. 4-7.
[3] For definitions of capitalized terms used in this brief please see the Company's Initial Brief.

Based on the premise that past earnings above the target proved their case, they asked for a rate reduction, the effect of which would have been to “return” these so-called “over-earnings” to customers solely based on the claim that earnings above the target were, by definition, unjust. There is no question that MIEC advocates for a ceiling on earnings established by the targeted ROE, but of course they advocate no floor.

Here, MIEC contends that the Company’s current rates have been unjustly and unreasonably allowing “over-earnings” and that the Commission should effectively cancel deferrals that it has already found to be appropriate[4] by applying these “over-earnings” to those deferrals. This too would have the same effect.

The bottom line is this: the Commission, like regulatory commissions across the country, has for decades approved AAOs and related deferral mechanisms for extraordinary costs and sometimes for extraordinary revenues and has, also for decades, reflected the regulatory asset balances arising from those deferrals in rates through an amortization of those balances.[5] The two most common circumstances giving rise to deferrals (and ultimately amortizations) arise from some event, often a storm or other act of God, or from some kind of legal mandate or regulatory policy. In this case, the solar rebates arose from both a legal mandate and regulatory policy – the encouragement of a greater use of renewables as reflected in Missouri law.[6] Regulatory policy drove the energy efficiency deferrals; the Nuclear Regulatory Commission

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[4] The Company will concede that the Commission did not make an affirmative finding about the appropriateness of the deferral of the just under $1 million of Fukushima flood study costs, the expenditure of which was required by the NRC. The appropriateness of those deferrals is a function of the provisions of the Uniform System of Accounts, made applicable to the Company by Commission regulation, as confirmed by Staff witness John Cassidy.
[5] Ex. 40, p. 16, l. 4 – 18 (Reed Rebuttal).
[6] Section 393.1030 *et seq.*

("NRC") drove the Fukishima flood study costs; the Noranda AAO arose out of a severe ice storm.[7]

In addition, neither this Commission nor, to the Company's knowledge, any other commission has ever applied an earnings test to deny an amortization.[8] As discussed below, MIEC tries to act as though the only reason is because the evidence in other cases where the argument came up was not strong. The record in those cases isn't before the Commission here, and the evidence in this case isn't very strong either, in any event. Regardless, we know the Commission has ***never*** done what it is being asked to do – even Consumers Council of Missouri's ("CCM") counsel, who claims to be disappointed and offended by the Commission's Noranda earnings complaint ruling and Ameren Missouri's request to amortize the solar rebate regulatory asset in this case, admits as much: "The Commission here has never found that the facts warranted a previous overearning situation discounting the amount of the deferral."[9]

Moreover, if the Commission were to impose such an earnings test and that resulted in the Company not being allowed to reflect the solar rebate regulatory asset in rates, not only would it require a complete write-off of nearly $97 million currently being deferred for solar rebates (with an approximate 160 basis point impact arising from the solar rebate payments alone) to Ameren Missouri's earnings in 2015,[10] but it would (a) call into serious question regulatory asset balances on Ameren Missouri's balance sheet generally and (b) effectively disable the Commission's ability to use the AAO as a regulatory tool in the future.[11] This is because it would be impossible to ever meet the stringent accounting standards necessary to

[7] The two-way vegetation management and infrastructure inspection trackers arise from mandated rules and the provision in those rules contemplating deferrals, and the two-way major storm tracker arises from policy considerations relating to the extreme importance of restoring service and also from the fact that major storms are, obviously, caused by acts of God and for that reason are extraordinary.
[8] Ex. 40, p. 16, l. 4-18 (Reed Rebuttal).
[9] Tr. Vol. 18, p. 484, l. 24 to p. 485, l. 2.
[10] Company's Initial Brief, p. 16.
[11] *Id.* pp. 15-17.

defer extraordinary costs to a regulatory asset. While there should be no “earnings test” at all, consider just how egregious imposing one would be here, which highlights just how misleading MIEC’s arguments are. As discussed in the Company’s Initial Brief, MIEC’s witness Greg Meyer’s charts give a misleading impression – that there were extremely large “over-earnings” in 2013 and that there would be again in 2014. We know, however, that the earnings above the target in 2013 were modest, and that earnings were actually below the target for calendar year 2014.[12] For both years combined, the net earnings above the target are far less (about $26 million) than the write-off that would be occasioned by refusing to allow an amortization of just the solar rebates (nearly $97 million), and thus obviously far less than would be occasioned by refusing to allow the other amortizations of regulatory assets at issue in this case. Of course this ignores the five out of the last seven years when there were significant – much more significant – “under-earnings,” and it ignores that imposition of such an earnings test will destroy the ability to use AAOs in Missouri. MIEC’s arguments simply reflect terrible regulatory policy.

MIEC fails to acknowledge any of the foregoing facts, and instead goes to great lengths to convince the Commission (a) that the *UCCM* case means the Commission and the Court of Appeals have apparently been sanctioning illegal amortizations of regulatory assets deferred pursuant to AAOs for years; (i.e., MIEC is the only one who gets it right and everyone else is wrong), and (b) that the Commission can do whatever it wants when confronted with a request to amortize regulatory assets that have been created by Commission-authorized deferrals. As explained in the Company’s Initial Brief, the courts have never interpreted *UCCM* as MIEC does – in fact, the courts have interpreted it contrary to MIEC’s position – and the courts have certainly never indicated that the Commission can do whatever it wants.

[12] CCM also misleadingly points only to Mr. Meyer’s charts, which fail to account for the “under-earnings” in 2014 and thus make it appear (incorrectly) that “over-earnings” were more than the solar rebates, when in fact, nothing could be further from the truth. CCM Initial Brief, p. 5.

On a related point, it is also simply not true that *UCCM* stands for the proposition that what MIEC characterizes as past "over-earnings" are relevant to prospective rate setting in the sense that prospective rates can be reduced below what the cost of service otherwise says they should be. What *UCCM* says is that past earnings "insofar as relevant" to what future rates should be can be considered. Consequently, if there were something systemic or structural driving past earnings levels that remained true in the test year of a rate proceeding (and that was not, non-recurring; i.e., it needed to be accounted for) then those past earnings may have some relevance.[13] However, as Ameren Missouri witness John Reed also testified in response to questions from Commissioner Hall, the test year process is a superior predictor of what the revenue requirement should be for setting rates, more so than past per-book earnings.[14]

Even if one were to assume that the Commission had the authority to deny an amortization of the deferred sums, even though it is undisputed that they were prudently incurred and even though there is no dispute about whether they were accurately determined or accounted for, as discussed above – and as amplified in the Company's Initial Brief – it should not do so. Several Commissioners appeared to understand this during the evidentiary hearings and for multiple reasons.

First, as discussed in the Company's Initial Brief, it is not possible to assign or allocate the so-called over-earnings to any particular regulatory asset.[15] But, to implement MIEC's "earnings test," that is precisely what one would have to do.

Second, MIEC (either directly through Mr. Meyer or indirectly by procuring James Dittmer as a witness) should not be allowed to side-step its agreements reflected in the Solar Rebate Stipulation ("SR Stipulation"). The Staff recognizes that MIEC's argument fails to hold

[13] Tr. Vol. 18, p. 526, l. 23 to p. 527, l. 3.
[14] *Id.*, and p. 527, l. 4-25.
[15] Tr. Vol. 18, p. 467, l. 8 to p. 468, l. 13.

water under the SR Stipulation, both as evidenced by Staff witness John Cassidy's consistent view that the SR Stipulation means that the solar rebate costs deferred to the regulatory asset must be reflected in rates, and Staff Counsel's statements that "I certainly – I don't think the stipulation provided for a signatory to the stipulation making the argument they're [MIEC] making at this time * * * [and] MIEC's actions are probably a breach of contract."[16] As pointed out by the Chairman's questioning, if the SR Stipulation was intended to allow MIEC to claim that rebate payments were "already recovered" – despite its very clear language regarding the *sole* reason a party could oppose the amortization of the solar rebate payments – then the SR Stipulation *should have so provided.*[17] MIEC tries to dodge the question of why the SR Stipulation did not contain an "earnings test" if, as MIEC now claims, one was intended, by arguing that MIEC did not have any way to know that Ameren Missouri would "over-earn." The excuse falls flat because MIEC's Counsel's claim that MIEC did not know that Ameren Missouri might be "over-earning" at the time the SR Stipulation was signed is completely rebutted by the facts. MIEC receives every surveillance report every single quarter. Mr. Meyer's own testimony shows that there were unadjusted earnings above the target ROE in each quarter of 2013.

It is not hard to deduce what happened here. MIEC knew. The only reasonable reading of what happened is that after the Commission denied the Noranda earnings complaint – a denial MIEC was very unhappy about – MIEC decided to use its significant dislike of deferrals as a means to try to cut Ameren Missouri's rate increase request in this case. It therefore developed this "already recovered" argument. What did it have to lose? When Ameren Missouri "called" MIEC on it in January of this year by seeking to strike Mr. Meyer's testimony, MIEC was

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[16] Tr. Vol. 18, p. 456, l. 14-25. MIEC is also acting in violation of the Commission's Order approving the SR Stipulation.
[17] Tr. Vol. 18, p. 468, l. 19 to p. 469, l. 20.

worried enough that it went out and procured Mr. Dittmer as a witness to try to hold onto its argument.[18] Its argument is wrong on the facts and on the law, and it is wrong because it is an argument MIEC is simply not entitled to make at all.

CCM takes the same tact, bemoaning the Commission's decision in the Noranda earnings complaint and acting like the fact that an amortization of solar rebate payments was a relevant fact in determining if a rate reduction was warranted in that case means that CCM ought to succeed now in denying an amortization of the solar rebate regulatory asset balance.[19] Notably, Staff too has consistently recognized that the solar rebate payments were relevant in the Noranda earnings complaint and that the regulatory asset should be reflected in rates through an amortization now. CCM's argument is wrong because it depends on Ameren Missouri's rates having been unjust and unreasonable just because there was some level of unadjusted earnings above the target since rates were last set even though there were no "over-earnings" at all during all of calendar year 2014.

Third, the record shows that MIEC truly does seek to impose a ceiling on earnings, but it is not interested in a floor, as Commissioner Bill Kenney's questioning of MIEC's counsel made clear.[20] Those questions and the tortured responses to them reveal that while MIEC objects to future customers (those paying rates after new rates take effect in this case) paying rates that are higher because they reflect regulatory assets arising when there were "over-earnings," MIEC has no problem at all with those same future customers having paid rates that were lower than they would have been had there been some reflection in the past of "under-earnings" that Ameren

[18] *Ameren Missouri's Objection to the Admission of the Testimonies of Witnesses Greg R Meyer and James R. Dittmer*, February 23, 2015.p. 4-8.
[19] CCM Initial Brief, p. 3 (accusing Ameren Missouri of having "already played this card").
[20] *See* Tr. Vol. 18, p. 475, l. 23 to p. 478, l. 13.

Missouri experienced for quite a long while, "under-earnings" that were indeed much more significant than the "over-earnings" MIEC is so loudly protesting now.

Fourth, certainly the solar rebate payments, Fukushima costs and the energy efficiency costs are "not costs like every other."[21] In the case of the solar rebate payments, they are also decidedly not like any other given the SR Stipulation and the Commission's independent finding and conclusion that the terms of the SR Stipulation – including those that provided for the amortization the Company seeks – are in the public interest.

Fifth, as indicated by answers to Commissioner Hall's questions, even MIEC does not dispute that but for entering into the SR Stipulation, Ameren Missouri could have sought to include solar rebate payments in a rider – a right Ameren Missouri specifically gave up in consideration for the agreements reflected in the SR Stipulation.[22]

Not only has MIEC completely failed to justify a denial of these amortizations, but MIEC also significantly over-reads (or perhaps simply over-states) the cases it relies upon in an effort to prevent reflection of these deferred assets in rates.[23] As discussed in the Company's Initial Brief, MIEC extends the holding in *UCCM* much too far, that is, unless numerous panels of two different districts of the Missouri Court of Appeals have simply been wrong for the past approximately three decades. As the Company's Initial Brief also pointed out, MIEC and others have previously argued to the Missouri Supreme Court itself that *everyone but them* has been wrong about when regulatory assets can be reflected in rates, and the Supreme Court has

[21] Tr. Vol. 18, p. 474, l. 18-24. As noted earlier, the other regulatory assets at issue in this case also arise from particular policy or regulatory circumstances that also make them unlike other ordinary costs.
[22] Tr. Vol. 18, p. 479, l. 4-8.
[23] So does CCM. Citing Mr. Dittmer's testimony, CCM claims that past Commission decisions have recognized that "offsets" should be considered when regulatory assets are at issue in rate cases. Notably, CCM cites to no decision that so states or holds. The truth is that CCM interprets Commission decisions that state that an AAO order is not itself a ratemaking order as endorsing an earnings test (i.e., the offset CCM seeks) – no such case so holds.

declined to review (meaning it let stand) the many Court of Appeals decisions that are contrary to the argument MIEC makes now.

MIEC tries to make its argument by plucking various statements out of various cases (some from the Court of Appeals; some from Commission orders) and arguing that they support applying an earnings test in this case. A closer reading of those cases shows that not one of them sanctioned the application of such a test and, indeed, all of them were either decisions where the Commission *did* include an amortization of a regulatory asset to be reflected in future rates or involved Court of Appeals' decision affirming the Commission's decision to do so.

For example, while it is true that in discussing why the Office of the Public Counsel ("OPC")'s claim that AAOs constituted unlawful single-issue ratemaking, the Court of Appeals has said that "other relevant factors" can be considered in rate cases where amortizations of regulatory assets were sought, the case at issue affirmed allowing an amortization of a regulatory asset and most certainly did not approve an earnings test; in fact, it didn't even consider one.[24] Note 1 in the opinion cited by MIEC did make note of the fact that in the AAO itself, the Commission had required that the utility start amortizing the regulatory asset within a certain time so that if there was a long period of time between the deferral and when a rate increase were needed, the utility would simply decline to file a rate increase in reliance on the benefit of the deferral. The Commission required no such early amortization here and, even more importantly, Ameren Missouri has had to file six rate cases in just eight years – every 16 months on average. Rate increases were approved in all five of the preceding cases and the facts show one is warranted now. There is no evidence that Ameren Missouri's rates have been unjust or

[24] MIEC Initial Brief, p. 3, referring to ***State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n***, 858 S.W.2d 806, 813 (Mo. App. W.D. 1993), as "OPC 1993."

unreasonably high, which is the circumstance the Commission sought to guard against in the case relied on by MIEC.

The second ***OPC*** case cited by MIEC also did not involve a claim that past "over-earnings" had meant that a deferred cost had "already been recovered."[25] In that case, OPC complained that the cold weather rule, which allowed deferral of lost revenues, might contain a flaw in that, as written, when a customer failed to pay a bill, Laclede could defer the entire payment that was missed even though it was possible that a customer might later pay part of it. If that happened, Laclede would have deferred the full bill amount (i.e., all of the revenues lost when the bill was not paid) but would later have received part of those revenues; yet, the way the rule worked, those later-received revenues did not reduce the original deferral.[26] Consequently, the controversy was that Laclede arguably would have deferred too much (i.e., the regulatory asset would have been too big) and thus would in effect receive the sums twice – once via amortization of the regulatory asset and once when the customer later paid some part of the bill.

But in that case, one could easily identify exactly how much the initial deferral should have been reduced by tracking deferrals arising from failure of a particular customer to pay, and tracking a later partial payment made by that same customer. The argument was really one of the accuracy of the regulatory asset balance, but it certainly had nothing to do with an earnings test. MIEC's use of this case is at best incorrect, and at worst misleading. This case was simply a recognition that the Court need not address this issue in the appeal of the AAO itself (which was the case on appeal) because the Commission could consider that particular problem in a later rate case where the deferrals were at issue for reflection in rates. The real point of the case is that the Commission can consider if the *calculation* of the deferral (there, as contemplated by the rule) is

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[25] MIEC Initial Brief at pp. 3-4, referring to ***State ex rel. Office of the Public Counsel v. Laclede Gas Co.***, 301 S.W.3d 556 (Mo. App. W.D. 2009), as "OPC 2009."
[26] ***OPC 2009***, 301 S.W.3d at 567.

accurate (did Customer A really only pay $X, or did he pay $Y), a point the Company has always agreed with.

Missouri Gas Energy v. Pub. Serv. Comm'n, 978 S.W.2d 434 (Mo. App. W.D. 1998) is similar because it only involved the correction of the use of a carrying cost that did not accurately reflect the utility's cost of capital.[27] The corrected sum using a proper cost of capital was reflected in rates through an amortization.

MIEC's next argument is to complain about the fact that Ameren Missouri President Michael Moehn did not endorse some kind of deferral mechanism to track *ordinary* O&M savings that a utility is able to achieve between rate cases.[28] MIEC is drawing an apples-to-oranges comparison here. The day-to-day efforts of a utility to reduce O&M costs are not extraordinary and thus wouldn't qualify for an AAO. Pursuing such cost reductions in the ordinary course of business is precisely what a state commission hopes rate of return regulation will incent a utility to do. The entirety of those O&M reductions (at least $67 million) are reflected in the Company's (lower) revenue requirement in this case, as Mr. Moehn pointed out.[29]

The fact that the Company achieved at least $67 million of O&M reductions from which customers will benefit belies an argument CCM makes in its Initial Brief in opposition to the solar rebate regulatory asset amortization. CCM claimed that "single-issue ratemaking mechanisms weaken the incentives for utilities to operate efficiently and to control *overall* costs"

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[27] MIEC's attempt to take the general discussion of what an AAO can do (protect from earnings shortfalls) and to then turn that into support for a retrospective "earnings test" is clever, but wrong. "Earnings shortfall" in this context has to mean earnings that are below that which are just reasonable, not earnings that are simply below the targeted ROE because, as previously explained, there is no floor nor any ceiling. In any event, MIEC's plucking a few words of general *dicta* out of an opinion does not show that the Commission can – nor that it should – impose a retrospective earnings test on deferrals. MIEC does the same thing in citing to prior Commission AAO decisions that discuss the debates that might (or might not) happen in future rate cases about prior utility earnings levels. MIEC Initial Brief, pp. 4-5.
[28] MIEC Initial Brief, pp. 5-6.
[29] Ex. 28, p. 6, l.12-22 (Moehn Direct).

(emphasis in original).[30] First of all, regulatory assets are not single-issue ratemaking mechanisms, as the courts have repeatedly recognized. Second, if Ameren Missouri didn't have an incentive to control overall costs, then why did it achieve more than $67 million of O&M savings? CCM's statement is nothing more than heated rhetoric; it is not supported by the facts in this case.

MIEC next says that the Commission must balance ratepayer and utility interests – the Company agrees.[31] But then MIEC again reveals the true nature of its argument, claiming that the Company has "already earned their *permitted* returns" (emphasis added).[32] Not true. The returns "permitted" were the returns actually produced by the lawful and in-effect rates the Company admittedly charged. There is no ceiling, just like there is no floor, MIEC's wishes to the contrary notwithstanding.

MIEC further shows its true stripes when it cites part of the Commission's decisions where regulatory assets were amortized via rates involving Missouri Public Service Company, which were cases where the Commission declined to adopt an earnings test like the one MIEC advocates for here.[33] One of MIEC's quotes actually shows why MIEC's argument fails. MIEC tries to convince the Commission that the reason the Commission declined to apply a retrospective earnings test in the two Missouri Public Service Company cases it cites is because the record was not as robust as MIEC claims it is here. However, in making this argument, MIEC states that the Commission "found that the evidence included 'minimal' analysis and did not show *whether overearnings were excessive* during part of the deferral period" (emphasis

[30] CCM Initial Brief, p. 5.
[31] MIEC Initial Brief, p. 8. At this point in its Initial Brief, MIEC again misstates the ***OPC 2009*** case, involving the cold weather rule and Laclede, as explained earlier.
[32] *Id.*
[33] MIEC Initial Brief, p. 9.

added).[34] That statement reflects that the Commission fully recognizes mere "over-earnings" (i.e., merely earning above the target) do *not* equal "excessive" earnings (i.e., unjust and unreasonable rates). To the contrary, the over-earnings would only be "excessive" if the rates that produced them were in fact unjust and unreasonable. If the term meant what MIEC says it means, then we truly would have a situation where a formula has to be applied – for every dollar of "over-earnings," we have to cut off $1 of deferrals. That has certainly never been the law, nor has it ever been the Commission's practice. As noted, had it been, the Commission would have been effectively unable to use AAOs as a regulatory tool.

Adoption of MIEC's position that the commitments it made in the SR Stipulation should be ignored and a retroactive earnings test should be applied to all amortizations would be a terrible policy decision. It would effectively mean that parties cannot rely on the commitments embodied in stipulations, and that utilities can have no expectation that they will actually recover costs that the Commission determines are appropriate to defer. It would establish a ceiling on "over-earnings" without adopting any floor for "under-earnings," which would mean, over the long run, a utility could not expect to earn its authorized return. Perhaps most significantly, as explained in depth in Ameren Missouri's Initial Brief, that decision would effectively disable the Commission and the Company from using cost deferrals and AAOs to address extraordinary cost and revenue items, and move the State of Missouri far outside the mainstream with regard to this issue—a circumstance that will clearly be noted by the financial community.

For all these reasons, MIEC's and other parties' proposals to deny Ameren Missouri recovery of amounts deferred should be rejected by the Commission.

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[34] *Id.*

II. Noranda AAO

OPC, MIEC and the Staff oppose reflecting an amortization of the regulatory asset authorized by the Commission's Noranda AAO order in rates in this case. OPC's and Noranda's arguments are very similar, and the Staff has some arguments in common with them. Staff also makes an additional argument that turns deferrals on their head, effectively arguing for the first time in this case that only if the item is recurring (i.e., not extraordinary) can an AAO be granted for it.

MIEC's Initial Brief contains nothing that was not already addressed in the Company's Initial Brief. In summary, MIEC misstates the law, in particular the *UCCM* case, and ignores a line of Court of Appeals' decisions that directly contradict the argument MIEC makes now. MIEC also ignores the fact that the Missouri Supreme Court has declined to disturb those Court of Appeals' decisions, even though the argument MIEC is making now has been made to the Supreme Court before.

OPC's Initial Brief attempts to argue that the Commission's decision to use an accurate carrying cost figure in the ***Missouri Gas Energy*** case cited earlier provides authority to disregard the deferred sums in whatever manner the Commission desires, even if the deferred sums were prudently-incurred and even if there is no issue respecting the calculation. The fact is that the Commission found the carrying costs were not reflective of the actual carrying costs in that case. There is no contention that the regulatory asset here has been inaccurately determined.

OPC also has some of its facts wrong about the case. At page 9 of its Initial Brief, OPC cites to the ***Missouri Gas Energy*** case, saying that it affirmed the Commission's decision in Case No. GR-98-140. It did not. Instead, it affirmed the Commission's decision in Case No. GR-96-

285.[35] This is important given OPC's other discussion of Commission proceedings involving the MGE deferrals that were the subject of the cases OPC cites. That means that the Court of Appeals has never sanctioned ignoring part of a deferral, as OPC seems to contend it did for the "stub period" OPC mentions in its Initial Brief.

In summary, aside from OPC's attempt to extend ***Missouri Gas Energy*** beyond its holding and aside from OPC's misstatement about what it decided, there is nothing new in MIEC's or OPC's Initial Briefs that was not already addressed in the Company's Initial Brief and that indeed was not already addressed in the Noranda AAO case and in the Commission's Noranda AAO order. The Company will not burden the record here with arguments that have already been made, considered and disposed of.

One final point bears noting. The Staff – and really it appears Staff Counsel, since Mr. Cassidy didn't exactly endorse Staff Counsel's views – is making an argument in this case that was not made in the AAO case; that is, Staff Counsel now reads *UCCM* to mean that the Commission can never reflect a regulatory asset arising from a Commission-authorized deferral in rates, unless the Commission expects the item at issue to repeat itself in the future. If this were true, it would mean that the Commission was wrong when it allowed AAOs for deferred costs associated with the extraordinary gas line replacements arising in the 1990s, when the Commission drastically changed its gas safety rules. It would also mean that the Commission was wrong when it enacted rules that contemplated deferrals for compliance costs for its then-new vegetation management and infrastructure inspection rules, and that it has been wrong on many other occasions. Why would it have been wrong? Because those rules and the events giving rise to most AAOs are by their nature one-time, non-recurring events.

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[35] Case No. GR-98-140 was not even decided *by the Commission* until August 1998. The Court of Appeals' opinion was issued in August 1998, and that was after there had been a circuit court writ of review proceeding.

Staff Counsel's argument is yet another example of parties stretching *UCCM* beyond its reasonable limits in an effort to defeat an amortization of a regulatory asset arising from an AAO that they clearly do not like. If *UCCM* means what Staff Counsel (to the Company's knowledge, for the first time) says it means, then the long line of Court of Appeals' decisions that recognize that it is appropriate to defer expenses from the past and to reflect them in rates through amortizations in the future when there are extraordinary items, including those driven by policy or regulation, were incorrectly decided. Staff Counsel is saying that only if the item is *not* extraordinary – because, e.g., there will be ice storms again – can a deferral be reflected in rates. That has not been the law for decades and it is not the law now, notwithstanding Staff Counsel's novel theory.

Related to Staff Counsel's argument is its contention that because of what has been referred to as the "N factor," a Noranda AAO situation could not occur again. As explained in the Company's Initial Brief, the N Factor should be retained and the Staff agrees.[36] However, others may argue to the contrary and Staff Counsel's argument is beside the point because the argument is simply wrong. One other point needs to be cleared up about the N factor. MIEC claims in its Initial Brief that the N factor was originally only applicable if an act of God had caused a sufficient loss in Noranda load. That is not true, as MIEC's own witness Mr. Dauphinais confirmed.[37]

As indicated in the Company's Initial Brief, there is simply no good reason to fail to include an amortization of the approximately $36 million of deferred sums (over five years, or about $7.2 million per year) in the revenue requirement in this case.

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[36] Staff Initial Brief, p. 107.
[37] Tr. Vol. 35, p. 2842, l. 1-6. *See also* Tariff Sheet No. 98.11, issued June 8, 2010, which first implemented the N factor, and which confirms that the N factor is triggered by a drop in load of 40,000 kWh regardless of its cause.

III. Income Tax Expense

A. Rate Base and ADIT

The Initial Briefs filed by MIEC and Staff are long on "spin," but short on substantiation of the positions asserted. These briefs are interlaced with mischaracterizations, statements that fail to support the premise which they purport to substantiate and "levitating" conclusions, that is, conclusions without any visible means of support. In the main, these are dedicated to the promotion of three unsupportable themes:

1. The Company's NOLC-related ADIT balance is overstated;
2. The Company's Tax Allocation Agreement ("TAA") is unreasonable; and
3. The Commission's affiliate transaction rules compel the Commission to ignore the Company's actual economic investment in its rate base in favor of a hypothetical level of investment that is lower than the investment it actually has.

We will address each theme in turn.

MIEC's and Staff's characterization of the Company's NOLC-related ADIT as "overstated" is not a fact – it is a conclusion, and a subjective one at that. One would hope that any such conclusion would be based on facts. It is not. And the relevant facts are not in dispute. The NOLC-related ADIT balance the Company used in its rate base calculation reflected its actual cash position – its true economic status. This was the amount reviewed and certified by its independent auditors. This was the amount the Company recorded on its financial statements which were filed with the Securities and Exchange Commission ("SEC"). And this amount reflected the NOLC that was allocated to the Company under the Internal Revenue Code. MIEC's and Staff's "stand alone" amount is none of the above. This is all undisputed. So, by the standards of economics, financial accounting (as attested to by the Company's external auditors, PricewaterhouseCoopers), the SEC and the tax law, the amount was properly stated –

not overstated. The use of the term "overstated" appears intended to elicit a negative response. It is inaccurate and any such negative response is completely unjustified.

MIEC includes the TAA among the universe of "unreasonable affiliate arrangements." Both MIEC and Staff observe that utility holding companies have opportunities to structure relationships between the utility and its unregulated affiliates in a way that is detrimental to ratepayers. Their inescapable implication is that the TAA is a relationship of this type. Again, this is a subjective conclusion. However, there is not a shred of record evidence that even arguably supports this judgment. MIEC's witness, Mr. Brosch, testified that the Company's TAA "…has been favorable, in fact, from ratepayers' perspective."[38] In its Initial Brief, Staff recognized that the TAA"…confers benefits to Ameren Missouri..." In fact, the record evidence shows that, from 2008 through 2012, the operation of the TAA placed the Company in a better position than it would have been in under MIEC's and Staff's "stand alone" approach. And if, as Staff states, the $31 million detriment to the Company in 2013 is "considerable," the amounts of the benefits bestowed upon the Company by the TAA between 2008 and 2012 must then be described as "epic," for they were multiples of Staff's $31 million "considerable" detriment ($127 million in 2008, $161 million in 2009, $188 million in 2010, $182 million in 2011 and $178 million in 2012). When evaluating the entire period, the Company and its ratepayers remain far better off under the TAA than they would have been using MIEC's and Staff's "stand alone" approach. Consequently, if the TAA was intended to extract tax benefits from Ameren Missouri for the benefit of non-regulated affiliates, its design was egregiously flawed. In fact, it accomplished precisely the opposite.

In light of the way the TAA has worked over time, the conclusion that the Company's tax allocations in 2013 and 2014 were unreasonable is simply without basis. These allocations were

[38] Tr. Vol. 16, p. 394, l. 1-2.

every bit as reasonable as the favorable results produced by that very same agreement in 2008 through 2012. Tellingly, had the Company actually used the "stand alone" methodology advocated by MIEC and Staff in all years, it would be subject to the charge that, though its tax allocations in 2013 and 2014 were reasonable, the allocations in 2008 through 2012 were unreasonable.

MIEC and Staff want the best of both worlds. They want to be able to pick and choose whether Ameren Missouri is treated as a stand-alone or consolidated taxpayer each year based on whichever status provides the lower rates in that particular year. And they want to ignore the fact that it is impossible for the Company to change its tax status back and forth. Consequently, regardless of the tax status adopted, the Company's TAA would be accused of representing an "unreasonable affiliate arrangement," and the Company would be precluded from reflecting the taxes it actually must pay.

MIEC's Initial Brief asserts that this Commission has no choice but to comply with its affiliated transaction rules and adopt MIEC's proposal. At hearing, MIEC witness Michael Brosch, was specifically asked if he thought the Commission's rules compel the adoption of his "stand alone" approach. He balked, stating that he was "…not enough schooled…" to answer the question.[39] Mr. Brosch did, however, state that his research regarding affiliate transaction rules had disclosed no specific reference to income taxes or tax allocation agreements.[40] Staff's position on this issue is that it takes no position. Thus, there is absolutely nothing in the record that supports the proposition that the affiliated transaction rules apply to the Company's TAA. Consequently, the "mandate" upon which MIEC relies is without support. It is pure conclusion.

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[39] Tr. Vol. 16, p. 401, l. 16-21.
[40] *Id.,* p. 394, l. 16-20.

In order to take a stab at fitting the TAA into the affiliated transaction rules, MIEC constructs a "transfer of value" concept which, it claims, is undisputed. MIEC is wrong. The Company vigorously disputes that any such thing existed or that a transfer of anything at all occurred. Ameren Missouri retained the value of every dollar of the NOLC it generated. No portion of it went (was transferred) anywhere else. In its Initial Brief, MIEC states categorically that the Company's NOLC-related ADIT is "…clearly an asset." However, Mr. Brosch testified that what was being transferred was "…the Ameren Missouri allocated share of the consolidated tax liability."[41] Which is it – an asset or a liability? MIEC is indecisive on the point. In fact, as Chairman Kenney properly observed, the NOLC-related ADIT is really an adjustment (*i.e.*, a reduction) to the amount of ADIT that is available.[42] So, in a ratemaking sense, it is not so much an asset as it is a reduction of a liability. However, even if one assumes that the NOLC-related ADIT is an asset, MIEC's "transfer of value" concept fails to fit. If the Company's assets represent things of value it owns, ironically, MIEC proposes that the Company be given credit for *less* of an asset than the Company proposes. MIEC's "value" proposition appears to go the wrong way.

MIEC asserts that the Company's treatment of its NOLC results in it being compensated through the TAA at a value below "fully-distributed cost." However, MIEC fails to explain what "fully distributed cost" might be in the context of a tax allocation agreement and references no authority for whatever definition it might apply. Further, MIEC fails utterly to quantify the shortfall.

In short, there is no evidence that there was an asset and certainly none that the Company disposed of an asset in return for which it received less than its fully distributed cost or market

[41] *Id.,* p. 393, l. 20-23.
[42] *Id.,* p. 350, l. 8-13.

value. It is no wonder that the affiliate transaction rules have not been applied to income taxes. They were never designed for, nor should they be used for, that purpose.

B. The Section 199 Domestic Production Deduction ("DPD")

With respect to the DPD, MIEC and Staff offer two proposals. Their primary position is that, recognizing that the DPD is limited to the Company's taxable income, the Company's NOLC should be ignored in computing that limitation. Their "fall back" proposal is that, if the Company's NOLC is not ignored, then the NOLC that should be used is a hypothetical "stand alone" NOLC computation rather than the Company's actual NOLC.

The "fall back" position is precisely the same as the proposal advocated by those parties with regard to the issue of the NOLC-related ADIT balance discussed above. No additional discussion of that position is required.

It is undisputed that the tax law requires that a company's NOLC be considered in computing its taxable income.[43] Since the DPD is limited by taxable income, the NOLC must be considered in calculating that limitation. Thus, their primary position amounts to a patent flouting of the tax law. They attempt to justify such defiance in two ways: (1) by pointing out that the Company itself ignored its NOLC for this purpose in prior rate cases and (2) by making vague references to the various uncertainties associated with the computation of the DPD.

With regard to the Company's prior practice, it was, in a word, erroneous. The Company recognized this and corrected it. Staff's agreement with MIEC that, "there is nothing inherently incorrect with the method Ameren Missouri has used to calculate its section 199 deduction in past rate cases…" is simply untrue. That method was, in fact, inherently wrong. The Company corrected at least two flawed tax-related prior practices in this case: its DPD calculation and its treatment of the ADIT balance in its Account No. 281. The former increased tax expense and

[43] *Id.,* p. 375, l. 8-11; *Id.*, p. 395, l. 3-6.

the latter decreased rate base and revenue requirement. Neither MIEC nor Staff objected to the latter correction. Thus, their slavish devotion to prior practice appears conveniently selective.

With regard to the uncertainties associated with computing a DPD, a lack of precision is an inescapable feature of ratemaking. It is true that Ameren Missouri is making educated estimates of what its DPD qualifying revenue will be. Similarly, Ameren Missouri does not know precisely what the expenses that relate to that qualifying revenue will be. But, in each case, it makes educated estimates. By contrast, there is no need to estimate the amount of the Company's NOLC. We know precisely what it is. Ironically, the Company's NOLC is the single most certain component of its DPD computation. To suggest that, because the other elements of the computation must be estimated, we should ignore the one aspect that we know with precision, is simply inexplicable.

The genuine rationale underlying MIEC's and Staff's DPD proposal is clearly articulated at page 41 of MIEC's Initial Post-Hearing Brief where it states:

> *Ameren Missouri's customers benefit from a larger DPD.*

It's as uncomplicated as that. However, this is not an acceptable basis for a rate case adjustment and their proposals should be rejected.

IV. Noranda Load

Staff and MIEC were the only two parties, not counting Ameren Missouri, to address this issue in their Initial Briefs. Staff recommends using what it describes as "the normalized test year" level of load for Noranda, which is merely Noranda's usage during the test year (12 months ending March 31, 2014). This reflects a 98.2% load factor,[44] which is close to the highest load factor Noranda has ever experienced as an Ameren Missouri customer. Staff's recommendation certainly does not adjust Noranda's load to account for the ongoing variations

[44] Staff's Initial Brief, p. 7.

in usage that serving Noranda entails. MIEC makes the same recommendation, as is explained in its Initial Brief.

> Under normal operations, Noranda consistently uses about 485 MW of power with an approximate 98% load factor. A 98% load factor means that during 98% of the hours in a year, Noranda uses about 485 MW of power.[45]

Later in its Initial Brief, MIEC repeats the same claims.

> Except for the ice storm and the abnormal level of pot failures which coincidentally occurred as a result of the ice storm, Noranda has operated at a 98% load factor, consuming approximately 485 MWhs on an hourly basis.[46]

MIEC's and Staff's statements rely on nothing more than conventional wisdom that has been presumed to be true over the years. Reliance on conventional wisdom does not make a presumption (here, that Noranda will operate at a 98.2% load factor) true. Interestingly, MIEC's Initial Brief did not include a single citation to the record for the claims made regarding this issue; likely because there is absolutely no evidence in the record to support its claims.

What is missing in this argument is the actual fluctuation in the level of usage by Noranda. Neither Staff nor MIEC, nor any other party to this case, has refuted the evidence provided by Ameren Missouri witness Steven M. Wills. During the roughly 10 years Noranda has been an Ameren Missouri customer, its load has varied and it most certainly has not stayed at "full" (98.2%) load. This is conclusively demonstrated by a table from Mr. Wills' surrebuttal testimony, a portion of which is reproduced below (and which was reproduced in the Company's Initial Brief):

[45] MIEC Initial Brief, p. 32.
[46] *Id.*, p. 33.

Table SMW-1[47] from Wills' Surrebuttal

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Noranda Load Factor	97.0%	98.4%	98.6%	98.2%	58.0%	95.7%	98.1%	97.3%	98.4%	95.4%

This evidence demonstrates that Noranda's load has only been at or slightly above 98.2% in four of the last ten years and that is exactly the point of normalizing Noranda's load. Further, Ameren Missouri notes that it is important to get Noranda's usage set correctly since Noranda is the only customer in the LTS class, meaning there is no other customer who might increase its usage and offset any decrease in Noranda's usage.

Staff and MIEC warn that if the Commission uses a three-year average for Noranda's usage, then Ameren Missouri could "over earn"[48] (in this case, meaning recover more than the costs assigned to the LTS class) while ignoring the fact that, with Staff's recommendation, if Noranda does not use electricity at a 98.2% load factor, the Company will not earn enough from the LTS class to cover the costs assigned to it in this rate case. The reality is that it is highly unlikely that Noranda will use exactly the same kWhs used by the Commission to set Noranda's electric usage level. But, given that no one knows exactly what level of usage Noranda will have, and that Noranda's usage has varied considerably, the appropriate way to handle usage is to normalize it, just like other changing factors such as the fluctuating expense of vegetation management costs. In this case, that means using a three-year average. Using this methodology will sometimes result in the Company receiving more or less revenues from Noranda than presumed when rates were set, but over time, those differences should average out. What Staff and MIEC propose to do is set the billing units at near the maximum level of electricity Noranda

[47] Ex. 54, p. 6, l. 12 (Wills surrebuttal).
[48] Staff's Initial Brief p. 8. MIEC Initial Brief, p. 33.

might use (absent some type of expansion at the plant) rather than at a multi-year average that incorporates natural fluctuations in usage. In that scenario, their proposal places the vast majority of the risk upon Ameren Missouri.

Both Staff and MIEC rely heavily in their briefs on the argument that the current reduction in load is caused by an abnormally high level of pot failures and argue that issue will be resolved in the near future.[49] This argument about the anticipated timeline of the restoration of pot lines misses the point and is only incidentally relevant to Ameren Missouri's proposal. It is a fact that if the pot line restoration takes longer than May to be resolved, then Ameren Missouri will be unable to cover the costs assigned to the LTS class (because Staff's, MIEC's and Ameren Missouri's proposals are all to set usage at a level higher than it actually is at this time). But, that is not the argument here. Just as it would not be appropriate to set Noranda's usage at the level prevailing at the true-up for this case (because it was much lower than even the three-year average), it is also not appropriate to set it at the 98.2% level. The Commission must determine the proper, normalized level of usage to use in calculating rates. A three-year average is the most appropriate level because Noranda's usage varies.

Secondly, the Commission should note that no witness with actual knowledge testified as to the date of when the pot line repairs will be complete. The only MIEC witness to testify directly about this issue was a consultant from Brubaker & Associates (Greg Meyer), despite the fact that several Noranda employees testified during the hearings in this case.[50] The problem with this is Mr. Meyer's lack of direct knowledge of the situation, as was illustrated by the cross-examination of Mr. Meyer at hearing.

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[49] Staff's Initial Brief, p. 8.
[50] Mr. Smith did testify about the pot lines but did not testify about a date by which the repairs would be completed, which is the central element of MIEC's and Staff's argument. See Tr. Vol. 31, p. 2429, l. 25 to p. 2430, l. 9.

Q. Let me ask you a question. Have you ever – do you have any experience in operating an aluminum smelter?
A. No, I do not.

Q. Are you – are you an electrical or a mechanical or an engineer of any kind?
A. No, I'm not.

Q. Do you – do you have expertise in the specifications for the materials or equipment or whatever it is that they use to reline pots in an aluminum smelter?
A. No.

Q. Isn't it true that whatever you're testifying about in terms of whether they will or won't have to reline the pots or how the pots perform is secondhand information that you've been given by somebody at Noranda?
A I discuss these things with Mr. Chad Pinson, who's the vice president and general manager of the smelter.

Q. But Mr. Pinson isn't here to testify, is he?
A. No.

Q. You're an accountant, as I recall; isn't that right?
A. Auditor/accountant, yes.

Q. Who, until you left the Commission a few years ago to Brubaker, spent his entire career as an auditor at the Missouri Public Service Commission, right?
A. That's correct[51].

Even on redirect, MIEC's own attorney could not solicit foundation to allow additional testimony from Mr. Meyer on this issue.[52] It is absolutely clear that any testimony that Mr. Meyer could provide on this matter is nothing more than hearsay, and he admits that he does not have the knowledge necessary to confirm the likelihood of Noranda being back to full production by the end of May.[53] MIEC's choice to have Mr. Meyer testify on this issue is difficult to understand since MIEC has at least two Noranda employees (CEO Kip Smith and CFO Dale Boyles) who have first-hand knowledge about this issue but who, for whatever

[51] Tr. Vol. 29, p. 2102, l. 16 to p. 2103, l. 21.
[52] Tr. Vol. 29, p. 2105, l. 2-22.
[53] *Id.*

reason, did not offer testimony on the date pot line repairs are expected to be complete. Again, as explained above, when the pot line failures are fixed is not the central question in this matter and the answer does not change this adjustment.

Last, both Staff and MIEC's Initial Briefs point out that there has been an evolution in Ameren Missouri's position on this matter throughout the case. The Company's position did change as the circumstances changed during the proceeding of this case. Noranda did not begin experiencing high pot line failures until after Ameren Missouri had filed its rate case. The case was filed on July 3, 2014, presuming billing units as of March 31, 2014, and the first evidence of pot failures appeared in the second half of 2014.[54] As the rebuttal and surrebuttal testimony deadlines approached, Noranda still had not completed repairs to the pot line failures and its usage was still not back to a 98.2% load factor. As Ameren Missouri looked closer at Noranda's changing usage, it determined that the typical methodology of handling this matter using billing units at the time of the update period (the year ending August 31, 2014) did not represent a fair level to use. Thus, the Company turned to the standard method for handling items with variation; using a multi-year average. Ameren Missouri set forth multiple methodologies[55] but chose the one that the evidence has shown is the most fair to all parties and the one that should be adopted. The undisputed fact is that there is variation in Noranda's electric usage and that variation should be acknowledged and reflected in the billing units used to set rates in this case.

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[54] Ex. 53, p. 20, l. 6-8. (Wills amended rebuttal).

[55] Ex. 54, p. 8, l. 1 (Wills Surrebuttal). In Table SMW-2, Mr. Wills also calculated a 10-year average. This number would be an appropriate normalization if the Commission denies Ameren Missouri's AAO recovery request, as that level of usage best reflects the tremendous risk Ameren Missouri faces with this large a customer who is the only customer in its rate class. The Company strongly feels, however, that the more appropriate solution is for the Commission to allow recovery of that AAO and to use the three-year average for setting billing units for the LTS class.

V. Return on Equity

Nine parties filed Initial Briefs addressing return on equity: Staff, MIEC, OPC, Walmart Stores East, LP and Sam's East, Inc. (collectively "Walmart"), CCM, Midwest Energy Consumers Group ("MECG"), Missouri Retailers Association ("MRA"), and the Company. Four parties based their analysis on the testimony of their expert witnesses (Staff, MIEC, OPC, and the Company). For the most part, the other intervenors (representing commercial ratepayer constituencies – CCM, MECG, and MRA) adopted or support the viewpoints of either OPC or MIEC. Walmart offered limited observations based upon its view of other authorized returns. Common themes in these parties' briefs are addressed below, and arguments unique to particular parties are addressed individually in the sections that follow.

For Staff, MIEC, and OPC, the future of the United States economy (including the Missouri economy) is a bleak one. In the view held by these parties and their experts, growth experienced today by utilities like Ameren Missouri is temporary and will turn downward in coming years, dropping below historic levels as it follows the overall economy.[56] OPC and Staff argue that the Missouri economy is in bad shape, and OPC postulates that aging demographic trends paint a grim picture for Missouri's economic future.[57] MIEC witness Michael Gorman assumes that U.S. economic growth will proceed at below historic levels.[58] These parties portray an investor sentiment that the competitiveness of capital markets for utilities is waning as a prospective consideration.[59] This low growth, low return viewpoint is not merely rhetorical but is reflected in the key assumptions that drive their analytics and models. This is the principal

[56] Ex. 512 (Gorman Surrebuttal), pp. 12-13; Tr. Vol. 21, pp. 1311-1313.
[57] Staff's Initial Brief, pp. 73-74; OPC Initial Brief, pp. 24-25.
[58] Ex. 18 (Hevert Surrebuttal), pp. 39-41.
[59] MIEC Initial Post-Hearing Brief, p. 19.

reason their recommended returns are so much lower than those proposed by Ameren Missouri witness Robert Hevert and recent authorized returns for vertically-integrated utilities generally.

Staff, MIEC, and OPC ask the Commission to accept a state of perpetual low growth and low return requirements as a forgone conclusion. The return on equity decided in this case is important because it is the return opportunity necessary to meet the requirements of investors to provide capital to support Ameren Missouri's *electric infrastructure* – which is foundational to the local and regional economy. The return authorized must be fair to consumers, but also sufficient to attract capital investment. Furthermore, the record facts run counter to MIEC's, OPC's, and Staff's pessimistic assumptions and support a different, more neutral perspective.

There are key indicators that drive the models used by experts to measure the cost of equity. Taken together, key indicators presently bode for stable and rising capital markets and a more competitive market for utility capital going forward. Those key indicators include: interest rates, growth rates, dividend yields, and authorized returns in other jurisdictions. These capital market conditions are key indicators of capital costs because they are principal inputs into the CAPM, DCF, and bond yield risk premium analyses. Additionally, economic indicators support an improving outlook.

Here is a summary of what the record contains with respect to the key indicators:

- Treasury rates used to calculate the CAPM are higher in this case than in Ameren Missouri's last rate case;[60]
- Prospectively, interest rates are expected to rise;[61]
- Recent data shows utility bond interest rates have risen in recent weeks;[62]
- Analyst growth rates relied upon by Mr. Gorman are higher compared to those he relied on in Ameren Missouri's last rate case;[63]

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[60] Tr. Vol. 21, p. 1218.
[61] *Id.*, pp. 1317-1318.
[62] Ex. 62.

- Value Line, a reputable source (relied upon by Mr. Hevert, Staff, Mr. Gorman, and OPC witness Lance Schafer), projects yields will rise to near historic levels;[64]

- Authorized returns are stable in the past 24 months for vertically-integrated utilities and are presently higher than Ameren Missouri's current authorized return;[65]

- The economy has improved over the past 24 months, has shown periods of strong growth, and unemployment has been declining;[66]

- The Federal Reserve views economic conditions as improving as the U.S. economy moves toward maximum employment.[67]

Staff, OPC, and MIEC focus myopically on DCF results that perpetuate a scenario seen in limited 13-week measurement periods of stock prices for proxy companies. Annualized dividends were measured last year, and combined with the 13-week average stock prices to develop yields.[68] The unusually high utility stock valuations prevailing during that period and static dividends produced yields that are below historic average yields for utility stocks. Valuations (stock prices) were high during this period and yields low; at least two witnesses observe that the low yields will not persist (Mr. Schafer and Mr. Hevert). Consider the direct testimony of Mr. Schafer and Mr. Hevert on the subject.

Mr. Schafer stated in his Direct Testimony:

> I am recommending an adjustment to the result of my constant-growth DCF model based on the evidence that my proxy group's dividend yield is both currently lower than it is expected to be within three to five years and also lower than it has historically been.[69]

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[63] Tr. Vol. 21, p. 1221.
[64] *Id.,* p. 1315.
[65] Ex. 18 (Hevert Surrebuttal), p. 5.
[66] Tr. Vol. 21, pp. 1221-1222.
[67] Ex. 202 (Staff Cost of Service Report), pp. 14-15.
[68] See e.g. Ex. 409 (Schafer Direct), LCS-3.
[69] Ex. 409 (Schafer Direct), p. 16.

Mr. Schafer admitted a source he relies upon (Value Line) for his growth rates predicts higher dividend yields going forward:

> **Q. You would agree with respect to your proxy group, the historic divided yield is 4.37%, correct?**
> A. Yeah, that sounds correct.
>
> **Q. You would agree that the Value Line forecast yield for the proxy group is 4.44%, correct?**
> A. Yes, 4.4 percent.[70]

Mr. Hevert testified at hearing concerning stock prices calculated for the purpose of the discounted cash flow model:

> ….At that time the PE ratio was 20 or 21. The long-term average is about 16.5. To put that in perspective, it was saying that the companies –utilities would trade forever at price-to-earnings ratios in excess of Apple computer price-to-earnings ratios and not by a small amount, by a considerable amount. That is why I said in my testimony even earlier this afternoon discussion that you have to take – you have to apply considerable caution in looking at the results of those constant growth DCF models. [71]

In contrast to other witnesses, Mr. Hevert does not assume a pessimistic or optimistic viewpoint, but rather he measures equity from several perspectives. His approach is not tied to prognostications about the future direction of the overall economy. His inputs and results reported are inclusive and not selective and exclusive. Mr. Hevert's constant growth DCF assumes perpetual growth and reflects present yield measurements.[72] His multi-stage DCF assumes a reversion to historic long-term economic growth (not a downturn).[73] His CAPM draws upon current and prospective data to take a forward-looking view of the total market and its relationship to the proxy companies.[74] Mr. Hevert does not calculate any single number or

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[70] Tr. Vol. 21, p. 1315.
[71] *Id.,* p. 1192.
[72] Ex. 16 (Hevert Direct), p. 18.
[73] *Id.,* pp. 23-24.
[74] *Id.*, pp. 25-26.

average to develop his recommendation, but rather relies upon an array of results in light of reasoned analysis to support his recommendation. [75]

A. Reply to MIEC

MIEC claims the evidence shows that the cost of capital is lower today than it was during Ameren Missouri's last rate case, and its recommended 9.30% return on equity proposal would suggest that decrease is dramatic.[76] There is no such evidence, and as noted above, there are indications that the capital markets are stable and moving higher. In its Initial Brief, MIEC owns up to the reality that Treasury bond yields have increased since last case, and MIEC claims growth rates are "relatively stable."[77] At hearing, MIEC's lead witness, Mr. Gorman, did not tell the Commission growth rates were "stable," he told the Commission they were higher. Here is what Mr. Gorman told the Commission at the hearing:

> **Q. Now, the consensus analyst growth rates that you observed in this case are, in fact, higher than Ameren Missouri's last rate case ER-2012-0166 as based on – as your analysis provides; is that correct?**
>
> A. Three to five-year growth rates are higher in this case than in the last case, based on review of my proxy group in this case relative to the proxy group in the last case.[78]

Like Mr. Gorman, Mr. Hevert also observed an increase in growth rates since the last case.[79]

MIEC tries to disclaim the importance of increasing Treasury rates and instead points the Commission to claims that utility bond yields have declined.[80] They do so by inserting a table that shows interest rates as of January 23, 2015.[81] However, Ameren Missouri sent Mr. Gorman a data request just prior to hearing asking him to update his analysis, and, in fact, interest rates

[75] Ex. 17 (Hevert Rebuttal), pp. 121-125.
[76] MIEC's Initial Brief, pp. 16-17.
[77] *Id.*, pp. 18-19.
[78] Tr. Vol. 21, p. 1221, l. 2-10.
[79] *Id.,* p. 1155, l. 4-10.
[80] MIEC's Initial Brief, pp. 19-20.
[81] MIEC's Initial Brief, p. 21; Ex. 512 (Gorman Surrebuttal), Schedule MPG-SR-2.

for public utilities rose significantly in the weeks leading up to the hearing. Here is what Mr. Gorman's updated analysis shows:

Ameren Missouri

Ameren Missouri-MIEC-011 Attachment

Date	A-Rated Yields	Baa-Rated Yields
2/13/2015	3.74%	4.50%
2/6/2015	3.64%	4.44%
1/30/2015	3.38%	4.21%
1/23/2015	3.51%	4.33%
1/16/2015	3.55%	4.38%
1/9/2015	3.68%	4.49%
1/2/2015	3.82%	4.60%
12/26/2014	3.94%	4.72%
12/19/2014	3.90%	4.71%
12/12/2014	3.87%	4.63%
12/5/2014	4.06%	4.73%
11/28/2014	3.99%	4.66%
11/21/2014	4.08%	4.77%
Average	**3.78%**	**4.55%**

NOTE: Yellow highlighted sections were not included in Mr. Gorman's Surrebuttal Schedule MPG-SR-2.

The recent dip in interest rates has clearly turned upward, and moreover, the increase tracks a sudden 50 basis point increase in Treasury rates.[82] Hence, the record does not show any decreasing trend in interest rates, but rather shows increasing rates in recent weeks. Furthermore, the contemporaneous increase in Treasuries and utility bonds is no coincidence. Asking the Commission to ignore the linkage between Treasury rates and utility bond interest rates is demonstrative of the strained argument that MIEC is attempting to hold together with respect to capital market conditions.

Because MIEC cannot rely upon growth rates or interest rates to substantiate its claims, Mr. Gorman's arguments concerning dividend yields become absolutely critical to MIEC's position. MIEC argues that Mr. Hevert's observations are "misleading and irrelevant," stating:

[82] Tr. Vol. 21, p. 1153.

"Ameren Missouri witness Hevert also testified that utility stock prices are not 'increasing,' citing a dip in stock prices during the period from January 29 through February 27, 2015."[83] This position in and of itself is illogical; a reduction in the price of proxy company stock prices is in fact evidence that these stock prices are not increasing. More importantly, the observation runs counter to MIEC's argument that high valuations and low yields are here to stay. Dividends increase as rate base investment is made and earnings grow, and even Mr. Gorman would acknowledge this point.[84] Dividend *yields,* calculated by dividing annual dividends by stock prices, increase as stocks prices are stable or decline. The 10% drop in utility stock prices is not important in and of itself, but rather it corroborates what Mr. Hevert indicated earlier in rebuttal and surrebuttal testimony (and at hearing): price earnings ratios for utilities will revert to historic norms over time.[85] Even OPC's witness, Mr. Schafer, recognized that utility stock valuations reflected in the proxy group were unusually high and attempted to adjust his DCF analysis to correct the problem.[86] As valuation levels hold steady or decline, increasing yields will be observed closer to the historic average rate of 4.5%.[87] What this means for measuring the cost of equity is that Mr. Gorman's DCF models (which incorporate adjusted yields of just 3.9%) are not fully representative of what investors would expect and require to invest in utilities on a prospective basis. The record shows that Mr. Gorman's DCF results are thus unreliable as a measure of the cost of equity. Therefore, it is critical to look beyond the DCF results to other indicators and models.

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[83] MIEC's Initial Brief, p. 21.
[84] Tr. Vol. 21, pp. 1284-1285.
[85] Ex. 17 (Hevert Rebuttal), pp. 75-76; Ex. 18 (Hevert Surrebuttal), pp. 36-37; Tr. Vol. 21, p. 1168.
[86] Ex. 409 (Schafer Direct), pp. 15-16.
[87] *Id.*; Tr. Vol. 21, p. 1314-1315.

i. MIEC's Unsupported Claims Regarding Growth

MIEC also argues in its brief that Mr. Hevert's "…analysis ignores the strong improvement in expected earnings of utility companies over the next three to five years."[88] MIEC does not explain how this view reconciles with Mr. Gorman's insistence that investors expect growth will turn sharply lower to 4.4% based on a single number plucked out of a Blue Chip Publication.[89] In fact, two of the three DCF results Mr. Gorman relies upon assume investors expect lower growth.[90] MIEC cannot have it both ways. These positions are logically inconsistent. Further, Mr. Gorman tells us that the utility construction cycle will slow in future years, but he does not tell us why.[91] *This is a critical flaw in Mr. Gorman's overall approach to measuring equity – it is a foundational assumption for his ultimate recommendation in this case and it is without factual support.* A key investor publication, Moody's Investor Services, reported business risks for Ameren Missouri including high compliance costs associated with investment required to meet environmental regulations.[92] Mr. Gorman told the Commission at hearing that capital investment necessary to comply with environmental regulation drives earnings growth and increases dividends.[93] Further, Mr. Gorman does not explain how aging infrastructure replacement (an industry-wide phenomenon) will be fully completed in the United States in 3-5 years.[94] Mr. Gorman acknowledged he has not reviewed the Company's Integrated Resource Plan "…in a while," and thus has no understanding of what prospective construction is required by Ameren Missouri to maintain adequate generation capacity.[95] In fact, since 2007, analyst growth rates (from sources Mr. Gorman considers reliable) consistently predict 3-5 year

[88] MIEC's Initial Brief, p. 28.
[89] Tr. Vol. 21, p. 1237; Ex. 63.
[90] Ex. 510, (Gorman Direct), pp. 24-26.
[91] Tr. Vol. 21, p. 1223.
[92] Ex. 61.
[93] Tr. Vol. 21, pp. 1284-85.
[94] *Id.,* p. 1213.
[95] *Id*., p. 1212.

growth higher than Mr. Gorman's long-term growth assumptions.[96] Accordingly, the record does not substantiate MIEC's theories that investors expect slowing construction and a significant downturn in growth rates after 3-5 years. If investors expect strong growth in the sector, then it follows that the market for capital will be competitive and the Commission should increase Ameren Missouri's authorized return so the Company can effectively compete for its capital requirements going forward.

Moreover, MIEC improperly conflates forward-looking and trailing P/E ratios, stating that "if forward-looking earnings are taken into account, the P/E ratio of the proxy group's prevailing stock price is actually below the historical normal (*sic*)."[97] MIEC is missing the point. Mr. Hevert's analysis clearly demonstrates that when measured on a consistent trailing twelve month earnings basis, utility valuation multiples had been at historically high levels, whether measured over time or relative to the broad market. MIEC mistakenly reasons that comparing P/E ratios calculated on a forward-earnings to P/E ratios calculated on a trailing twelve months basis somehow invalidates Mr. Hevert's analysis. Of course P/E ratios based on projected earnings will be different than P/E ratios based on historical earnings – the two are entirely different metrics. MIEC quite simply has compared apples to oranges and in so doing, has arrived at a fundamentally incorrect conclusion.

With respect to Mr. Gorman's predictions for long-term growth, MIEC claims that Mr. Hevert's assumed long-term growth rate (based on historical GDP growth) "…significantly exceeds independent market participants' current outlooks for U.S. GDP growth."[98] MIEC cannot and does not know what every market participant expects in terms of long-term U.S. GDP growth over the next 30 years. Surely, there is no single number that every participant agrees

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[96] *Id.*, p. 1230.
[97] MIEC's Initial Brief, p. 28.
[98] *Id.,* p. 25.

upon. No one can predict what future GDP will be or what relationship utility growth will have to overall economic growth. Investors likely have varying expectations with respect to investment growth. Mr. Gorman selected a GDP projection for 2021-2025 to project growth expectations for 2026 and beyond.[99] There is no support in the record that this approach is shared by any investors and certainly does not support that all of them would hold such a view. While investors would reference the document relied on by Mr. Gorman, they would likely consider a variety of sources. Mr. Hevert's expectation of a return to a historic average GDP growth rate (plus a measure of inflation) over time is not unreasonable, and accordingly his 5.71% long-term growth expectation is appropriate and reasonable.[100]

MIEC argues in its brief that the Commission should lower Ameren Missouri's authorized return due to the divestiture by Ameren Corporation of its subsidiary merchant generating affiliate since the last rate case.[101] This argument is without merit. The Commission is setting rates for Ameren Missouri and not Ameren Corporation. The notion that the Commission should award higher returns for utilities with higher risk unregulated affiliates and lower returns for utilities that do not have such affiliates is illogical and should be rejected. Ameren Missouri's return should be established upon an informed review of the risks it faces as a utility relative to the market, and not conjecture about the risk associated unregulated ventures of other companies or past affiliates.

ii. <u>MIEC's CAPM</u>

MIEC's arguments and position with respect to its CAPM are similar to those offered by OPC, and are addressed below in our reply to OPC (and also discussed in the Company's Initial Brief).

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[99] Tr. Vol. 21, pp. 1233-1234.
[100] Ex. 16 (Hevert Direct), pp. 22-23.
[101] MIEC’s Initial Brief, p. 23.

iii. MIEC's Limited Review of Authorized Returns

MIEC continues to argue that the Commission should not only consider returns authorized for other vertically-integrated utilities, but rather should expand that review to include returns provided to distribution utilities that do not own generation.[102] The reason is obvious; commissions routinely authorize lower returns for distribution electric utilities[103] that do not own generation when compared to utilities that do own generation.[104] Thus, including these returns lowers the average. Distribution utilities simply do not have the same risks that vertically-integrated electric utilities have and are inappropriate for comparison. ***Bluefield*** and ***Hope*** require that the return allowed be commensurate with returns of businesses of *corresponding risk.*[105] Accordingly, returns for distribution utilities dilute the comparative value of examining authorized returns.

Further diluting the comparative value of returns, Mr. Gorman also does not consider settled returns in his average, arguing that the settled returns are merely a "suggestion."[106] Mr. Gorman's claim runs counter to legal requirements in the United States that are imposed on state Commissions who make decisions based upon findings of fact. In Missouri, the authorized return must be supported by substantial and competent evidence.[107] A return on equity finding in a Commission order must be supported by evidence irrespective of whether the finding is premised on a settlement or upon a litigated position. The same can be said of other jurisdictions. A recent North Carolina case provides a good example. The North Carolina Supreme Court addressed an appeal by the Attorney General with respect to a settled return on

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[102] MIEC's Initial Brief, p. 30.
[103] Also referred to as "delivery service" or "wires only" utilities.
[104] See Ex. 18 (Hevert Surrebuttal), RBH-S29, p. 5-6 (Regulatory Research Associates Report denotes distribution only utilities with a "D" in the far right column).
[105] Ameren Missouri's Initial Brief, p. 55.
[106] Tr. Vol. 21, p. 1275, l. 9-10.
[107] ***State Ex. Rel. Public Counsel v. Public Service Comm'n***, 274 S.W.3d 569, 573 (Mo. App. W.D. 2009).

equity used to set rates.[108] The court reviewed the North Carolina Commission's decision and found it to be supported by testimonial evidence in the record.[109] The salient point is that regulatory Commissions rely upon findings of fact based on evidence to support important decisions, including the return on equity. A settled return on equity must be supported by record evidence and cannot consist of numbers arbitrarily picked out of the air.

Thus, Mr. Gorman's average includes inappropriate returns and excludes returns that should be considered. There is no reason to assume that investors would look at distribution utility returns and ignore settled ROE values for vertically-integrated utilities when making investment decisions.

B. Reply to OPC

Much like MIEC, OPC argues that capital costs are low and that position is unsupported by the record for the same reasons stated above. OPC also makes certain novel claims not otherwise addressed in response to other parties above, or in Ameren Missouri's Initial Brief. First, OPC argues that the Commission should set a low return on equity for the Company based on its prognosis for the Missouri economy, which OPC portrays as being in a state of perpetual decline.[110] Second, OPC claims that the Company has little risk because of regulatory mechanisms which are commonly used by electric utilities throughout the United States.[111] Finally, with respect to the CAPM model, OPC offers a false premise argument suggesting the Company is attempting to compare itself to other high growth businesses;[112] the Company has never offered this argument and is on record agreeing that regulated utilities are less risky than

[108] ***State Ex. Rel. Utilities Commission v. Cooper***, 767 S.E.2d 305, 307-309 (N.C. Sup. Ct. 2015).
[109] *Id.*, It is noteworthy that part of the evidence relied upon in that case was submitted by Mr. Hevert.
[110] OPC's Initial Brief, pp. 23-24.
[111] *Id.,* p. 25.
[112] *Id.*, p. 20.

non-regulated companies.[113] OPC's misplaced criticisms attempt to obfuscate fundamental flaws in OPC's Capital Asset Pricing Model prepared by Mr. Schafer that render its extremely low implied ROE (8.74%) unreliable.

i. OPC's Opinions Concerning U.S. and Missouri Economy

OPC asks the Commission to dramatically reduce the authorized return on equity for Ameren Missouri in response to OPC's view of the Missouri economy. OPC views the current Missouri economy as essentially destitute; an amalgamation of "distressed communities," the demographics of which are both in decline and aging.[114] This perspective is not simply a matter of rhetorical argument for OPC, but is a view reflected in Mr. Schafer's low long-term growth rate assumptions.[115]

The issue to be decided with respect to return on equity is about establishing a return opportunity consistent with what investors would require in order to make an investment in Ameren Missouri's electric infrastructure – which is foundational to the Missouri economy. Essentially, OPC asks this Commission to throw in the towel and accept the proposition that Missouri is an economically desolate place, where historically low growth can be expected in perpetuity. To the extent one accepts this dismal view, it follows that there really is no pressing need to attract investment to support infrastructure because the State is in a state of irreversible decline. Ameren Missouri does not accept this view and neither should the Commission. The economy is improving and despite occasional setbacks, will continue to improve. The communities that Ameren Missouri serves have great potential and are worthy of infrastructure investment. In fact, as Mr. Hevert noted, Ameren Missouri is investing billions of dollars in the

[113] Tr. Vol. 21, pp. 1164-1165.
[114] *OPC's Initial Brief, p. 24.*
[115] Ex. 409 (Schafer Direct), p. 25-26; Tr. Vol. 21, pp. 1312-1313.

state of Missouri.[116] Accordingly, the return authorized in this case should allow the Company to compete for the capital needed to support investment in Missouri's electric infrastructure.

Setting aside the policy implications, OPC's arguments about economics also do not withstand legal scrutiny. In the seminal case, ***Bluefield, Waterworks and Improvement Co. v. Public Service Commission of West Virginia***, the West Virginia Commission refused to accept that certain costs had increased as a result of the economic impacts of World War I.[117] Today, the principle still applies. Despite the 2008 recession and economic impacts that have followed, the Commission cannot and should not set rates without full consideration of the actual costs the Company must pay, including capital costs. Capital market conditions and authorized returns (10.01% average) in the United States are much higher than OPC's recommended 9.01% return.[118] For both policy and legal reasons, the Commission should reject OPC's arguments regarding its economic assessment of the Missouri economy.

ii. OPC's Unsupported Claims Regarding Rate Mechanisms

OPC claims that the Company has "extraordinary rate-making mechanisms" at its disposal that lessen its risk.[119] The record does not support this position. Measuring the cost of equity is a comparative analysis, and risks and returns must be viewed relative to the competitive market for equity capital. Fuel adjustment clause mechanisms are common throughout the United States — 98% of utilities have one.[120] Most states allow recovery of costs related to CWIP in rates, and Missouri is one of only five states that legally prohibit CWIP in rate base.[121] Other states (such as Colorado) have flexible rate mechanisms that provide for recovery of costs

[116] Ex. 16 (Hevert Direct), pp. 33-34.
[117] ***Bluefield Waterworks and Improvement Co. v. Public Service Comm'n of W.V.***, 262 U.S. 679, 677-678 (1923).
[118] *Id.*, pp. 4-5.
[119] OPC's Initial Brief, p. 25.
[120] Tr. Vol. 21, p. 1214 l. 7-14; Ex. 3, pp. 28-29 (Barnes Rebuttal).
[121] Ex. 16 (Hevert Direct), p. 32.

between rate cases or afford other special rate-making treatment.[122] Additionally, Mr. Hevert clarified that some of the companies in his proxy group have the ability to recover the cost of "…rate base additions through forecast test years or alternative rate plans."[123] The record clearly does not support an assessment that Ameren Missouri has "extraordinary" rate mechanisms at its disposal. To the contrary, Ameren Missouri does not have access to many mechanisms that other states allow.[124] The fact that utilities with these mechanisms are included in Mr. Hevert's proxy group means that the analysis assumes access to alternative rate mechanisms. Thus, OPC's argument concerning comparable risk and rate mechanisms would actually support a higher return for Ameren Missouri, not lower.

iii. OPC's Flawed CAPM Model

OPC claims that Mr. Schafer's recommendation is reasonable as it is premised upon the mid-point among the results of his three models (Constant Growth DCF, multi-stage DCF, and CAPM). The bottom of that range is established by his CAPM, which produces the dramatically low result of 8.74%. This result is both flawed and driven by incorrect assumptions – a fundamental change in capital markets characterized by low growth and low capital costs.

With respect to Mr. Schafer's CAPM, OPC argues that Ameren Missouri is "no Apple or Home Depot."[125] To be clear, neither Ameren Missouri, Mr. Hevert, nor counsel for the Company ever offered any such argument. The Company has supported an ROE of 10.2%-10.6% for setting rates, materially lower than the average 12.5%-13% return attributable to the market as a whole.[126]

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[122] Tr. Vol. 21, pp. 1189-1191 (Hevert Redirect); *Id.,* pp. 1247-1248 (Gorman Cross-Examination).
[123] Ex. 16 (Hevert Direct), p. 33.
[124] Tr. Vol. 21, pp. 1190-91 (Hevert Redirect).
[125] OPC's Initial Brief, p. 20.
[126] Tr. Vol. 21, p. 1165.

OPC's argument distracts from a critical and errant assumption that Mr. Schafer relied upon as part of his analysis. Mr. Schafer argued in his rebuttal testimony that Mr. Hevert's Market Risk Premium incorporated growth rates well in excess of U.S. GDP, and therefore Mr. Schafer contends it must be flawed.[127] Mr. Schafer's assumed constraint reveals a critical weakness in his analysis. The CAPM is a model distinct from the DCF approach to measuring the cost of equity and does not rely upon or require any long-term growth constraints. The theory that the United States GDP constrains *discounted cash flow* growth for a U.S. utility follows the logic that over time growth will be consistent with overall economic growth – the economy being the domestic U.S. economy.[128] The CAPM is a separate measurement of the cost of equity; it takes a broader perspective that measures the risk relationship between the Company and the market as a whole to develop the implied required return.[129] The market as a whole (represented by the S&P 500), is a global market and includes multinational companies.[130] Accordingly, growth of the S&P 500 is not constrained by U.S. GDP directly and GDP projections are not relevant to the CAPM model. *This is an important perspective that the CAPM provides this Commission – it is why we examine this model in the first place*.

As Mr. Gorman testified, Ameren Missouri competes for capital with companies in the S&P 500.[131] The S&P 500 contains both income and growth stocks.[132] Rational investors diversify their investments, and have choices with respect to stocks they select to include in their portfolios.[133] Mr. Schafer admits that the S&P 500 includes multinational corporations with

[127] Ex. 410 (Schafer Rebuttal), pp. 43-44.
[128] Ex. 16 (Hevert Direct), p. 23.
[129] *Id.*, pp. 25-26.
[130] *Id.*
[131] Tr. Vol. 21, pp. 1214-1215.
[132] *Id.*, pp. 1320-1321.
[133] *Id.*, p. 1320.

growth rates higher than the U.S. GDP.[134] As Mr. Schafer explained at hearing, the CAPM has a *beta coefficient* that measures the risk between the utility and the market (that coefficient is less than 1 to reflect the lower risk for regulated utilities),[135] and thus it is critical to the CAPM to appropriately represent the total market return or otherwise the model will not produce reliable results. Because Mr. Schafer assumes a false constraint on growth, his analysis is flawed.

Additionally, Mr. Schafer's arguments are logically inconsistent with OPC's arguments in its brief. OPC explains in its Initial Brief as follows: "Additionally, forward-looking economic growth in this country is not projected to be commensurate with past experience. [Citation omitted] Mr. Hevert's estimated growth rate gives no weight to what the current economic conditions are and does not reflect the widely known sentiment that we are expected to be in a low-growth, relatively low-inflation environment for the near future."[136] Yet, Mr. Schafer developed his CAPM risk premium during a historic period with much higher interest rates and growth rates. If OPC and Mr. Schafer truly believe their own story – economic downturn, low growth, low inflation, and low capital costs - then Mr. Schafer would not have used a CAPM that developed a historic risk premium during periods of higher interest (5.9%) and growth rates (6.2%) to model a risk premium.

Mr. Schafer's CAPM forms the basement of his range, is unreasonably low, and should be disregarded.[137]

C. Reply to Staff

Staff's arguments concerning the models used and inputs thereto (i.e. growth rates) are discussed above and in Ameren Missouri's Initial Brief. Those arguments do not need to be

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[134] *Id.,* p. 1321, l. 5-10.
[135] *Id.,* p. 1320.
[136] OPC's Initial Brief, pp. 20-21.
[137] Tr. Vol. 21, p. 1312; Ex. 409 (Schafer Direct), LCS-10.

repeated here. Staff makes several comments regarding Mr. Hevert's analysis that warrant response. Staff alleges that Mr. Hevert "manipulated" his analysis to "produce higher results." Staff also denigrated Mr. Hevert's use of inputs into his models, suggesting "…where he had a choice, he chose higher rather than lower." Staff also accuses Mr. Hevert of intentionally altering his analysis stating "…he chose to skew the data in his client's favor." These arguments are not substantive, but merely rhetorical. Staff's allegations leveled against Mr. Hevert go beyond a critique of his analysis, and are unfair and inappropriate. Staff's rhetorical attack is merely an indication of the weakness in its own unsupportable position with respect to the cost of equity – that all regulators in the United States are getting it wrong,[138] and that the return on equity is somehow separate from the cost of equity which, in Staff's world, is 6% for utilities.[139] Moreover, Staff's allegations directed at Mr. Hevert are demonstrably untrue.

Mr. Hevert does not employ selectivity in reporting the results of his analysis. Mr. Hevert provided the results of his constant growth DCF analysis despite the fact that he believed these results to be impacted by unusually high utility price-earnings ratios. He provided not just one result but an array of results using different inputs, using different averaging conventions, and two proxy groups.[140] He did the same for his multi-stage DCF results.[141] He also calculated his CAPM results using two separate sources for beta coefficients, two separate measures of Treasury rates, two sources for his market risk premium, and two proxy groups.[142] He provided all of the results of those calculations in his rebuttal testimony.

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[138] *Id.,* p. 1356.
[139] *Id.,* p. 1348; Staff's Initial Brief, pp. 47-48. (It is noteworthy that Staff has recommended 9.5% return on equity in the current Empire District Electric Company rate case, File No. ER-2014-0351, 25 basis points above Staff's recommendation in this case and well above 6%.)
[140] Ex. 17 (Hevert Rebuttal), pp. 121-122.
[141] *Id.*
[142] *Id.,* p. 123.

Mr. Hevert chose a long-term growth rate that is consistent with a return to the historical mean growth rate for the U.S., based on U.S. GDP data. The long-term growth rate used in the terminal stage of a multi-stage DCF is intended to reflect investor expectations of long-term perpetual growth.[143] A return over time to historic experience is not an unreasonable assumption. As Mr. Hevert explains "…the term of even the longest GDP forecast considered by Mr. Murray does not reflect the perpetual nature of the terminal growth assumed in the DCF model."[144] In fact, Mr. Gorman also looks to long-term historical data as an estimate of expected future conditions in his CAPM analysis.[145] Nonetheless, Staff suggests that the use of certain GDP projections it examined are the only means of assessing long-term growth expectations of investors beginning ten years in the future.[146] Future projections (especially those beginning in the future and extending into the distant future) are inherently speculative, and subject to change; historic observed data is known and does not change. What Staff (or OPC or MIEC) believe about the future for the U.S. economy is not the issue, rather it is - *what do investors expect*? It is highly unlikely investors would consider any singular point of view associated with any one projection for growth. Accordingly, Mr. Hevert's long-term growth rate is reasonable and appropriate for the Commission to consider.

Mr. Hevert's analysis was not skewed or biased, but rather it can be said that Mr. Hevert's analysis was transparent, and his testimony candid. Case in point is the issue of the impact of dividend yields on the DCF analysis in this case (specifically with respect to the constant growth model). As Mr. Schafer observed, yields during the measurement period used by the DCF models in this case were impacted by lower than historically experienced yields for proxy

[143] Ex. 16 (Hevert Direct), p. 23.
[144] Ex. 17 (Hevert Rebuttal), p. 39.
[145] Ex. 510, (Gorman Direct), p. 35, Schedule MPG-16.
[146] Staff's Initial Brief, p. 63; Staff Cost of Service Report, Appendix 2, Schedule 14-1.

companies.[147] This produces a lower implied return, particularly when the dividend yield is modeled to remain flat forever, as is the case with a constant growth DCF. Mr. Hevert did not attempt to adjust or alter his constant growth DCF, nor did he tell the Commission not to consider this perspective. In response to Commissioner questions, Mr. Hevert stated that "…while I certainly used market data, I think we have to be careful about how we interpret that data."[148] Mr. Hevert went further and explained his interpretation:

> …[I]n my testimony I mentioned that we have to view the constant growth discounted cash flow models with considerable caution, because whereas in that multistage model we were able to see the price earnings multiple fall over time, the constant growth model assumes it stays the same. So it assumes that if you buy a utility at 21 times earnings, you're going to be able to sell it at 21 times earnings.[149]

Mr. Hevert's explanation to the Commission was candid and offers his opinion as an expert on how to view a model that assumes a price-earnings multiple of 21, when 16.5 is the historic norm.[150] Mr. Hevert does not skew data or employ data selectivity, but rather is transparent in his approach, shows his work, and offers an informed interpretation based on a broader contextual perspective. Therefore, Staff's criticisms of Mr. Hevert are unfounded and should be rejected.

D. Reply to Other Parties (without independent witnesses)

Four parties filed Initial Briefs in this case concerning return on equity but did not offer testimony containing analysis from a cost of capital expert. Those parties are CCM, MECG, MRA, and Walmart. CCM and MECG adopt the position of Mr. Schafer (OPC) and Mr. Gorman (MIEC) respectively, and argue the merits based on the testimony of those witnesses.[151]

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[147] Ex. 409 (Schafer Direct), p. 16.
[148] Tr. Vol. 21, pp. 1168-1169.
[149] *Id.,* p. 1169.
[150] *Id.,* p. 1168.
[151] CCM’s Initial Brief, pp. 6-7; MECG’s Initial Brief, pp. 19-20.

MRA stated that it joins OPC with respect to the return on equity issue, but offered no arguments on the merits.[152] The Company has already responded to the merits of the analysis submitted by those parties and need not repeat those responses here. However, MECG adopts a tactic similar to Staff and attacks Mr. Hevert's credibility, and that warrants a response. Walmart's arguments in its Initial Brief regarding authorized returns merit a response as well.

MECG challenges Mr. Hevert's credibility based upon misleading and selective references to previous Ameren Missouri rate cases.[153] Ameren Missouri provided a review of recent rate cases in its Initial Brief.[154] A review of those cases will plainly indicate that the Commission routinely finds the analysis of one party superior to that of others on a given issue or topic. Such a finding depends on the facts and circumstances of that case, and does not reflect upon the credibility of a witness as a general proposition. Moreover, the Commission recently found Mr. Hevert's analysis to be reasonable in a rate case and relied upon it to set rates, attesting to the competence of Mr. Hevert's methods and analysis.[155]

Walmart criticizes Mr. Hevert's recommendation based on its limited consideration of authorized returns. It is noteworthy that Walmart reports an average authorized return of 10.02%[156] (average of 2012 – 2014), which is consistent with Mr. Hevert's review of the past 24 months,[157] and is higher than Ameren Missouri's present authorized rate of return of 9.8%.

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[152] MRA's Initial Brief, p. 8.
[153] MECG's Initial Brief, p. 19.
[154] Ameren Missouri's Initial Brief, pp. 54-55.
[155] *Report and Order,* GR-2014-0152, pp. 19-29 (December 3, 2014).
[156] Walmart's Initial Brief, p. 6.
[157] MECG's Initial Brief, p. 24.

VI. Fuel Adjustment Clause

A. CCM's Initial Brief confirms that its opposition to the FAC, and its attempts to change it, is unjustified, unsupported and should be disregarded.

As discussed in the Company's Initial Brief, CCM attacks the Company's FAC based only on unsupported assertions, rhetoric and positions that are reflective of nothing more than philosophical opposition to FACs. CCM expresses its "belief" that the FAC has shifted risk in an "unjust and unreasonable manner."[158] For six years, the FAC has had non-controversial operation and four prudence reviews in which no "unjust and unreasonable" actions on the Company's part have been found. This proves that CCM's "beliefs" have no basis in fact.

CCM's only other two points appear in two conclusory sentences in the carryover paragraph at the top of page 9 of its Initial Brief, both of which are devoid of any evidentiary support. As explained in the Company's Initial Brief, it can hardly be said that the Company's earnings during the five full calendar years that it has had an FAC are "excessive," as CCM claims. In three of those five years, the Company did not achieve its targeted return, and throughout the period, the Commission has found three times that its rates were *too low* and needed to be increased (File Nos. ER-2010-0036, ER-2011-0028 and ER-2012-0166).[159]

It also cannot be said that the FAC should be cancelled for a claimed violation of any Commission rule, as CCM advocates. As already thoroughly explained in the Company's Initial Brief, the compelling and extensive evidence of record in this case proves that the Company has fully complied with all of the Commission's FAC minimum filing requirement rules. Although CCM relies on OPC's "explanation" in which it initially claimed that the Company had not complied, the fact is that OPC has abandoned its position that the FAC should be cancelled for some claimed violation of the rules and indeed supports continuation of the FAC.

[158] CCM Initial Brief, p. 8.
[159] Ameren Missouri's Initial Brief, pp. 90-91.

Finally, there is absolutely no evidentiary support for CCM's last FAC-related recommendation – the adoption of a completely arbitrary 50%/50% sharing mechanism. Had such a mechanism been in place since the FAC began, it would have forced Ameren Missouri to forego recovery of a staggering $380 million of prudently-incurred net energy cost changes.[160]

The FAC should be continued as-is (save the few changes agreed upon with the Staff and OPC pursuant to stipulations or in response to recommendations with which the Company agreed).

B. MIEC has completely failed to rebut the undisputed evidence that all of the MWhs sold to Ameren Missouri's customers are purchased by Ameren Missouri from the MISO market and, as such, are purchased power within the meaning of Section 386.266. As a consequence, MISO transmission charges are transportation costs associated with purchased power and are properly included in the FAC.

As it has a history of doing, MIEC rests its attempt to avoid the reflection in the FAC of MISO transmission charges incurred because of the power Ameren Missouri purchases from MISO to serve its load on MIEC's own unique and unsupported take on the law. As discussed in the Company's Initial Brief, this new argument follows earlier MIEC attempts to avoid inclusion of MISO transmission charges in the FAC. MIEC has previously argued that the earlier FAC tariff's exclusion of capacity contracts with a term of greater than one year excluded these transmission charges as a matter of law[161] (incorrect, said the Commission). MIEC has previously argued that "transportation" under Section 386.266 did not include transmission as a matter of law (incorrect, said the Commission and the Court of Appeals). MIEC has also previously argued that Section 393.135 meant transmission charges from MISO were CWIP for Ameren Missouri and thus could not be included in the FAC as a matter of law (also incorrect,

[160] *Id.*, pp. 92-93, (Explaining that the 5% sharing mechanism has resulted in the Company's failure to recover $38 million of prudently-incurred costs – 50% sharing would have been 10 times as much).
[161] Since tariffs have the force and effect of law.

said the Commission and the Court of Appeals). On other issues in this case (notably amortizations) MIEC, as explained earlier, over-reads, overstates and arguably misstates the holdings of prior cases, including *UCCM* and numerous Court of Appeals' opinions that rebut MIEC's claims of what the law does or does not require or allow.

In summary, MIEC's testimony in this case and its Initial Brief make no attempt whatsoever to rebut the undisputed fact that the MISO tariff and applicable FERC orders (e.g., Order 668[162]) fully reflect the fact that a utility participating in an RTO market (MISO included) buys the MWhs it needs to serve its load. Instead of rebutting this fact (because it can't), MIEC resorts to pointing to (a) rulemaking comments filed by lawyers, (b) Commission orders in other cases involving other utilities decided on a different basis than MIEC urges here, (c) arguments about a state of facts that does not exist, and (d) the fact that the Company accounts for the sales and purchases it makes on a *net* basis as FERC requires which, as FERC recognizes, does not change the fact that it sells and purchases *gross* MWhs. MIEC also argues that the MISO tariff addressing Schedule 26A charges somehow turns purchased power into "self-generated" power. We have addressed most of these points in the Company's Initial Brief, and elaborate on them below.

First, while MIEC accurately quotes the rulemaking pleading filed by Ameren Missouri in the Commission's FAC rulemaking docket, the quote proves nothing.[163] The pleading, signed by one of the Company's undersigned lawyers, is simply wrong to the extent it fails to recognize the realities of the MISO's market operations. A misstatement of the reality of the MISO market and of the fact that Ameren Missouri purchases all of the MWhs consumed by its load cannot

[162] Ex. 66 (Portion of FERC Order 668).
[163] MIEC Initial Brief, pp. 50-51 n. 164.

change what actually happens any more than MIEC and CCM calling the Company's earnings "excessive" can turn just and reasonable rates into rates that are not just and reasonable.

Second, MIEC's citation to one paragraph from the 2010 Kansas City Power & Light, Company - Greater Missouri Operations ("KCPL-GMO") decision (File No. ER-2010-0356) also fails to support MIEC's legal argument in this case. As the entire Commission discussion shows,[164] the argument in that case was whether transmission charges constitute "transportation costs" within the meaning of Section 386.266. At that time, the Commission answered that question in the negative. The Commission's entire discussion from that case (minus footnotes) follows. Note that the Commission's focus was clearly on the question of whether the charges at issue were for "transportation," as evidenced by the Commission's own emphasis (in ***bold and italics***) of those terms from the *Report and Order*:

> 72. Both Empire and Ameren have tariffs which include the same transmission costs that Staff is now recommending be removed from the GMO FAC tariffs.
>
> 73. Section 386.266.1 states:
>
>> Subject to the requirements of this section, any electrical corporation may make an application to the commission to approve rate schedules authorizing an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including ***transportation***. The commission may, in accordance with existing law, include in such rate schedules features designed to provide the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities.
>
> 74. The statutes at Section 386.520.1 make a distinction between transmission and transportation. That subsection states in part:
>
>> . . . In case the order or decision of the commission is stayed or suspended, the order or judgment of the court shall not become effective until a suspending bond shall first have been executed

[164] MIEC only plucked one paragraph and took it out of context.

and filed with, and approved by, the circuit court, payable to the state of Missouri, and sufficient in amount and security to secure the prompt payment, by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission, and of all moneys which any person or corporation may be compelled to pay, pending the review proceedings, for ***transportation***, ***transmission***, product, commodity or service in excess of the charges fixed by the order or decision of the commission, in case such order or decision is sustained.

75. Commission rule 4 CSR 240-20.090(1)(B) states in part:

(B) Fuel and purchased power costs means prudently incurred and used fuel and purchased power costs, ***including transportation costs***. Prudently incurred costs do not include any increased costs resulting from negligent or wrongful acts or omissions by the utility. If not inconsistent with a commission approved incentive plan, fuel and purchased power costs also include prudently incurred actual costs of net cash payments or receipts associated with hedging instruments tied to specific volumes of fuel and associated ***transportation*** costs.

1. If off-system sales revenues are not reflected in the rate adjustment mechanism (RAM), fuel and purchased power costs only reflect the prudently incurred fuel and purchased power costs necessary to serve the electric utility‘s Missouri retail customers.

2. If off-system sales revenues are reflected in the RAM, fuel and purchased power costs reflect both:

A. The prudently incurred fuel and purchased power costs necessary to serve the electric utility‘s Missouri retail customers; and

B. The prudently incurred fuel and purchased power costs associated with the electric utility‘s off-system sales;

(C) Fuel adjustment clause (FAC) means a mechanism established in a general rate proceeding that allows periodic rate adjustments, outside a general rate proceeding, to reflect increases and decreases in an electric utility‘s prudently incurred fuel and purchased power costs. *The FAC may or may not include off-system sales revenues and associated costs.* The commission shall determine whether or not to reflect off-system sales revenues *and*

> *associated costs* in a FAC in the general rate proceeding that establishes, continues or modifies the FAC;

> 76. The Commission concludes that all transmission costs should not be included in GMO's adjustment clause because they are not included in section 386.266, RSMo. Supp. 2010, as a type of cost to be recovered through a fuel adjustment clause, they are inconsistent with the definitions of fuel and purchased power cost in 4 CSR 240-20.090(1)(B), and elsewhere, and they do not vary in a direct relationship with fuel or purchased power. With regard to the transmission costs specifically related to OSS, however, those costs shall be allowed to the extent that they do not include transmission costs from the Crossroads facility.[165]

Having concluded (for whatever reason) that "transmission" and "transportation" were not the same in the KCPL-GMO case, in File No. ER-2012-0166, Ameren Missouri's last rate case, the Commission changed its mind and determined that "transportation" did include "transmission." But at this point, the Commission's change does not matter because the question of whether "transportation" encompasses "transmission" was always a legal question and that legal question has now been settled by the Court of Appeals, which confirmed that the Commission got it right in File No. ER-2012-0166. *See* ***In the Matter of Union Elect. Co, Office of Public Counsel, AARP, Missouri Industrial Energy Consumers, and Consumers Council of Missouri v. Pub. Serv. Comm'n***, 422 S.W.3d 358, 368 (Mo. App. W.D. 2013) ("We conclude that the legislature intended the word 'transportation' in section 386.266.1 to encompass 'transmission'").

[165] *Report and Order*, File No. ER-2010-0356, pp. 217-219. The following finding of fact, appearing just before the conclusions of law reproduced here further demonstrates that the issue in the KCPL-GMO case was whether "transportation" encompassed "transmission": "597. GMO's proposal to include all transmission expenses in its fuel adjustment clause is based on its faulty interpretation that — "transportation" costs as used in 4 CSR 240-20.090(1)(B) and therefore, Section 386.266.1, RSMo. Supp. 2010, includes transmission costs. GMO witness Tim Rush even draws a distinction between "transportation" and "transmission" costs in his direct testimony when he says, "The increasing prices for natural gas, coal, coal *transportation* and *transmission* costs are not costs that can be controlled by the Company, nor are they costs that can be absorbed by reducing other costs."

Third, MIEC's theory that the reality of the MISO market and its tariff's requirements mean there would be "grounds for the Commission to remove"[166] Ameren Missouri's generation investments from rate base for state ratemaking purposes reflects a classic case of changing the subject when one is losing an argument. Customers are getting the full benefit of all of the base level of sales margins built into rates enabled by the generation that is included in the Company's rate base for ratemaking purposes, and are getting 95% of any improvement in those margins (while only bearing 5% of any reduction in those margins) between rate cases because the sales and the fuel that makes those sales possible are reflected in the FAC. A conclusion that Ameren Missouri buys all of the MWhs it sells to its customers does not change any of that. The "grounds" Mr. Dauphinais claims do not exist. It is also worth noting that not only do customers get the benefit of the energy sold to the MISO market from the Company's generators, but customers also get the benefit of the Company's self-supply of *capacity* as part of MISO's Resource Adequacy Construct, as Mr. Haro discussed during the evidentiary hearings.[167]

Fourth, we have already addressed the accounting/reporting arguments MIEC makes. The Company reports the net – no question. It has to, since FERC Order 668 requires it to do so. FERC Order 668 also fully recognizes that the Company purchases the gross MWhs. Those MWhs are purchases of *power*. If the gross is purchased – and the FERC and MISO's tariff tells us it is – and if the gross purchases are of power – then Ameren Missouri is purchasing power. If Ameren Missouri is purchasing power and incurs MISO transmission charges, then the transmission charges are charges for transportation of purchased power and are squarely within the costs that are eligible for inclusion in the FAC under Section 386.266.

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[166] MIEC Initial Brief, p. 52.
[167] Tr. Vol. 29, p. 2042, l. 5-21 (Mr. Haro responded to the Chairman's question about self-supply).

Fifth (and lastly), the fact that MISO Schedule 26A speaks of "withdrawals" of energy does not mean that the energy that is withdrawn was not purchased from the MISO market and it certainly does not mean that Ameren Missouri self-generates (or, in MISO's terminology, self-supplies). The Company's Initial Brief fully rebuts Mr. Dauphinais' attempt to turn the limited self-*scheduling* done for energy from the Company's hydro units into wholesale self-supply of energy on the Company's part, which the Company simply does not do.[168] Mr. Haro, the *only* witness in this case who actually manages the sales of energy to an RTO market from a utility's generation and who also manages the purchase of energy from an RTO market for a utility, testified unequivocally that all of the power Ameren Missouri needs to serve its load is purchased from the MISO market. As noted in the Company's Initial Brief, not only does Mr. Haro so testify, but MISO's tariff, its Business Practice Manuals, its settlement statements and the applicable FERC orders all support Mr. Haro's testimony. Compare this to MIEC's fourth attempt to construct a legal argument to avoid the Schedule 26A transmission charges and Mr. Dauphinais' stand-alone new opinion in this case, which is devoid of support except that which he attempts to provide for himself.

The Commission has correctly approved FAC tariffs since the inception of the Company's FAC in 2009 that include these transmission charges, and it should do so now.

VII. Labadie ESPs

In its Initial Brief, Ameren Missouri noted the Commission needs to decide only two questions to determine if the Company's investment in ESPs for Labadie Energy Center Units 1 and 2 can be included in rate base: (1) whether the amount of the investment is prudent, and (2) whether the ESPs are used and useful in providing service to customers.[169] Only Sierra Club

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[168] As noted earlier, the Company does "self-supply" capacity as part of MISO's Resource Adequacy Construct.
[169] Ameren Missouri's Initial Brief, p. 105.

has challenged the prudence of making these investments and because Sierra Club has not met its burden to create a serious doubt as to the prudence of the investments, there should be no question about whether the ESPs belong in rate base.

Sierra Club objects to including the Labadie ESPs in rate base on the grounds that Ameren Missouri has failed to establish the long-term viability of the Labadie Energy Center. As noted in the Company's Initial Brief, because Sierra Club's evidence in support of its claim is weak and also because Ameren Missouri is legally entitled to the presumption that all its expenditures and investments are prudent, the Commission should reject Sierra Club's objections. As a matter of law, Sierra Club bears the burden of presenting evidence that creates a "serious doubt" about the prudence of the Company's investment in the Labadie ESPs. ***State ex rel. Nixon v. Public Service Comm'n***, 274 S.W.3d 569, 582 (Mo.App. 2009). Sierra Club has not satisfied that burden.

In both the testimony of its witness and in its Initial Brief, Sierra Club fails to create any doubt about the reasonableness of Ameren Missouri's decision to install ESPs at the Labadie Energy Center, let alone a serious doubt. In its Initial Brief, Sierra Club claims two "major factors" raise serious doubts about the prudence of the ESPs.[170] First, it argues Ameren Missouri failed to perform an analysis to determine if retiring the units would be a lower cost alternative to installing the ESPs. Second, Sierra Club challenges the reasonableness of what it claims was Ameren Missouri's assumption "there is an 85% chance of no carbon costs affecting its [Labadie] units." Upon analysis, neither of Sierra Club's arguments have merit.

Sierra Club seeks to use the first "major factor," that a specific "prudence analysis" of alternatives to installing ESPs was not supplied by Ameren Missouri, to simply wish away its own obligation to establish a serious doubt. In essence, what Sierra Club is saying is that since

[170] Sierra Club's Initial Brief, p. 7.

the Company did not perform the kind of specific analysis that Sierra Club thinks it should have, the Company must now supply that very specific analysis. Put another way, Sierra Club is saying that the Company is not entitled to its presumption of prudence regarding its investment in the ESPs because it had not affirmatively demonstrated their prudence in advance. This argument cannot possibly live up to a reasonable standard for establishing a serious doubt, lest the presumption of prudence afforded utility investments be rendered illusory. Rather, Sierra Club must itself offer competent and substantial evidence that challenges the prudence of the ESP investments. It has not. In fact, Sierra Club offers **no** analysis of its own whatsoever to demonstrate its theory that retiring the units could even possibly result in lower costs to customers than making the investments in the ESPs to allow the units to continue to operate and supply electricity to customers.

Sierra Club's allegation that Ameren Missouri failed to perform a specific analysis of retirement alternatives to the ESPs also ignores the overwhelmingly favorable economics of continuing to operate Labadie based on the more general Labadie retirement analysis the Company did include in its Integrated Resource Plan ("IRP") filing. As Ameren Missouri witness Matt Michels testified in his rebuttal testimony and at the evidentiary hearing, continuing to operate Labadie, including all of the costs of operating and maintaining the units and making investments in pollution control equipment, saves customers $3.6 billion compared to retiring the units in 2023.[171] For good measure, Mr. Michels also showed that compared to retirement in 2016, customers would save over $2 billion, even if the units generated no net margin from operations.[172] Sierra Club claims that the environmental investment assumptions for Labadie are

[171] Ex. 26, p. 12 (Michels Amended Rebuttal); Tr. Vol. 28, p. 1947.
[172] Ex. 26, p. 16, l. 12-20 (Michels Amended Rebuttal); Mr. Michels further noted in his rebuttal testimony (starting at page 18, line 20) that Labadie generated $90 million in margin in 2013 under highly challenging market

insufficient, but offers no evidence to support its assertion other than its own lack of understanding of the assumptions. This is in spite of the fact that Sierra Club has had access to Ameren Missouri's IRP filing and workpapers since early October 2014 and has been free to perform any necessary discovery regarding the assumptions, analysis and conclusions included in the IRP.

Sierra Club's arguments ignore the fact that Ameren Missouri needed to install ESPs on Labadie Units 1 and 2 in order to bring those units into compliance with federal Mercury and Air Toxics Standards ("MATS"), even though it acknowledged this fact in its Initial Brief.[173] The Company had to achieve compliance within a relatively short timeframe. As shown in Schedule EDH-3 (which was appended to the direct testimony of Sierra Club's own witness), April 16, 2015, was the original MATS compliance date. Even though that compliance date was extended one year,[174] there is no evidence to suggest closing Labadie was a viable alternative to installing the ESPs or could have been accomplished within the timeframes prescribed by MATS. Without such evidence, which would have to consider from where and at what price the Company would secure alternative generation, Sierra Club's claim does not even come close to creating the serious doubt necessary to rebut the presumption of prudence to which the Company is entitled. In contrast, Mr. Michels testified in rebuttal that not only would the Company have to identify and procure replacement generation resources if Labadie were retired, but it is likely that upgrades to the transmission system would be necessary to ensure grid reliability upon retirement of the Labadie units. Because of the long construction cycle for these projects and the

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conditions and $163 million in 2014 through November, pointing out that the assumption that Labadie would generate no margin at all is highly conservative.

[173] Sierra Club Initial Brief, p. 3

[174] The date for Ameren Missouri to comply with MATS was later extended to April 16, 2016. Ex. 900, Sch. EDH-3, p. 1 (Hausmann direct).

relatively short decision window for compliance with MATS, it is likely the Company would have to continue operating the units and make the ESP investments in any case.[175]

The second major factor cited by Sierra Club is its claim that Ameren Missouri's decision to install the ESPs is based, at least in part, on the assumption that there is an eighty-five percent chance no carbon costs will affect the coal generating units at Labadie. This claim is without merit because it ignores both the evidence the Company submitted in this case as well as the much larger volume of evidence it has submitted in its pending IRP case.

Both in his prepared testimony and during the evidentiary hearing, Mr. Michels explained how Ameren Missouri's IRP analysis accounted for the effects of regulation of carbon dioxide emissions.

> The fact that Ameren Missouri has assigned a 15% probability to GHG [greenhouse gas] regulation that includes an explicit price on carbon dioxide emissions does not mean it has assumed an 85% probability that there will be no regulation of carbon dioxide emissions. To the contrary, Ameren Missouri has assumed an 85% probability that there will indeed be regulation of carbon dioxide emissions through indirect means. Ameren Missouri has accounted for regulation of carbon dioxide emissions through a range of scenarios, most of which represent an indirect approach to regulation with no explicit price on carbon dioxide. These scenarios were applied to the evaluation of all resource options and alternative resource plans in Ameren Missouri's 2014 IRP, as well as to the analysis of compliance with the proposed CPP [Clean Power Plan].[176]

Describing the analysis of the cost of carbon dioxide emissions the Company included in its IRP, Mr. Michels included the following excerpt from that filing in his rebuttal testimony:

> Through this process, we considered the structures [by which] a future GHG policy could be implemented which included the following:
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> - Legislative
> - Regulatory
> - International Treaty

[175] Ex. 26, p. 15, l. 8 to p. 16, l. 2 (Michels amended rebuttal).
[176] Ex. 26, p. 8, l. 8-17 (Michels Amended Rebuttal).

> We identified three general mechanisms by which GHG policy could be implemented through any of the above structures. Each implementation path could seek to achieve GHG reductions through any, or a combination of, three mechanisms:
>
> - Policies to mandate and/or promote low/no carbon resources
> - Specified limits on GHG emissions (emission rates or mass emission)
> - Implementation of an explicit price on GHG emissions
>
> This framework provided a vehicle for discussion with our internal experts to identify the probable ranges of coal retirements and carbon prices that define our scenarios.[177]

Mr. Michels also testified that Ameren Missouri's IRP analysis specifically included retirement of certain coal-fired units, including some of the Company's coal generating facilities, as an expected result of environmental regulation of carbon dioxide and other emissions:

> The assumptions that we made in the IRP filing for retirement of existing coal plants were done based on a review of the relative efficiency of all of the coal plants in the eastern interconnect.
>
> So we did include assumptions for the explicit retirements of coal generation as part of the pricing scenarios that we developed to use to evaluate alternative resource plans in the IRP, and those retirements included retirements in Missouri, including Ameren Missouri's Meramec Energy Center, also units at KCPL's Sibley plant, at Montrose and at Lake Road.
>
> . . .
>
> So we believe that our assumptions for retirements that were used as a basis for our scenarios in the IRP are entirely consistent with what we're seeing from other sources and even consistent with announcements that the utilities have actually made.[178]

Mr. Michels further testified at the evidentiary hearing that these retirements themselves, along with their replacement by less carbon-intensive generation sources, represent the costs of compliance with regulation of carbon dioxide emissions without an explicit price on those emissions, such as is embodied in the EPA's proposed Clean Power Plan.

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[177] *Id.*, p. 8, l. 19 to p. 9, l. 7.
[178] Tr. Vol. 28, p. 1949, l. 12 to p. 1950, l. 24.

> The policies included in the Clean Power Plan are just these kinds of non-market policies, and, therefore, the cost of complying with those, the retirements of existing coal generation, replacement with other forms of generation, those are the costs of complying with this kind of regulation.[179]

Consistent with this analysis, Ameren Missouri concluded that because the Labadie Energy Center is one of the lowest cost coal generating facilities in the United States [180] it was unlikely to be among those plants retired as a result of future environmental regulations. Indeed, and as previously stated, continuing to operate that facility, even with investments in environmental controls (including the ESPs), was prudent because doing so would save the Company's customers approximately $3.6 billion on a present value revenue requirement basis.[181] Far from assuming that other utility generators, and none owned by Ameren Missouri, would bear the brunt of any regulations of carbon dioxide emissions, as Sierra Club suggests, the Company has included in its preferred resource plan the retirement of both the Meramec and Sioux Energy Centers, totaling over 1,800 MW, or roughly one-third of the Company's coal-fired generation.[182] By comparison, the Company has assumed a range of coal retirements nationwide of 80-120 GW, roughly one-third of the U.S. coal-fired generating fleet of over 300 GW.[183]

In addition, as the Company noted in its Initial Brief, Sierra Club bases its argument regarding the alleged unreasonableness of Ameren Missouri's assumptions on Environmental Protection Agency ("EPA") regulations that are not yet final. Because the EPA will not issue those rules in final form until sometime this summer – weeks or months after the operation of law date in this case – it would be premature to make decisions of the magnitude of retiring large

[179] Tr. Vol. 28, p. 1944, l. 17-23.
[180] Ex. 65HC (Coal Inventory)
[181] Ex. 26, p. 12, l. 6-10 (Michels Amended Rebuttal).
[182] Ex. 26, p. 6, Figure 1 (Michels Amended Rebuttal).
[183] Tr. Vol. 28, starting at p. 1938, l. 17.

baseload units based solely on a proposed rule. Even so, the Company's preliminary analysis of compliance with the proposed regulations indicates that Labadie could continue to operate well into the future.[184] Compliance will have to be analyzed again once the final rules, and Missouri's plan for complying with them, are known. What is now known, however, is that the EPA's proposed rules do not include a direct charge or tax for carbon dioxide emissions. Given that fact, Ameren Missouri's decision to assign a fifteen percent probability to such an outcome should be viewed as reasonable.

As Ameren Missouri stated in its Initial Brief, questions and analyses regarding the long-term viability of baseload generating units like the Labadie Energy Center are not the kinds of issues the Commission needs to consider or decide in a rate case. Moreover, those issues are not germane to the questions the Commission must answer in determining whether the Labadie ESPs should be included in rate base. The IRP process, governed by Chapter 22 of the Commission's rules, is the appropriate forum to examine such issues. Ameren Missouri's pending IRP case, File No. EO-2015-0084, thoroughly discusses all options the Company has considered to meet its generation needs over the relevant planning horizon, including plans for the Labadie Energy Center. Sierra Club is an intervenor and active participant in the IRP case and has an opportunity to fully critique those plans within that docket. Therefore, those same questions need not – and should not – also be considered in this rate case.

Although Sierra Club raised concerns about Ameren Missouri's decision to install ESPs on Labadie Energy Center Units 1 and 2, merely articulating their concerns does not raise the serious doubt the Commission and reviewing courts have concluded is necessary to overcome the presumption of prudence to which utilities are entitled under Missouri law. Moreover, the evidence in this case clearly shows both of Sierra Club's concerns are completely unfounded.

[184] Ex. 26 starting at p. 5, l. 16 (Michels Amended Rebuttal).

Ameren Missouri reasonably determined installing ESPs on Labadie was necessary to comply with MATS. As detailed evidence filed in the IRP shows, the relevant portions of which were presented to the Commission in this case, continuing to operate Labadie and make investments in equipment necessary to bring that facility into compliance with current and anticipated environmental regulations is in the best interests of both the Company and its customers. The evidence also shows that Ameren Missouri thoroughly considered carbon emissions costs in its analysis, and that the manner in which it considered those costs was and is reasonable.

In summary, there is no basis to exclude the cost of the Labadie ESPs from rate base. The amount of the Company's investment is reasonable, the ESPs are fully used and useful, and Sierra Club has failed to present evidence or arguments raising a serious doubt regarding the prudence of Ameren Missouri's actions.[185]

VIII. Two-Way Storm Restoration Costs Tracker and Base Level of Storm Costs

Staff claims the two-way tracker for major storm restoration costs should be discontinued because: (1) Ameren Missouri has not justified continuation of the tracker, (2) the tracker distorts the Company's economic incentives to engage in preventive maintenance, and (3) traditional modes of regulation – the deferral of costs to a regulatory asset authorized by an

[185] It is also worth mentioning that questions and analyses regarding the long-term viability of baseload generating units like the Labadie Energy Center are not the kinds of issues the Commission needs to consider or decide in a rate case. The IRP process, governed by Chapter 22 of the Commission's rules, is the appropriate forum to examine such issues. Ameren Missouri's pending IRP case, File No. EO-2015-0084 (and previous IRP cases) thoroughly discusses all options the Company has considered to meet its customers' energy needs over the relevant planning horizon, including plans for the Labadie Energy Center. Sierra Club is an intervenor and active participant in the IRP case and will have an opportunity to fully critique those plans within that docket. Sierra Club's allegation Ameren Missouri failed to perform a thorough analysis of alternatives to the ESPs also ignores the extensive and detailed information in the Company's IRP filing that discusses those alternatives. Certainly Sierra Club is aware of that information, because more than half its Initial Brief is devoted to a discussion of the IRP filing. The fact all information from the IRP was not also included as part of Ameren Missouri's rate filing case does not create "serious doubt" the analyses Sierra Club claims are required were not performed.

AAO for later reflection through rates in a later rate case – already ensure costs expended to restore service following a major storm are fully reflected in rates.[186]

MIEC argues the tracker should be discontinued because traditional modes of regulation are adequate to ensure reflection of storm restoration costs in rates, and also because the tracker would prohibit parties from arguing against recovery of deferred costs through rates during periods when Ameren Missouri's earnings are "excessive."[187]

OPC also contends the tracker is unnecessary because traditional modes of regulation already provide a means for Ameren Missouri to reflect all its major storm restoration costs. OPC further contends the tracker is bad public policy because it both reduces Ameren Missouri's incentives to control costs and it violates the matching principle.[188]

The argument that traditional modes of regulation adequately ensure Ameren Missouri will be able to reflect all costs it incurs to restore service following a major storm was addressed at length in the Company's Initial Brief.[189] As explained there, traditional modes of regulation do not ensure reflection in rates of major storm costs for at least two reasons. First, there is no guarantee Ameren Missouri will be able to obtain the AAO that traditional modes of regulation require to enable a utility to defer storm restoration costs. The Commission generally requires a utility seeking an AAO to establish that the costs "pertain to an event that is extraordinary, unusually, and unique and not recurring," and there are often arguments about materiality.[190] But, testimony by Staff witness Kofi Boateng showed how difficult it can be for a utility to satisfy these criteria. For one thing, the standard for determining if a storm is extraordinary is completely subjective, so a utility can never be sure whether a storm will qualify regardless of

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[186] Staff's Initial Brief, pp. 33-37.
[187] MIEC's Initial Brief, pp. 3-14.
[188] OPC's Initial Brief, pp. 33-37.
[189] Ameren Missouri's Initial Brief, pp. 108-15.
[190] Tr. Vol. 20, p. 859, l. 10 to p. 860, l. 2.

how much damage it wrought. In addition, Staff generally advocates the use of five percent of a utility's net income as its threshold for determining financial materiality, which means Staff would argue that storm restoration costs that fail to reach that threshold do not qualify for an AAO.

The second reason traditional modes of regulation cannot ensure reflection of major storm costs is because even if a utility obtains an AAO, there is no guarantee it will be allowed to reflect all deferred amounts in future rates. Indeed, the flaw in this aspect of traditional regulation – the uncertainty of future reflection in rates – is exposed by MIEC's arguments against retaining the tracker (especially when coupled with MIEC's arguments against Ameren Missouri's recovery of various regulatory assets created by AAOs in this case). Although it claims traditional modes of regulation adequately ensure reflection of major storm restoration costs, MIEC also argues retaining the tracker denies it the ability to contest recovery of deferred storm costs when the Company's earnings are "excessive." If, under traditional modes of regulation, MIEC or any other party has the ability to contest reflection in rates of deferred amounts for whatever reason they believe is appropriate, that fact merely shows that traditional regulation does not afford Ameren Missouri the protections MIEC and other parties opposing the tracker claim.

In contrast, the uncertainties that afflict traditional modes of regulation are noticeably absent from the two-way storm cost tracker. Instead of a subjective standard for determining whether a storm is "major," the tracker relies on a completely objective standard – IEEE Standard 1366 - which is a mathematical formula that looks at how long customers' service is interrupted. In addition, the tracker has no financial materiality requirement. If a storm qualifies as "major" under IEEE Standard 1366, Ameren Missouri can flow through the tracker all

non-internal labor O&M restoration costs it incurs to restore service following the storm.[191] In addition, the tracker also allows Ameren Missouri to defer costs it incurs staging personnel and resources to respond to severe weather conditions that never develop into severe storms. These costs would not be recoverable under traditional modes of regulation because they are not incurred in connection with an extraordinary event. It is also highly unlikely that these costs would satisfy the materiality criterion Staff advocates.

But, as noted in the Company's Initial Brief, it is the tracker's two-way feature that truly distinguishes it from – and elevates it above – traditional modes of regulation. Because the tracker tracks storm costs both greater than and less than the base amount included in rates, the rates customers pay reflect only those costs the Company actually and prudently incurs to restore service following a major storm. The tracker thus protects the interests of both Ameren Missouri and its customers. The traditional modes of regulation extolled by Staff, OPC, and MIEC cannot make such a claim.

Regarding Staff's argument the tracker "could distort the appropriate economic incentive regarding preventative maintenance,"[192] there is no credible record evidence to support or otherwise justify Staff's concern.[193] Staff's witness on this issue, Kofi Boateng, filed testimony expressing Staff's concern "that Ameren Missouri's decision to reduce distribution maintenance may be, in part, a result of the guaranteed storm cost recovery tracking mechanism..."[194] But, when he was asked what evidence Staff has linking reduced distribution maintenance

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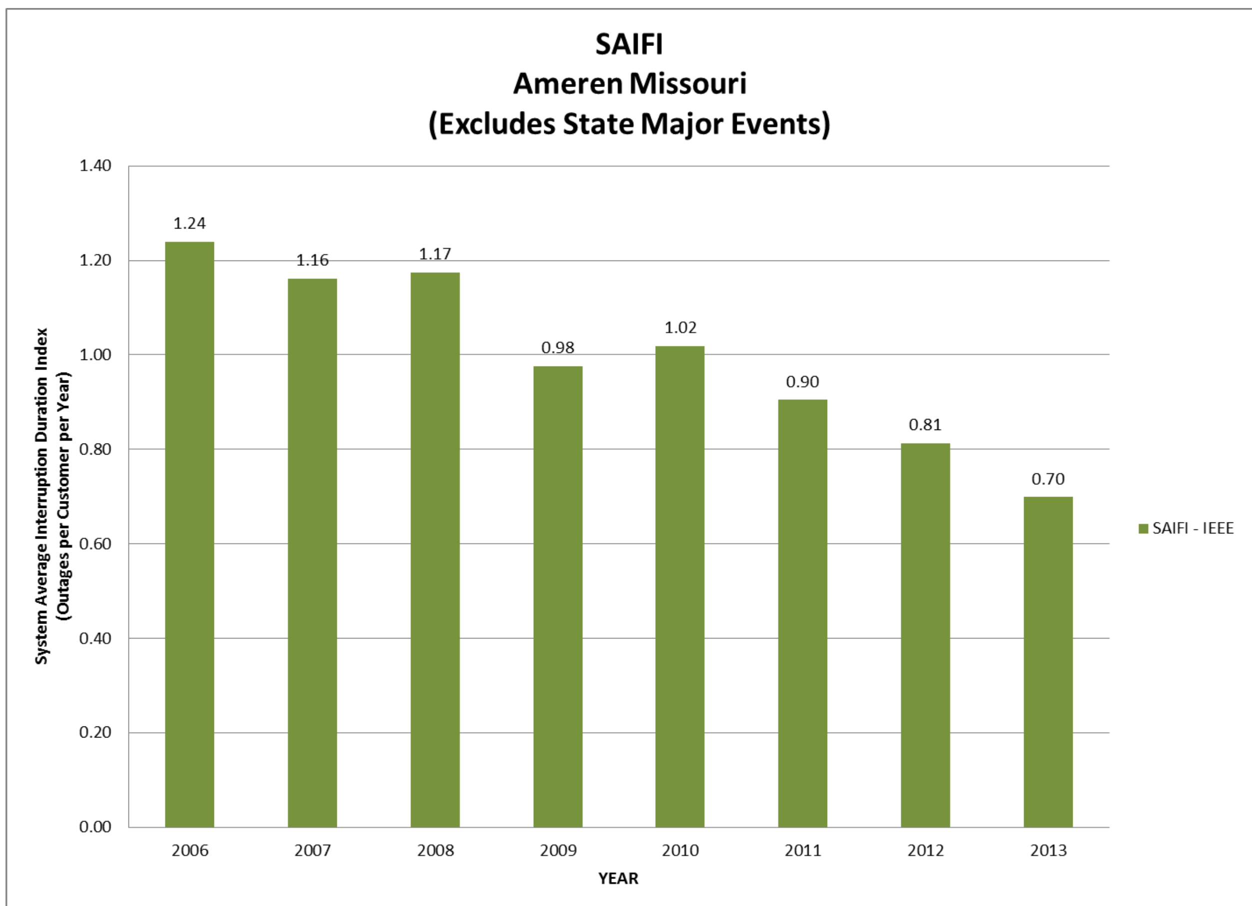
[191] No party opposing the tracker argued IEEE Standard 1366 is inappropriate or that it fails to correctly classify storms as "major." And Mr. Boateng conceded that, unlike the subjective standard for AAOs, IEEE Standard 1366 is a completely objective standard. Tr. Vol. 20 p. 862, l. 8-21.
[192] Staff's Initial Brief, p. 31.
[193] In fact, the O&M cost that most impacts the cost of storms is vegetation management. Vegetation management is also tracked and any amount not spent is refunded to customers. If there is any concern that Staff's argument might have any validity, the way to resolve the concern is to retain both trackers, not to get rid of them.
[194] Ex. 206, p. 6, l. 5-11 (Boateng Surrebuttal).

expenditures to the tracker, he admitted no such evidence exists.[195] Moreover, testimony from David Wakeman, Ameren Missouri's Senior Vice President of Operations and Technical Services, makes clear that there is no linkage between the tracker and reductions in distribution maintenance expense the Company has been able to achieve. Mr. Wakeman testified that reduced expenditures were motivated by concerns that customer rates remain as low as possible, and were achieved by adopting and employing technology, tools, and equipment that keep maintenance costs low.[196] Despite these cost reductions, outage minutes per customer have continued to decline, as can be seen in the following graph from the direct testimony of the Company's President, Michael Moehn:[197]



[195] Tr. Vol. 20, p. 875, l. 7-10.
[196] Tr. Vol. 20, p. 887, l. 10 to p. 888, l. 13.
[197] Ex. 28, p. 7, l. 11 (Moehn Direct).

These are not the kinds of service results one would expect if, as Staff suggests, Ameren Missouri were using the tracker as a means for reducing normal maintenance activities. In fact, were Staff's assumptions valid, one would expect Mr. Moehn's graph to show a trend going the opposite direction – i.e., customer service would be deteriorating instead of improving.

As for OPC's claims that the tracker should be discontinued because it is bad public policy and also because it violates the "matching principle," neither of these arguments have merit. The Commission addressed public policy considerations related to the tracker in the *Report and Order* in File No. ER-2012-0166. In that order, the Commission found the tracker is in the public interest because:

- "The two-way storm restoration costs tracker would not allow Ameren Missouri to recover its costs any sooner. But it would rationalize the process, and it would allow over collected costs to be returned to ratepayers if the company is fortunate enough to avoid any major storms."[198]

- "The storm restoration costs tracker would not allow Ameren Missouri to automatically recover the tracked costs. Those costs would still be subject to a prudence review by Staff just as those costs are currently reviewed for prudence."[199]

- "In general, the Commission remains skeptical of proposed tracking mechanisms. There is a legitimate concern that a tracker can reduce a company's incentive to aggressively control costs. However, that concern is reduced for major storm restoration costs. When faced with a massive power outage, the company's first priority must be to quickly restore electric service to its customers."[200]

- "Major storm restoration costs are particularly well suited for inclusion in a two-way tracker. Ameren Missouri has no control over whether major storms occur and has very little ability to control its restoration cost when such storms do hit its service territory."[201]

- "In the past, the Commission has allowed Ameren Missouri to recover all its major storm costs through a series of AAOs. The creation of a two-way tracker will simply rationalize that method of recovery without reducing Ameren Missouri's incentive to control costs."[202]

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[198] *Report and Order*, File No. ER-2012-0166, p. 95.
[199] *Id.*, pp. 95-96.
[200] *Id.*, p. 96.
[201] *Id.*
[202] *Id.*, pp. 96-97.

Neither OPC nor any other party opposing continuation of the tracker presented any evidence demonstrating that the public policy arguments the Commission articulated in its prior order are no longer valid.

OPC's other argument – that the tracker violates the "matching principle" – is equally without merit because both the tracker and the traditional modes of regulation OPC champions as an alternative would recover storm costs in one or more future accounting periods that differ from the period in which those costs actually were incurred. To the extent such a result "violates" the matching principle, it is unclear why OPC considers one departure more egregious than another. There is no evidence in the record in this case explaining why one "violation" of the matching principle is permissible while another is not.

The tracker continues to work exactly the way it was designed to work, and no party opposing the tracker argues otherwise. The tracker ensures Ameren Missouri will be able to fully reflect its prudently-incurred major storm restoration costs in rates while also ensuring rates will not reflect more storm restoration costs than the Company actually incurs. Because traditional modes of regulation cannot guarantee either of those results, the tracker should be retained.

As for the base amount of storm costs to be included in the revenue requirement used to set rates in this case, all parties now agree that amount should be $4.6 million. However, there is no similar agreement on the amortization period for the storm cost regulatory liability created because the amount of such costs reflected in past rates exceeded the Company's actual expenditures. Ameren Missouri, Staff, and MIEC all propose to amortize the liability over five years, which annually would return approximately $1.3 million to customers. OPC proposes a

two year amortization. Five years is the period the Commission generally uses for these types of amortizations, and there is no basis to deviate from that pattern in this case.

IX. Two-Way Vegetation Management and Infrastructure Inspection Costs Tracker and Base Level of Costs

The parties opposing continuation of the vegetation management and infrastructure inspection costs trackers make several arguments in support of their position. For example, several parties, including Staff, argue that the costs Ameren Missouri incurs to comply with the Commission's rules governing vegetation management and infrastructure inspection are stable so trackers related to those costs are no longer necessary.[203] MIEC argues that (1) the trackers are not necessary because costs to comply with these rules do not represent a large percentage of the Company's annual operating expense, and (2) the costs incurred through the trackers do not meet the standards required for an AAO.[204] As it did with the major storm cost tracker, OPC argues the tracker violates the "matching principle."[205] OPC also argues the trackers create a disincentive to control costs.[206] Finally, MECG argues that the trackers are unlawful because the Commission can only allow recovery of deferred items in future rates if the basis for the deferral was an extraordinary event.[207]

The argument that the Company's costs to comply with the vegetation management and infrastructure inspection rules are stable is not supported by the record evidence in this case. Ameren Missouri witness David Wakeman testified that the costs the Company incurs for vegetation management have varied since the rule took effect and will continue to vary into the future. The reasons for this include, but are not limited to: fluctuations in the number of miles

[203] Staff's Initial Brief, p. 39.
[204] MIEC's Initial Brief, p. 12.
[205] OPC's Initial Brief, pp. 28-29.
[206] *Id.*, p. 31.
[207] MECG's Initial Brief, p. 16.

of line that must be cleared; varying vegetation growth rates; varying rates of tree mortality based on environmental factors; new or increasing threats from disease and insects; and changes in the cost of labor, equipment, and fuel.[208] Evidence provided by Mr. Meyer confirmed Mr. Wakeman's testimony about historical fluctuations in vegetation management costs. As shown on Table 3 from Mr. Meyer's direct testimony, between 2008 and the end of the test year in this case, vegetation management costs varied each year. In fact, from the beginning to the end of that period, costs increased by almost thirteen percent.[209] If these same fluctuations continue into the future – as Mr. Wakeman believes they will – only by maintaining the trackers can Ameren Missouri be assured it can reflect the costs it incurs to comply with those rules in its rates.

As for MIEC's argument that costs the Company incurs to comply with the rules are not great enough to qualify for an AAO, this is largely a strawman argument because Ameren Missouri has not asked for an AAO to recover its vegetation management and infrastructure inspection costs – even if the trackers are discontinued. But, perhaps unwittingly, Mr. Meyer has provided yet another compelling reason to retain the trackers because if the costs of compliance are not sufficient to justify an AAO, then the trackers represent the only regulatory device available to address these mandated costs. That explains why the Commission included language in both the vegetation management and infrastructure inspection rules that specifically provide for trackers.[210]

OPC's concerns that the trackers violate the matching principle are just as baseless here as they were for the major storm cost tracker. Although the Commission should, whenever possible, attempt to match revenues, costs and investment from the same period, that is not

[208] Ex. 46, p. 3, l. 12-21 (Wakeman Rebuttal).
[209] Ex. 513, p. 18, l. 6-7 (Meyer Direct).
[210] 4 CSR 240-23.020(4) and 4 CSR 240-23.030(10).

always possible. The Commission has addressed those situations by granting utilities the authority to defer costs incurred in one period for reflection through rates in a future period. As noted in the discussion of the major storm cost tracker, if OPC's argument regarding the matching principle is correct, then not only are trackers unlawful but so are AAOs. Courts that have reviewed Commission orders granting AAOs not only have verified the Commission's authority to issue such orders but have done so with the full understanding of what those orders represent.[211] Therefore, OPC's matching principle argument is completely meritless.

As for OPC's argument that the trackers create a disincentive to control costs, there is no record evidence in this case to support such a finding. Moreover, OPC's argument ignores the fact that all costs processed through the tracker are scrutinized to ensure they were prudently incurred. Thus, the tracker already provides Ameren Missouri with the strongest possible incentive to ensure the costs it incurs for vegetation management and infrastructure are prudent, because it cannot reflect in its rates any deferred costs that fail to meet that standard.

MECG's argument that the trackers are unlawful is without merit for at least two reasons. First, it misrepresents or misinterprets the holdings in ***State ex rel. Public Counsel v. Public Service Comm'n***, 858 S.W.2d 806 (Mo.App. 1993). Second, it ignores two more recent decisions by the Missouri Court of Appeals that (1) allow the Commission to authorize utilities to defer costs that are not "extraordinary" for reflection in future rates, and (2) specifically approved the Company's vegetation management and infrastructure inspection trackers.

Regardless of how MECG characterizes the decision, the holdings in ***State ex rel. Public Counsel v. Public Service Comm'n*** do not limit the Commission's authority to allow utilities to defer certain costs for reflection in future rates to circumstances where an "extraordinary event" was the basis for the deferral. In fact, that question was not even presented to the court for

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[211] *See,* ***State ex rel. Noranda Aluminum v. Pub. Serv. Comm'n***, 356 S.W.3d 293, 319-20 (Mo.App. 2011).

decision in the case. Instead, the court was asked to determine if the Commission lawfully authorized an AAO for amounts it found were unusual and extraordinary.[212] And while the court concluded the Commission acted lawfully, the decision cannot reasonably be interpreted as limiting the Commission's authority to grant such orders only where unusual or extraordinary circumstances exist.

Any doubt the case discussed in the preceding paragraph did not limit the Commission's authority in the manner claimed by MECG should have been erased by the 2009 decision in ***State ex rel. Public Counsel v. Public Service Comm'n***, 301 S.W.3d 556 (Mo.App. 2009), where the Court of Appeals affirmed the Commission's grant of authority to defer costs incurred to comply with the "cold weather rule," 4 CSR 240-13.055. There is nothing in the court's decision indicating the basis for the Commission's order granting authority to defer lost revenues was based on an extraordinary event. Instead, the basis for the Commission's action was the effect on utilities of complying with the cold weather rule.

In addition, in its 2011 decision in ***State ex rel. Noranda Aluminum, Inc. v. Public Service Comm'n***, 356 S.W.3d 293 (Mo.App. 2011), the Court of Appeals specifically affirmed the Commission's authority to approve the vegetation management and infrastructure inspection trackers here at issue. Addressing the concerns MECG raised in its Initial Brief, the court stated:

> AmerenUE cannot go back in time and adjust the rates charged to past customers to reflect increased efforts to trim plant growth and maintain electric transmission components. But because these authorized additional expenses were considered through the various procedures of the instant case for future rate payers, amortized recovery of the expenses does not constitute retroactive ratemaking.[213]

Staff, MIEC, OPC, and MECG all ignore – or at least fail to acknowledge – that in addition to ensuring Ameren Missouri can fully reflect its costs of complying with the vegetation

[212] 858 S.W.2d p. 810.
[213] 356 S.W.3d pp. 319-20.

management and infrastructure inspection rules in its rates, the trackers also ensure customer rates do not reflect more than the actual costs of compliance. If the amount the Company actually expends to comply with the Commission's rules is less than the amount of compliance costs included in rates, the difference is recorded as a regulatory asset to be returned to customers in a future rate case. Just like the tracker for major storm restoration costs, these trackers represent a win-win situation for Ameren Missouri and its customers.

Regarding the amount of vegetation management and infrastructure inspection expense that should be included in the revenue requirement used to set rates in this case, neither Staff, MIEC, nor OPC have presented a convincing argument as to why the actual amounts of these costs incurred through the end of the true-up period should not be used. As Ameren Missouri witness Laura Moore testified, and as Mr. Meyer's own data confirms, compliance costs have increased in each of the past three years. If that trend continues – and there is no evidence to suggest it will not – normalizing compliance costs based on a historical average will significantly understate the costs the Company is likely to incur during the period rates set in this case. Therefore, the Commission should find the appropriate base cost for vegetation management is $56 million and $6.4 million for infrastructure inspection.

X. Street Lighting

A. Cities are not captive 5(M) customers, and neither their financial conditions nor their desires to save money justify the relief they are requesting.

Ameren Missouri's Initial Brief addresses nearly all the arguments made in the Initial Brief of the cities of O'Fallon, Missouri and Ballwin, Missouri ("Cities"), so Ameren Missouri will limit its reply to Cities' brief to only those arguments not already addressed.

The Cities are not as they suggest, captive 5(M) customers.[214] Street lighting is in fact the one electric utility service the Company offers where the customer desiring service can choose to take service under one of two rates, the Company's 5(M) Company-owned street lighting facility rates, or under 6(M) customer-owned street lighting facility rates. The fact is, if the Cities are being held captive by anything, it is not Ameren Missouri, it is their reluctance to acquire street-lighting fixtures in any manner other than asking the Commission to strong-arm Ameren Missouri into selling its street lighting fixtures. Clearly, Ameren Missouri is not preventing Cities from buying on the open market the street lighting facilities they would need in order to take 6(M) service. Perhaps it is the Cities' financial condition[215] that prompts their reluctance to go out and buy street lighting facilities, but it is simply not Ameren Missouri's obligation to sell its own property to put Cities in a better financial situation.[216]

Nor does Cities' presumption that they will save money by switching to 6(M) service obligate Ameren Missouri to transfer its Company-owned street lighting facilities to Cities. In the first place, Cities do not appear to have offset their presumed savings[217] by *any* estimate of the cost to disentangle the Company's street lighting facilities from its distribution system, or by the maintenance costs associated with owning such systems. Maybe this is because Cities persist in their irrational belief that Ameren Missouri can and should simply transfer to Cities, "only…the light fixtures themselves[.]"[218] As Ameren Missouri's witness David Wakeman testified to extensively, for numerous and varied safety and operational reasons, the Company

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[214] Cities' Initial Brief, p. 1.

[215] Cities imply they are in financial straits, "[t]hese monetary reductions and savings are significant and particularly important at a time when municipalities across the state are being asked to consider the manner in which they both derive and expend revenues." Cities' Initial Brief, p. 2

[216] As the Noranda subsidy proposal demonstrates, a particular customer's purported financial situation can prove to be a very slippery slope on which to order a public utility to set rates, let alone ordering it to sell its property to that customer for the purpose of saving the customer money.

[217] Cities' Initial Brief, pp. 1-2.

[218] Ex. 853, p. 2, l. 7-9 (Kunst Direct).

could not transfer its street lighting system to Cities "in situ."[219] Even where they contemplate the transfer of the cables necessary to supply service, they wonder why they couldn't simply work some agreement out to have the Company perform maintenance. As Mr. Wakemen explained, there is no existing tariff under which to charge Cities for service even if Cities also owned "the wires" but Ameren Missouri handled all maintenance (so that only Ameren Missouri was operating in its trenches and distribution system), because neither the 5(M) nor the 6(M) tariff are designed to cover costs Ameren Missouri would incur if it worked on wires owned by the customer.[220] In short, even if monetary savings to the Cities were adequate grounds for granting Cities the relief they are requesting, they haven't demonstrated what those savings, if any, would be.

B. The Commission can provide Cities appropriate rate relief by shifting revenue from 5(M) to 6(M), to reflect each class' cost of service; and beginning such a shift now may also send timely pricing signals to other 5(M) customers.

Cities urge the Commission to provide them with "rate relief."[221] Ameren Missouri respectfully suggests that given the lighting CCOSS analysis performed by Mr. Davis, the appropriate rate relief for 5(M) customers may be a $3.9 million shift in revenue from 5(M) customers, whose rates are approximately 11% above cost of service, to 6(M) customers, who are paying rates well below their cost of service, with the shift taking place over a sufficient period of time to avoid rate shock.[222] Initiating a shift to cost-based 6(M) rates now may be particularly timely, since other 5(M) customers may be using current, below cost of service 6(M) rates to evaluate if it is more economic to take service under 6(M) rates, and if the

[219] *See*, Ameren Missouri's Initial Brief, pp. 123-124.
[220] *Id.*, p. 124.
[221] Cities'Initial Brief, p. 2.
[222] Ex. 9, p. 39, l. 20 to p. 41, l. 2; *Id.*, p. 41, l. 12 to p. 42, l. 4. (Davis Rebuttal).

Commission waits to raise 6(M) rates until after customers have moved to 6(M) service, those customers may find the move was not economic.[223]

C. A §393.140(5) RSMo-based Commission power to condemn cannot be harmonized with §71.525 RSMo.

Cities argue that §71.525 RSMo "does not even appear to conflict with Section 393.140 RSMo," and as such, they can be reconciled with ease.[224] Ameren Missouri agrees that *without* reading a power to condemn utility property into §393.140 RSMo, the two statutes can be harmonized. Even Cities would have to agree that §393.140 RSMo would have to be *interpreted* to include a power to force a utility to involuntarily convey its property to a city, since such a power is not expressly conferred. However, that interpretation would be contrary to expressed public policy and the plain language of §71.525 RSMo. "[T]he very highest evidence of the public policy of any state is its statutory law, and if there is legislation on the subject, the public policy of the State must be derived from such legislation."[225] Section 71.525.1 RSMo expressly sets forth this public policy:

> ***no city***, town or village ***may condemn the property of a public utility***, as defined in section 386.020, RSMo…if such property is used or useful in providing utility services and the city, town or village seeking to condemn such property, ***directly or indirectly***, will use or proposes to use the property for the same purpose, or a purpose substantially similar to the purpose that the property is being used by the public utility[.]

§71.525.3 RSMo then makes clear just how broadly this prohibition must be read:

> ***The provisions of this section shall apply to all cities***, towns and villages in this state, incorporated or unincorporated and ***no matter whether*** any statutory classification, special charter or constitutional charter or ***any other provision of law appears to convey the power of condemnation of such property by implication***.

In other words, even if §393.140 RSMo *implies* that Cities may indirectly, through an order of the Commission, acquire Ameren Missouri's property against Ameren Missouri's will in

[223] Tr. Vol. 26, p. 1843, l. 3-24.
[224] Cities' Initial Brief, p. 4.
[225] ***State ex rel. City of St. Louis v. Public Service Commission***, 73 S.W.2d 393 (Mo. 1934).

order to use that property the same way Ameren Missouri is currently using it, §71.525.3 RSMo expressly prohibits such a reading of §393.140 RSMo. For the same reason, the Commission cannot order Ameren Missouri to promulgate a tariff that requires it to involuntarily convey its street lighting facilities to a city that proposes to use the property for the city's street lighting purposes.[226]

XI. "Economic Considerations"

OPC (and, to a limited extent, some others[227]) includes in its Initial Brief a somewhat extended discussion of general economic conditions. OPC compares historical rate increases to increases in wages and draws other comparisons. It is true that electric rates have gone up significantly more than wages over the past several years. That does not mean that Ameren

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[226] The purpose behind §71.525 RSMo, enacted in 1994, was to make clear that municipalities cannot condemn public utility property in order to operate that property for the same purpose, whether the Commission permits or orders the involuntary transfer or not. This purpose becomes even clearer in view of the cases that immediately preceded its enactment. In ***State ex rel. Missouri Cities Water Co. v. Hodge***, 1993 Mo. App. LEXIS 1361 (Mo. App. E.D. August 31, 1993), the Writ Division of the Eastern District Court of Appeals made permanent a writ of prohibition to prohibit the Circuit Court of Audrain County from enforcing an order of condemnation, authorizing the City of Mexico to condemn Missouri Cities' waterworks, so that the city could operate the waterworks. Although the Court of Appeals found that the condemnation would not destroy or materially impair the use to which the waterworks would be put, since the city also planned to operate the waterworks, and although the Court of Appeals found that statutes provided the city, by necessary implication, the right to condemn an existing waterworks, the Court of Appeals granted the writ prohibiting the condemnation because the appeals court found it necessary for the utility to first obtain Commission approval of the transfer (pursuant to §393.190 RSMo).

The case was transferred to the Missouri Supreme Court. In ***State ex rel. Missouri Cities Water Co. v. Hodge***, 878 S.W.2d 819 (Mo. 1994), the Missouri Supreme Court made its writ of prohibition absolute, but for an entirely different reason. The Court identified the issue as whether property already dedicated to a public use may be condemned by a municipality for the very same purpose. The Court found that virtually all the cases in other jurisdictions noted that the power to condemn the property of a *public utility* for the same purpose must be expressly conferred by statute. The Missouri Supreme Court noted that a municipality's power to condemn the property of a public utility operating under a certificate of convenience and public necessity must be expressly conferred. Since no such express statutory power was conferred on the City of Mexico, the writ of prohibition was made absolute. Tellingly, the Court noted that while the case was pending, the Legislature passed SB709 (now §71.525 RSMo), which if signed by the governor, the Court noted, "would appear to prohibit the type of condemnation considered here." In other words, while *Missouri Cities* was being decided, the Legislature took the bull by the horns and confirmed that not only was such power *not* conferred on municipalities by statute, it was expressly prohibited, notwithstanding *any* provision of law appearing to convey the power by implication.

The same result was reached in ***City of Kirkwood v. Union Electric Company,*** 896 S.W.2d 946 (Mo. App. E.D. 1995)(affirming trial court's dismissal of the city's petition to condemn the Company's electric distribution facility serving the City of Kirkwood).

[227] CCM briefly makes similar points as some of those made by OPC; MECG summarizes past rate increases for the Company.

Missouri's electric rates do not remain comparatively low – they do – as the record in this case

shows.[228] But the combination of the need to make huge investments in aging infrastructure; low or non-existent load growth; large, mandated investments (most notably, driven by environmental laws over which the Company has no control and with which it must comply); lower power prices which cut power sales margins requiring greater revenues to cover costs from retail revenues; and ordinary inflationary pressures, have all combined to cause electric rates in the country and the state to increase significantly in the past several years. The Company was able to avoid filing this rate case for almost two and one-half years since its last one (about a year longer than in recent history) and the overall rate increase it is seeking is smaller than most of the past rate requests.

When one looks at these general economic conditions discussions, in particular in the case of OPC, it appears that the hope in pointing to general economic conditions is to convince the Commission to render rulings on the issues that will lower the Company's revenue requirement even if basic cost of service principles require a higher revenue requirement. As discussed below, revenue requirement decisions must be made based on cost of service.

An example of OPC's attempt to get the Commission to depart from setting a revenue requirement based upon a fair determination of cost of service is OPC's citation to ***State ex rel. Capital City Water Co v. PSC***, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993) and its statement

[228] MECG claims that concerns about "affordability" may arise in terms of Missouri companies' ability to compete with companies out of state in terms of electricity costs. MECG Initial Brief, p. 5. With rates about 20% below the national average (Ex. 28, p. 11, l. 9-12), this claim, like many others made in this case, is simply not supported by the record.

that "the Commission's principal interest is to serve and protect ratepayers."[229] OPC's statement is taken out of context, at least to the extent that OPC is suggesting that the Commission can simply ignore cost of service if that means ratepayers will be "protected" via rates that are lower than they should be.[230] There are other cases that make very clear that Commission decisions have to be equally fair to customers and utilities.[231] Taken together, the case law is telling the Commission that its rate orders must be based upon competent and substantial evidence of record and that rates must be set so as to provide a reasonable opportunity for the utility to earn a fair return. There is only one way to provide that opportunity: to set rates that, based on the record, are expected to allow the utility to cover its operating costs, income taxes and depreciation and its cost of capital, equity and debt. That formula does not include an "adder" if the economy is doing quite well, nor does it include a "deduct" if the economy is not doing as well.

OPC also points to a 2006 rate case order involving placing the Iatan 2 power plant into rate base, where the Commission had to decide how much of Iatan 2's capacity to allocate between two KCPL-GMO divisions (MPS and L&P). The suggestion of OPC's citation to this case appears to be that the Commission can simply cut revenue requirement if the impact will be greater than some subjective measure OPC does not specify. However, the question in that case was *not* whether all of KCPL-GMO's prudently-incurred investment in ownership of Iatan 2

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[229] OPC misquotes the case in two respects. OPC states that the Commission's "principle" [sic] "purpose" is to serve and protect ratepayers. As the quote included above indicates, the correct word is "principal" and the case refers to the Commission's "interest" not "purpose." The facts of this case are also instructive. In this case, the utility later argued that letters from the Commission's general counsel and secretary (that had not been voted on or approved by a majority of a quorum of the Commission) that expressed "no objection" to a water contract estopped the Commission from later finding the contract imprudent. The Court cited to the "principal interest" in protecting ratepayers simply for the proposition that the Commission could not contract away its regulatory authority because circumstances could change over time.

[230] Setting revenue requirements lower than they should be doesn't protect customers in any event. Doing so weakens utilities and reduces needed investment in utility systems that are essential for those customers' true protection. OPC's citation to this case is also inconsistent with OPC's position on the Noranda rate subsidy since the record in this case fails to establish that the smelter will close and fails to establish that customers are better off with providing a large rate subsidy even if the smelter were to close.

[231] ***State ex rel. Wash. Univ. v. Pub. Serv. Comm'n***, 272 S.W. 971, 973 (Mo. 1925) (Fair administration of the PSC law is mandatory. "Fair" means fair to the public and to utility investors).

would be included in rates. To the contrary, the question was how much of that investment should be *allocated* between different KCPL divisions, as the Commission itself recognized: "The Iatan 2 Allocation issue is *more akin to a rate design issue* since it determines the relative amount of the rate increase that will be received by both the MPS and the L&P service areas *rather than the overall revenue requirement impact* of Iatan 2" (emphasis added).[232] *All* of the investment was reflected in the rates of the two divisions combined. Consequently, this case obviously does not suggest that the Commission can set a revenue requirement apart from the utility's true cost of service.

Finally, OPC claims that "persistent over-earning" somehow makes asking for what is now a 6.7% increase in rates (more than one-half of which is simply a re-base of net energy costs that would have been recovered through the FAC even if a rate case had not been filed) is somehow relevant to the Commission's revenue requirement decision in this case.[233] First of all, if the Company had been truly "over-earning" (i.e., had its rates been unjustly too high) it would not have needed five rate increases in the last eight to nine years, plus a sixth one now. Second, failing to achieve its authorized return – often by a significant amount – in every year over the last eight except two, is hardly a case of "persistent" over-earnings, even if there are times during that period when the actual earnings have been above the targeted earnings.

The Company understands that rate increases can impose additional burdens on customers. As addressed in the Company's Initial Brief, the Company works very hard to keep its costs down, taking more than $67 million of O&M costs out of its business since its last rate case. As Mr. Moehn testified, the Company works very hard to keep its product – electricity – as

[232] *Report and Order*, File No. ER-2010-0356, p. 196, 535.
[233] OPC Initial Brief, p. 25-26.

affordable as it can.[234] But the Company provides an essential and mandatory service. It has to invest in infrastructure, it must comply with environmental laws, it must pay its employees and suppliers, it must pay for fuel and it cannot control the markets that set the prices for power or for the fuel it has to buy.

The Commission is concerned about electricity costs, and understandably so. But to the extent OPC or others are suggesting that the Commission's job is to cut utility revenue requirements, not because the cost of service is lower, but because there are general economic problems or concerns for some in the state, those suggestions are simply wrong. The legislature delegated cost of service ratemaking authority to the Commission. It did not delegate the authority to make economic policy decision in place of the legislature.

As the Missouri Supreme Court has stated:

> The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. *We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested*. The woof and warp of our Public Service Commission Act bespeaks these terms. The law would be a dead letter without them, and a commission under the law, that would not be the law in the proper spirit, would be breathing into it the flames of ultimate deterioration of public utilities. *These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors*.[235]

The Commission, citing ***Bluefield***, 262 U.S. at 690, has itself recognized essentially these same principles:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust,

[234] Tr. p. 198, l. 12 to p. 199, l. 1.
[235] ***Washington Univ. v. Public Serv. Comm'n***, 272 S.W. at 973 (emphasis added).

> unreasonable and confiscatory, and their enforcement deprive the public utility of its property in violation of the Fourteenth Amendment.[236]

XII. Union Proposals

IBEW Local 1439's ("IBEW") request for a special training allocation is a solution looking for a problem, and it should be rejected because there is no competent or substantial evidence of record that there is any current or future internal workforce staffing problem that would justify Commission intervention in Company personnel management.

IBEW wants the Commission to order Ameren Missouri to train and hire 111 new long-term employees, to increase the Company's revenue requirement in this case by $11.1 million dollars, and to allocate those funds specifically for such training. To encourage the Commission that it has carte blanche to do so, IBEW assures the Commission that it has, "broad authority to direct money for hiring, training and general reinvestment in the internal workforce under its statutory mandate to oversee and require safe and adequate service of the utility."[237] This assertion ignores the long-standing precedent established in ***State ex rel. Harline v. Public Serv. Comm'n***[238] that the Commission is not clothed with the general power to manage a public utility so long as the utility "performs its legal duty, complies with lawful regulation and does no harm to the public welfare." Perhaps IBEW steers the Commission away from ***Harline*** so that it does not have to identify any evidence of dereliction of Company duty that would justify the Commission inserting itself into the day-to-day management affairs of the Company to "direct money" in the manner IBEW requests. That would certainly be hard to do, given that IBEW's own witness Mike Walter agrees that the Company is performing its legal duty — is currently

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[236] *Report and* Order, File No. ER-2008-0318, p. 10. Nor can the Commission fail to "give heed to all legitimate expenses that will be charges upon income during the term of regulation." ***West Ohio Gas Co. v. Public Utilities Comm'n of Ohio***, 294 U.S. 63, 71 (1935).
[237] IBEW's Initial Brief, p. 2.
[238] 343 S.W.2d 177, 182 (Mo. App. K.C. 1960).

providing consistently reliable service[239] — and admits that he is relying solely on his personal experience to support his claimed concerns about the Company's ability to provide safe and adequate service in the future.[240]

To encourage the Commission to interfere in Company personnel management decisions, IBEW asserts there is a Company workforce shortage that "will" (i.e., in the future) "adversely impact the safety and quality of service to the customers."[241] IBEW has provided no evidentiary support for this assertion, however. Strangely, IBEW offers the testimony of Ameren Missouri's President, Michael Moehn.[242] However, Mr. Moehn's cited testimony has nothing to do with the Company's workforce, let alone a shortage. Rather, Mr. Moehn's testimony addresses the necessity to make investments in infrastructure driven by the age of the current infrastructure and by new environmental regulations.[243] IBEW offers the Commission no concrete, objective evidence of a current worker shortage at all, let alone one that is affecting quality of service, such as an example of a project left unfinished due to a shortage of workers, or even a project completed in an untimely manner. To be clear, the Company is not aware of any such situations and in fact, Mr. Walter himself testified to the opposite, highlighting that the Company's internal workforce consistently completes jobs more quickly than scheduled.[244] That is quite an accomplishment for a supposedly short-handed workforce. Instead, IBEW offers only its witness' conclusory and self-serving testimony. Mr. Walter simply testifies that cuts to personnel have left the internal workforce "short-handed."[245] IBEW does not offer any evidence

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[239] Tr. Vol. 20, p. 1024, l. 4-10.
[240] Tr. Vol. 20, p. 1026, l. 23 to p. 1027, l. 23.
[241] IBEW's Post-Hearing Brief, p. 2.
[242] *Id.*
[243] Ex. 28, p. 15, l. 17-22 (Moehn Direct), referring to "capital investments" the Company's ability to make "incremental investments" in the face of "stringent environmental requirements and the need to replace infrastructure[.]"
[244] Tr. Vol. 20, p. 1044, l. 12 to p. 1045, l. 14.
[245] Ex. 800, p. 4, l. 14-22 (Walter Direct).

to show that the Company has incorrectly forecasted its future personnel needs, or that its plans for addressing future personnel needs are insufficient.

In contrast, the Company's Senior Vice President of Operations and Technical Services, David Wakeman, testified that while the headcount has indeed decreased in recent years through voluntary separation and normal attrition, the fact is that the Company has completed all mandatory and scheduled maintenance work[246] and has been able to complete work with up to 20% fewer personnel due to improvements in tools, equipment, technology and reduced maintenance activities for newer equipment.[247] Additionally, the Company intentionally augments its workforce with outside contractors to balance its workload and to manage it effectively over a wide geographic area.[248] As to future needs, the Company is paying attention to projected and actual retirements and planning accordingly, with training for several job classifications already underway.[249]

To justify IBEW's recommendation that the Commission make a training-specific allocation, IBEW notes the Commission has made such allocations in the past.[250] That much is true. IBEW then suggests that its current $11.1 million request is not "extraordinary," just "more comprehensive."[251] Ameren Missouri disagrees completely. In prior rate cases, the Commission ordered special allocations after finding that the Unions *and the Company* agreed that the Company could use some additional funds ($1.29 million for training personnel in File No. ER-2010-0036 and $1.25 million for training personnel in File No. ER-2011-0028) earmarked for training, and that the Company and the Unions agreed there was a need for improved training

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[246] Ex. 46, p. 13, l. 3-13 (Wakeman Rebuttal).
[247] Ex. 46, p. 12, l. 6 to p. 13, l. 2; Tr. Vol. 20, p. 973, l. 1 to p. 974, l. 3 (Wakeman Rebuttal).
[248] Tr. Vol. 20, p. 983, l. 6-16.
[249] Tr. Vol. 20, p. 989, l. 12-20; Tr. Vol. 20, p. 990, l. 16 to p. 991, l. 5; Tr. Vol. 20, p. 991, l. 24 to p. 993, l. 1.
[250] IBEW's Initial Brief, p. 3.
[251] Id.

and the Company agreed to accept the funds.[252] In this case, the Company has explained to the Commission that it is already in the process of training for several job classifications,[253] it is not asking for any additional funds for those training programs,[254] and it certainly doesn't think IBEW's inflexible mandate to hire exactly 111 workers between 2015 and 2017 is a good management decision for the Company and its customers.[255]

In short, no evidence has been presented to prove that any personnel management decision of the Company has led, or will lead, to a Company failure to provide safe and adequate service. Given the lack of evidence, and the Company's reluctance to accept a $11.1 million special allocation that comes with an inflexible long-term hiring mandate, there is no competent and substantial basis on which the Commission can inject itself into the Company's day-to-day personnel management decisions as IBEW has proposed.

A. The competency of the Company's internal workforce does not justify Commission intervention in Company personnel management decisions with respect to the use of outside contractors.

In support of its proposed mandate to hire 111 long-term employees, IBEW offers evidence that the Company's internal workforce is expert with regard to the Company's system, is especially motivated to do a good job, and does a good job handling the Company's normal and sustained workload.[256] The Company agrees. IBEW then asserts that the internal workforce is "substantially more efficient than the subcontractor workforce on similar projects."[257] Ameren Missouri takes issue with this statement, since, as Mr. Wakeman testified, the study on which IBEW bases this conclusion was not a wide-ranging study encompassing all work and that

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[252] *Report and Order,* File No. ER-2010-0036 , pp. 70-71, ¶5; *Report and Order,* File No. ER-2011-0028, p. 103, ¶¶3-4.
[253] Tr. Vol. 20, p. 991, l. 24 to p. 993, l. 1.
[254] Tr. Vol. 20, p. 1015, l. 16 to p. 1016, l. 10
[255] Tr. Vol. 20, p. 994, l. 16 to p. 995, l. 4; *Id.,* p. 1010, l. 23 to p. 1012, l. 20; *Id.*, p. 1002, l. 23 to p. 1003, l. 15.
[256] IBEW's Post-Hearing Brief, p. 5.
[257] *Id.*

contractors are often given bigger jobs or different jobs than the Company's internal employees.[258] IBEW then points out that "recently" the Company's internal workforce completed roughly the same number of hours (243 FTE) of distribution and transmission work as was completed by outside contractors (225 FTE).[259] IBEW then makes the leap, with obvious dismay, that the numbers must mean that the "normal and sustained workload in distribution and transmission is now requiring significant employment of subcontractors."[260] Ameren Missouri takes issue with this conclusion, as well. For example, IBEW considers all heavy underground work to be part of the normal and sustained workload that should be handled by internal workforce, whereas the Company does not consider the recent two-year replacement of its Martin Luther King substation, which required subcontracted workers, to be normal sustained workload since that work is complete.[261] Regardless, the Commission is left to infer that it could return whatever constitutes normal and sustained workload to the Company's internal workforce and stem the tide of contracted employees if the Commission would only mandate the training and hiring of 111 new long-term employees.

The problem with this suggestion is the fact that the internal workforce does a good job is not evidence that the Company's contracted employees do not. IBEW has offered no testimony or other evidence that the Company's use of outside contractors has had any negative effect on the Company's ability to provide safe and adequate service. In fact, IBEW's own witness admitted that he cannot quantify his belief that the Company's internal workforce does a better job,[262] admitted that the Company's contractors are well trained,[263] and that they get the job done

[258] Tr. Vol. 20, p. 993, l. 14 to p. 994, l. 2.
[259] IBEW's Post-Hearing Brief, pp. 6-7.
[260] *Id.,* p. 7.
[261] Tr. Vol. 20, p. 985, l. 22 to p. 986, l. 14.
[262] *Id.,* p. 1041, l. 16-21.
[263] *Id.,* p. 1044, l. 13 to p. 1045, l. 14.

in a timely manner.[264] As a result, this line of argument also provides no support for IBEW's recommended mandate.

B. The Commission cannot fix the fact that IBEW's infrastructure replacement allocation violates the "anti-CWIP" statute by "issuing a pool of money," or by approving an Infrastructure System Replacement Surcharge.

In a footnote, IBEW suggests that the Commission "can authorize money to pay for" Company investment in its physical infrastructure.[265] The Commission cannot, however, simply "issu[e] a pool of money that can be tapped as a reimbursement immediately after Ameren Missouri makes a capital expenditure."[266] The Commission cannot make and issue currency, so as to create a "pool" that could be "tapped," the Commission would have to order Ameren Missouri to collect the money from its customers *before* completion of infrastructure work. That would violate the anti-CWIP statute.[267] Nor can the Commission, as IBEW suggests, authorize the Company to recover the cost to replace aging infrastructure through an Infrastructure System Replacement Surcharge ("ISRS"). ISRSs are statutory single-issue rate-making mechanisms authorized *solely* for gas and water utilities.[268] Absent specific statutory authority, it is well-settled that such mechanisms are unlawful in Missouri.

C. The Commission should reject IBEW's request for additional, mandated quarterly reports on infrastructure because such reporting has no value and would only add unnecessary expense.

As to reporting on infrastructure, IBEW represents that "Ameren Missouri questions the authority of the Commission to require quarterly reporting requested by IBEW 1439."[269] This is not correct. The Company did not question the Commission's authority to order any particular

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[264] Tr. Vol. 20, p. 1045, l. 19-25.
[265] IBEW's Post-Hearing Brief, p. 3, n.1.
[266] *Id.*
[267] §393.135 RSMo.
[268] §393.1000 through §393.1015, RSMo.
[269] IBEW's Post-Hearing Brief, p. 3.

reporting,[270] it questioned the value of the reporting recommended by IBEW. Since the Company already reports on equipment performance and outages, which gives the best information about the performance of the Company's utility system,[271] and the Company can provide Staff with any particular information regarding infrastructure or loading upon Staff's request,[272] the reports IBEW has recommended would add nothing but unnecessary expense. For that reason, the Commission should decline to require the additional reporting.

XIII. Rate Design

A. Class cost of service and revenue allocation.

As Ameren Missouri noted in its Initial Brief, four parties performed class cost of service studies ("CCOSS") and filed testimony supporting those studies: Ameren Missouri, Staff, OPC, and MIEC. With but one exception, the production plant allocators those studies produced are qualitatively equivalent. The sole outlier was OPC's proposed four coincident peak version of the peak and average method.

OPC's Initial Brief states that in lieu of the CCOSS methodology supported by its testimony, it has chosen to adopt the terms of the March 10, 2015, *Non-unanimous Stipulation and Agreement Regarding Economic Development, Class Cost of Service, Revenue Allocation and Rate Design* ("March 10 Stipulation")[273] to resolve all issues related to class cost of service, revenue allocation, and rate design.[274] With regard to those issues, the March 10 Stipulation

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[270] Whether such reporting can be ordered piecemeal in a rate case as opposed to be required by a rule of general applicability is a valid question, but could the Commission in some fashion require more reporting? The answer is "yes."
[271] Tr. Vol. 20, p. 1006, l. 7-25.
[272] *Id.,* p. 1015, l. 7-15.
[273] Because Ameren Missouri, Staff, and MECG each formally objected to the Stipulation, under 4 CSR 240-2.115(2)(D) all terms and agreements in the Stipulation "shall be considered to be merely a position of the signatory parties . . . except that no party shall be bound by it. All issues shall remain for determination after hearing."
[274] OPC's Initial Brief, p. 37.

simply provides that any rate increase authorized by the Commission should apply on an equal percentage basis to all rates within each rate class.[275]

Because the results of the CCOSS are qualitatively equivalent, whether the Commission sets rates in this case based on the four non-coincident peak version of the Average and Excess Demand Allocation method – the methodology proposed by Ameren Missouri and MIEC – or Staff's Base/Intermediate/Peak methodology – is of little practical concern. That is especially true if the Commission chooses to spread any authorized increase to all rate classes on an equal percentage basis. If, however, the Commission believes it must adopt one CCOSS methodology, orders in past rate cases have found Ameren Missouri's method to be balanced and reliable.[276]

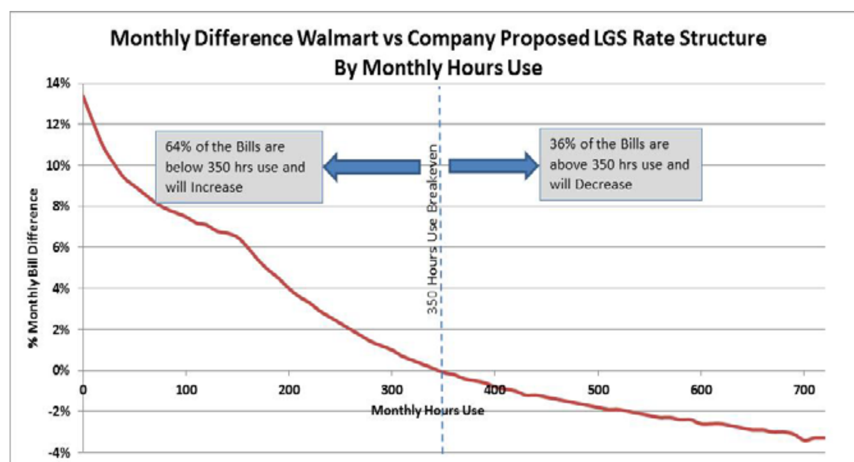
But, as noted in the Company's Initial Brief, while the results of CCOSS are useful for rate design, those results should not entirely control the Commission's rate design decisions. Other factors should also be considered, such as rate and revenue stability, public acceptance, value of service, and the effectiveness of rates in allowing Ameren Missouri to recover the approved revenue requirement.[277] Many of these qualitative rate design considerations are already "baked-in" Ameren Missouri's rates, and adopting Ameren Missouri's proposal to spread any increase granted in this case over all classes on a uniform percentage basis would preserve those considerations in future rates. So, although Walmart claims no evidentiary support exists for the proposal of Ameren Missouri and others to spread any rate increase on an equal percentage basis,[278] the fact all of the non-cost rate design considerations were discussed in

[275] March 10 Stipulation, ¶3. The only exception is that under the March 10 Stipulation, the residential customer charge is to remain at $8/month.
[276] *See Report & Order*, File No. ER-2012-0166, p. 87.
[277] Ameren Missouri's Initial Brief, p. 147.
[278] Walmart's Initial Brief, p. 3.

testimony filed by Ameren Missouri witness William Davis[279] shows Walmart's claim to be unfounded.

Mr. Davis stated there was basic agreement between the parties on which classes are below cost of service and which are above cost of service, as defined by the point estimates for each class in each CCOSS. The question therefore comes down to whether the Commission wants to move more toward those point estimates, and if so, to what degree.[280]

The rate design changes proposed by Walmart would apply half of any rate increase for the LGS and SPS rate classes to the initial hours-use block of each of these respective rate classes, with the remaining half applied to each class's demand charge. Rates for the second and third hours-use blocks for these classes would remain unchanged.[281] Ameren Missouri was the only party to analyze the impact of this proposal on all of the customers in the LGS and SPS rate classes, and based on the Company's bill impact analysis, the Walmart proposal will negatively impact lower load-factor customers in the LGS and SPS classes to a much greater degree than it will benefit higher load-factor customers in those classes. The results of that analysis are shown in two charts included in Mr. Davis' rebuttal testimony:[282]



[279] Ex. 7, p. 15, l. 15 to p. 16, l. 5 (Davis Direct).
[280] Tr. Vol. 23, p. 1494, l. 4-11.
[281] Ex. 9, p. 6, l. 11-12 (Davis Rebuttal).
[282] *Id.*, p. 6, l. 19-22.

As shown above, under the Walmart proposal, customers in the LGS and SPS classes could see double-digit rate increases *in addition to* whatever increase the Commission authorizes in this case. Sixty-four percent of customers in the LGS class and fifty-five percent of customers in the SPS class will experience increased billings from the proposed change to the existing rate design, regardless of the increase allocated to these classes in this case. In fact, the only customers who would benefit are those customers whose usage extends into the third hours-use block, which in most cases means businesses open at least sixteen hours per day. Not surprisingly, Walmart and some or all of the customers represented by MECG are in that group. But, as pointed out in Ameren Missouri's Initial Brief, the benefit those customers will realize is limited to monthly bill reductions of only a few percentage points.[283]

Walmart claims the data portrayed on these charts is "nothing more than a sophisticated and misleading way of saying that under the 'hours-use' methodology, lower load factor customers within the LSG/SP [sic.] class pay less than it costs to serve them . . .."[284] To the contrary, Mr. Davis' analysis shows the ramifications to customers in the LGS and SPS classes from implementing Walmart's proposal in this case.

[283] Ameren Missouri's Initial Brief, p. 149.
[284] Walmart's Initial Brief, p. 13.

In addition to the rate shift discussed above, Walmart also proposes that the Commission order Ameren Missouri "to develop alternative rate designs for LGS/SP customers that more accurately reflect the class' cost of service, and to present those alternatives in the next general rate case."[285] More specifically, Walmart wants the Company to develop one or more alternative rate design proposals that are not based on hours-use rate design principles.

Mr. Davis explained the origin and evolution of hours-use rate design in his rebuttal testimony:

> Immediately preceding May 1980, the Company's rate structure for customers who would generally fit in one of these two rate classifications, based on service use and voltage service, were billed under declining block energy rates both with (Large General Service) or without (Primary Service) a rate limiter, whereby the customers' cents per kilowatt-hour ("kWh") billing could not exceed certain thresholds. The Company's total cost (i.e., production, transmission, distribution, etc.) of providing service to said customers was reflected in these rates.
>
> Effective May 30, 1980, there was a material change in the rate structure for these classes, whereby customers were billed a nominal monthly customer charge, monthly demand charges that reflected a significant portion of fixed production costs, transmission costs and distribution costs and, also, monthly energy charges that reflected the Company's variable production costs along with the remaining portion of fixed production costs not reflected in the monthly demand charges. Due to numerous complaints from low load factor customers experiencing materially higher cents per kWh realizations from this rate design, the Commission approved the addition of rate limiters effective March 7, 1981, for Large General Service and July 17, 1981, for Primary Service customers. This rate design for both the Company's Large General Service and Primary Service rate classes was in place through November 26, 1990.
>
> Effective November 26, 1990, the Commission approved new rates that reflected a settlement of a revenue complaint case and also a settlement of a rate design case (Case No. EO-87-175). Within the rate design settlement, the Primary Service class was split between a SPS class and a LPS class. Also, the rate design for both the LGS and the SPS was restructured to eliminate the rate limiters and instead structured the rates with a monthly customer charge reflecting customer-related costs, monthly demand charges reflecting distribution-related costs and "Hours Use block" cents per kilowatt-hour charges reflecting both transmission and fixed and variable production related costs. The implementation of this rate structure significantly mitigated concerns of high cents per kilowatt-hour

[285] *Id.*, p. 3.

customer bill realizations and, therefore, afforded the Company the opportunity to eliminate the aforementioned rate limiters which had no cost support. These rate structures have remained in effect for more than 24 years. (footnote omitted)[286]

Later, in the same testimony, he also explained why hours-use rate design is appropriate for the LGS and SPS rate classes:

> Rather than structuring the declining energy blocks as fixed blocks for customer classes with varying load diversities, it is more appropriate to vary the size of the blocks based on the customer's relative size relationship between demand and energy usage. To do this, the blocks are structured as "Hours Use blocks" in which the kWhs billed in each block are determined by taking a "kWh per kilowatt ('kW') of demand" factor times the customer's demand. For a block with an Hours Use block of 150 kWh per kW demand, a customer with a 1,000 kW demand would have 1,000 x 150 or 150,000 kWh billed in that block whereas a customer with a demand of 100 kW would have 100 x 150 or 15,000 kWh billed in that block. This allows the energy blocks to be scalable to the customer's utilization of demand.[287]

The hours-use rate design was explicitly developed to deal with the diversity of loads found within the LGS and SPS rate classes. Because of that fact, it equitably recovers costs from customers with varying load factors without the need for non-cost-based rate limiters.[288]

As stated in its Initial Brief, Ameren Missouri is satisfied with the current hours-use rate design as it produces equitable rates for customers in the LGS and SPS rate classes. Walmart's claim that the current use of hours-use rate design is attributable to something tantamount to regulatory inertia[289] is demonstrably false. Mr. Davis' testimony clearly shows the change to hours-use in a rate design case that commenced in 1987 was agreed to by the parties to that case – and was approved by the Commission – because all involved witnessed first-hand how poorly an alternative rate design, in effect the previous decade, had performed. Hours-use was then, and remains today, the best method for designing rates for LGS and SPS customers.

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[286] Ex. 9, p. 7, l. 3 to p. 8, l. 10 (Davis Rebuttal).
[287] *Id.*, p. 8, l. 13-22.
[288] *Id.*, p. 10, l. 5-8. Rate limiters cap the realized average price/kilowatt-hour for each customer. In the event a customer's actual average price/kilowatt-hour exceeds the rate limiter, then the customer's total bill is reduced to match the rate limiter.
[289] *See* Walmart's Initial Brief, pp. 11-12.

Walmart also claims the current hours-use structure is difficult for customers to administer because it requires understanding of the interplay of the energy rate and load factor. But it seems peculiar that this is the first time Walmart has raised this concern.

Walmart further argues that the hours-use structure does not provide customers with clear energy and price signals.[290] If Walmart's claims were true, one would expect over the more than twenty years hours-use rate design has been in place that more than one customer would have complained. One would also expect Walmart to have raised its complaints in prior rate cases. Because there is no evidence either of those things has occurred, Walmart's claim is unfounded and should be rejected.

Walmart wants the Company to develop one or more alternative rate design proposals that are not based on hours-use rate design principles, but Walmart has been unable to articulate what alternatives it would consider satisfactory. Based on its testimony in this case, Walmart appears to prefer a rate design whereby the customer, energy, and demand charges are set exactly equal to the cost of service study results. Yet, that is the rate design Ameren Missouri had from mid-1980 to late-1990. Based on that experience, Ameren Missouri believes the hours-use rate design is an appropriate rate design for the LGS and SPS rate classes. If Walmart believes one or more alternative rate designs should be proposed and considered in Ameren Missouri's next rate case, then Walmart is free to do whatever is necessary to develop such proposals. Walmart witness Steve Chriss' resume,[291] which includes approximately eleven pages listing the utility cases he has appeared in personally, shows Walmart is a sophisticated and well-financed consumer of electricity that is fully capable of developing alternative rate design principles and

[290] *Id*., p. 14.
[291] Ex. 750, Schedule SWC-1 (Chriss Direct).

presenting them to the Commission. Walmart should not be allowed to foist that burden, and the associated costs, on to Ameren Missouri's customers.

B. Monthly residential customer charge.

Ameren Missouri proposes to increase the current $8.00 monthly customer charge for the Residential class by the same uniform percentage all other rates within the Residential class are increased in this case. As stated in its Initial Brief, based on the current revised rate increase request (after accounting for true-up and settled items) the Company estimates the increased monthly charge will not exceed $8.50.[292]

Two parties, Staff and OPC, oppose the proposed increase. Staff's opposition is based on the results of its CCOSS – which determined a fully cost-based customer charge of $8.11 – as well as on guidance provided in the *Report and Order* in Ameren Missouri's last general rate case, where the Commission stated "shifting customer costs from variable volumetric rates, which a customer can reduce through energy efficiency efforts, will tend to reduce a customer's incentive to save electricity."[293] OPC's opposition is based on a provision of the March 10 Stipulation that fixes the Residential customer charge at its current level.[294]

As noted in its Initial Brief, although Ameren Missouri has attempted to increase the Residential customer charge in each of its last five rate cases, only one of those requests was granted. As a result, over that period for every five percent increase in volumetric rates there has been only a one percent increase in the customer charge.[295] If the Commission denies an increase in the customer charge in this case, that gap will widen even further. Even with the

[292] Ameren Missouri's Initial Brief, p. 150.
[293] Staff's Initial Brief, p. 79.
[294] OPC's Initial Brief, p. 38.
[295] Ameren Missouri's Initial Brief, p. 151.

increase the Company proposes, the 5/1 ratio will not reduce but, instead, will remain what it is today.

Ameren Missouri's evidence in support of its proposal presents several compelling reasons why the monthly Residential customer charge should be increased. First, the Company's CCOSS supports a cost-based monthly customer charge of roughly $20.00. This was determined based on fixed costs Ameren Missouri incurs regardless of whether customers use any energy. The reason Staff's estimate of a cost-based customer charge is much lower than Ameren Missouri's estimate is because Staff's CCOSS excluded certain categories of capital costs and associated operations and maintenance expenses. But the record in this case clearly establishes Staff should not have excluded those costs from the calculation of the customer charge because Staff does include capital investments not related to the amount of energy customers use in its CCOSS.

Staff's Initial Brief notes that to determine its cost-based Residential customer charge, Ameren Missouri's CCOSS includes a portion of the costs in FERC accounts 364-368 (poles, conductors, conduit, and line transformers). In contrast, Staff's CCOSS only includes costs from FERC accounts 269 and 270 (service meters).[296] It appears that Staff based the limited amounts of capital investment included in its customer charge calculation on language from the Commission's *Report and Order* in the Company's last general rate case that stated "Ameren Missouri's [CCOSS] tends to overstate the amount of the distribution system that would appropriately be allocated to customer-related usage."[297] While it is unclear how, or for what reason, the Commission reached its conclusion, no similar conclusion is supported by the

[296] Staff's Initial Brief, p. 81.
[297] *Id*.

evidence in this case. In fact, all CCOSS in this case use the Company's method for determining how much of the investment recorded in these FERC accounts are not related to customer usage.

In response to a question from Commissioner Hall, Staff's witness Robin Kliethermes stated the reason Staff only included costs from FERC accounts 269 and 270 in its calculation of the customer charge was because "the costs that I have included . . . are connected to that customer or can be related to that customer or it can be easily looked at as an additional customer causing those costs to be incurred."[298] However, during follow-up cross-examination by the Company's counsel, Ms. Kliethermes admitted that poles, wires, conductors, and line transformers – which Staff excluded from its analysis – all must be in place in order for Ameren Missouri to serve customers.[299] Therefore, at least part of the investment recorded in accounts 364-368 is not usage-sensitive and should have been included in Staff's analysis. So, regardless of what the Commission found in its *Report and Order* in the last rate case, based on the record in this case, Ameren Missouri's CCOSS in this case does not overstate its costs. Instead, Staff's study understates fixed costs that should have been included in the determination of a cost-based customer charge.

Staff's understatement of fixed costs in determining the Residential customer charge is further confirmed by Mr. Davis' rebuttal testimony:

> **Q. Please explain the Staff's classification of distribution FERC Accounts 364-368.**
> A. Staff has classified these accounts using the results of the Company's zero-intercept method, as described in Company witness Warwick's direct testimony.
>
> **Q. Please explain how Staff allocated the customer-related portion of these distribution system costs.**
> A. Staff, like the Company, used its customer count allocator to allocate the customer-related portion of these distribution costs to the various classes.

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[298] Tr. Vol. 23, p. 1536, l. 14-19.
[299] *Id*. p. 1539, l. 13-21.

Q. What is the significance of using such an allocator to allocate FERC Accounts 364-369 to the distribution system?

A. The significance is that Staff recognizes a portion of the costs of the distribution system varies directly with the number of customers being served by that system as opposed to how much those facilities are used. In short, a portion of those costs is fixed and directly linked to the number of customers connected to the Company's system. This is precisely why Ameren Missouri's current and past studies have shown support for a much higher Residential customer charge. For example, Staff is using allocators the same way as Ameren Missouri, but when it comes time to bundle costs to determine the appropriate customer charge Staff treats all the costs as demand-related, which artificially understates what the results of Staff's own study indicates the customer charge should be.

Q. Why would Staff allocate costs based on the number of customers and then not include those costs in the monthly customer charge like other customer-related costs?

A. I cannot explain it. It stands to reason that if Staff believes those costs vary with the number of customers, then these costs should be bundled consistent with that allocation methodology.[300]

But, as noted earlier, cost was not the only consideration that caused Staff to oppose any increase in the Residential customer charge. In addition, Staff's position was guided in part by language from the *Report and Order* in File No. ER-2012-0166 that suggested higher volumetric rates create an incentive for customers to adopt energy efficiency measures while increases in the monthly customer charge have the opposite effect.

Ameren Missouri's Initial Brief notes the Commission's finding in the prior rate case, and Staff's reliance on that finding in this case, ignores three critical facts. First, there is no evidence in the record in this case that Ameren Missouri's proposed increase to the Residential customer charge will reduce customers' incentive to adopt energy efficiency measures. Even OPC, which opposes any increase, acknowledged there is no evidence that an increase in the customer charge to $8.11 or $8.50 would have any impact on energy conservation price signals sent to residential customers.[301] Second, the final order in this case will include an increase in

[300] Ex. 9, p. 11, l. 17 to p. 12, l. 20 (Davis Rebuttal).
[301] OPC's Initial Brief, pp. 38-39.

volumetric rates. Therefore, to the extent such an increase provides an incentive for customers to invest in energy efficiency, that incentive will exist regardless of whether the order also authorizes an increase in the monthly customer charge or not. Finally, denying an increase in the customer charge so volumetric charges can be artificially inflated sends inaccurate price signals to customers regarding actual savings that energy efficiency measures can achieve.

The Commission also must guard against tilting rate design for the Residential class too much toward encouraging investment in energy efficiency, because not all customers in that rate class can afford to invest in energy efficiency. For other customers in the class, not all investments in energy efficiency measures – such as higher efficiency space heating and air conditioning systems – are easily affordable. Costs are already being pushed higher due to mandates like solar rebates required by the Renewable Energy Standard.[302] It would be ill-advised to push volumetric rates higher just to avoid an increase in the Residential customer charge. Finally, if the Commission denies the Company's request to increase the customer charge again, half the customers in the Residential class will, as they have in past rate cases, receive above-average bill increases because the entire amount of any rate increase is applied to volumetric rates.

C. Economic Development.

In testimony filed in response to the Commission's October 20, 2014, *Order Directing Consideration of Certain Rate Design Questions,* no party presented a specific proposal for an economic development rate design mechanism to modify or replace Ameren Missouri's Economic Re-Development Rider ("ERR"), which has been in place since 2007. For example, OPC witness Geoff Marke, who presented almost twenty pages of testimony addressing questions raised in the Commission's order, identified and discussed numerous features that

[302] §393.1020-1030, RSMo.

could be included in such a mechanism, and also presented an overview of the economic development tariffs currently in place for Missouri's investor-owned utilities. But nowhere in his testimony did Dr. Marke propose specific changes to the Company's ERR, or propose a tariff that the Commission should adopt to replace the ERR. Indeed, based on his testimony, Dr. Marke's position on whether an economic development rate mechanism should be approved in this case can best be characterized as cautious ambivalence:

> **Q. Should any rate design mechanism be established to promote stability or growth of customer levels in geographic locations where there is underutilization of existing infrastructure?**
> A. Properly designed, perhaps. However, there may be other more preferable mechanisms to provide an economic development rate structure which would operate in a more narrowly tailored and efficient fashion than that suggested by the Commission's questions.[303]

Dr. Marke also cautioned that issues related to economic development rate mechanisms are complex and often involve competing interests that cannot be easily and readily reconciled.

> However, the Commission should be mindful of certain, albeit limited, benefits to excess capacity. For instance, transmission lines in depopulated areas are often needed to service other areas where population is stable or growing. Further, redundancy in energy infrastructure may be desirable since under-used infrastructure provides a back-up for the rest of the network, particularly in emergency situations. Ultimately, it is likely preferable to maintain existing infrastructure as it would be both difficult and expensive to restore or expand service at a later point if a given area regains population.
>
> If the Commission enacts a mechanism to incentivize demand in an area with underutilized infrastructure, the Commission should be mindful of the potential conflicting policy direction inherent in a rate design mechanism charged with promoting energy usage while other policy is in place attempting to curb demand. The tension between economic growth and environmental sustainability is persistent, as the Commission is well aware, and merits additional dialogue beyond the scope of this testimony. (footnote omitted)[304]

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[303] Ex. 403, p. 3, l. 4-9 (Marke Direct).
[304] *Id*., p. 3, l. 13 to p. 4, l. 2.

According to its Initial Brief, OPC now supports the "Economic Development Rider (Exemplar)" attached to the March 10 Stipulation ("Stipulated Rider").[305] But even if the Commission agreed with the terms of the Stipulated Rider, it cannot implement it because there is no evidence whatsoever on the record in this case explaining or supporting that proposal. All witnesses who filed testimony on economic development rate mechanisms presented their oral testimony on March 4, 2015 – six days before the March 10 Stipulation was filed. And none of those witnesses were recalled to explain the terms of the Stipulated Rider, answer questions about it, or testify in support of the rider. Therefore, as a matter of law, the Commission cannot adopt the Stipulated Rider because it is not supported by any competent or substantial evidence. Serious questions also exist regarding whether the Commission has the authority to order a particular utility to implement a particular program at all, via a tariff or otherwise.

Had one or more witnesses been offered to explain or support the Stipulated Rider, the Commission and the parties would have had an opportunity to explore numerous questions and concerns that the proposal raises. These include, but are not limited to:

- Although the stated purpose of the proposed rider is "to encourage industrial and commercial business development in Missouri, prevent and remediate the underutilization of infrastructure and retain existing load," incentives are only available to "industrial and commercial facilities which are not in the business of selling or providing goods and/or services directly to the general public." What was the basis for that limitation, and is the limitation in the public interest?

- The Stipulated Rider purports to cap the subsidy a customer can receive at certain specified percentages, but it appears the cap would not apply to customers Ameren Missouri would seek to retain because those customers are entitled to the lesser of the capped rate provided in the rider or the rate offered by an alternative electric supply option. Was that result intended? And if so, why would it be in customers' best interest to provide a discount greater than necessary to meet an offer from a competitive provider?

[305] OPC's Initial Brief, p. 53.

- Customers seeking an economic development rate are required to submit documentation that they satisfy eligibility criteria prescribed in the proposed rider. Who will make the determination if documentation submitted by the customer is satisfactory, and what criteria will be used to make that determination?

- Under the "Revenue Determination" provisions of the proposed rider, a customer can elect to increase discounts in the early years of the eligibility period, thereby accelerating the cost reduction benefits available to the customer. What if a customer elects to accelerate those benefits but leaves the system before the end of the eligibility period? What safeguards exist to keep a customer from "gaming" the system to take advantage of this provision?

- The "Positive Contribution" provisions of the proposed rider require that revenues received from customers over the term that the economic development rate is in effect "shall be greater than the applicable incremental cost to provide electric service, as determined by the Company and verified by the Commission's Staff ...." Will Ameren Missouri be required to perform a cost study to make that determination? If not, on what basis will Ameren Missouri make that determination, and what criteria will Staff use to verify the determination?

- Provisions governing "Separately Metered Service" allow the Company to install separate meters to measure service subject to the proposed rider. Will the cost of the meters be borne by Ameren Missouri or by the customer?

- The proposed rider limits "standard" incentive benefits to an average annual rate reduction of fifteen percent over five years, while the average "enhanced" benefit is twenty percent. What is the justification for that difference, and is it in the public interest?

- Ameren Missouri would be required to perform an incremental cost analysis to confirm revenues received from customers receiving service under the economic development rider are expected to be sufficient to cover any cost increases the Company incurs to serve those customers, and the results of that analysis would be submitted along with the annual and triennial filings required by Chapter 22 of the Commission's rules. What would be the consequences, if any, of an analysis that shows rates under the proposed rider do not cover all associated cost increases?

There is also the unanswered question regarding whether customers who otherwise qualify for economic development rates would be required to comply with MEEIA. The Missouri Department of Economic Development – Energy Division, argues MEEIA compliance

should be required,[306] while MIEC and MECG argue MEEIA compliance should not be tied to any economic development rider because to do so would add costs to potential participants and therefore be inconsistent with the purpose of the rider.[307] Choosing between those positions creates an impossible dilemma for the Commission, because there is no record evidence supporting either of them. In addition, MIEC argues that requiring a customer to comply with MEEIA would violate the opt-out provisions of Section 393.1075.7, RSMo.[308]

In addition to the specific questions and concerns identified above, there are at least two overarching concerns about the Stipulated Rider that have not – and cannot – be answered based on the record in this case. First, how will Ameren Missouri determine if facilities serving a customer who seeks rate incentives are "underutilized"? And because that determination is subject to review by Staff, OPC, and ultimately the Commission, what criteria will be used to decide whether the determination was reasonable? The record in this case conclusively demonstrated that determining whether facilities are underutilized is not a simple task. Both Mr. Wakeman and Staff witness Dan Beck testified that it is impossible to determine whether a circuit is underutilized simply by looking at the percentage of the circuit's capacity that is currently used to service customers.[309] That is true for at least two reasons. First, each circuit is part of Ameren Missouri's integrated network, and just because a feeder line is currently being used at less than full capacity does not mean the portions of the network to which the feeder line connects – other feeders, transformers, substations, sub-transmission lines, and transmission lines – also have excess capacity. The network is designed to provide redundancy, which means some portions are supposed to be used at less than full capacity so they will be available to back-up

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[306] Missouri Department of Economic Development – Energy Division's Initial Brief, p. 2.
[307] MIEC's Initial Brief, p. 49; MECG's Initial Brief, p. 50.
[308] MIEC's Initial Brief, p. 49.
[309] Tr. Vol. 24, p. 1719, l. 2 to p. 1725, l. 24; Tr. Vol. 26, p.1879, l. 18 to p. 1892, l. 9.

other portions of the system. Attempting to move all portions of the network to full capacity will defeat the purpose for which the redundant circuits were designed in the first place.

Second, there is nothing in the Stipulated Rider, or anywhere in the record in this case, that addresses the question of how Ameren Missouri will reflect in its rates the costs of an expanded economic development rate mechanism, and how those costs – including revenues lost because certain customers receive service at a discount – will be determined.

As noted previously, there is no evidence in the record in this case supporting any specific changes to, or the replacement of, Ameren Missouri's existing ERR. If anything, the record in this case creates more questions about economic development rate mechanisms than it answers, and the eleventh-hour introduction of the Stipulated Rider did nothing to ameliorate that situation. Indeed, it may have exacerbated it. In addition, there are numerous uncertainties as to how the Stipulated Rider would operate, whether the terms of that rider are in the public interest, and, indeed, whether the Commission can require it be implemented at all, at least outside of the adoption of a rule of general applicability applied evenly to all electric utilities under its jurisdiction. For all of those reasons, the Commission should adopt the solution originally proposed by Staff and later endorsed by Ameren Missouri. Instead of attempting to take action in approving an economic development rate mechanism in this rate case, the Commission should open a workshop docket so all issues related to such mechanisms can be dealt with collaboratively. The workshop should not be limited to the parties to this case but, instead, should be open to all interested stakeholders statewide. The many advantages of such a process are described in the Company's Initial Brief.[310] If the Commission wants to seriously pursue all issues and questions that bear on whether economic development rate recommendations are in

[310] Ameren Missouri's Initial Brief, pp. 155-157.

the public interest and, if so, how they should be implemented, a collaborative process is the best way to consider those issues and answer those questions.

PART TWO: NORANDA'S SUBSIDY PROPOSAL

A. Introduction

Before getting into more specific points, it is important to step back and examine as a whole what Noranda is saying in an attempt to obtain a significant rate subsidy in this case, and to compare what Noranda is saying to the *evidence* that bears on its request. [311]

In briefs and opening statements (as opposed to sworn testimony) that discuss Noranda's request, definitive statements were made such as the smelter "is not viable" without rate relief and that rate relief is "required now."[312] Claims were made that it is "clear" that denial of rate relief "will" result in shutdown of the smelter.[313] The claim was made that the ********************************** **********************[314] None of these contentions are supported by the evidence in this case. Even OPC, one of Noranda's closest allies, seems underwhelmed by Noranda's "proof" of a financial crisis. OPC blandly states that the "record in this case provides *a* basis on which the Commission . . ." can determine that Noranda needs relief (emphasis added). [315] The Company supposes that if the Commission just took everything Noranda said at face value and blinded itself to the significant deficiencies in its story and proof, that might be true.

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[311] While we will cite to MIEC's Initial Brief on points relating to the Noranda rate subsidy (because that is how the brief supporting the subsidy request was denominated), it is clear that Noranda, which is a member of MIEC, is really the entity that is speaking for MIEC on these issues. Consequently, in this section of this brief the references to testimony and other evidence relating to the Noranda rate subsidy request will be to Noranda and not MIEC.
[312] Noranda's Initial Brief, p. 55.
[313] *Id.* p. 57
[314] Tr. Vol. 32, p. 2228, l. 9-10.
[315] Tr. Vol. 31, p. 2260, where Public Counsel essentially says that he knows there is a dispute about Noranda's need, but OPC "came down" based on a "judgment call" that itself is simply based on believing the sworn testimony [by that he means Noranda's and Noranda's alone]. This too is hardly a ringing endorsement of the sufficiency of Noranda's proof.

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As discussed in detail in the Company's Initial Brief (pages 157-190), even under the three pessimistic "scenarios" sponsored by Mr. Boyles; even if the many "ifs" discussed below happen (including the prolonged free-fall in aluminum prices Mr. Boyles' scenarios assume), Noranda continues to have sufficient liquidity as it defines it *until sometime in* **************** years from now.

Noranda has not made any decision to close the smelter – even if its liquidity crossed the "red line" it subjectively drew – nor has it even evaluated whether closure would be the smart business move, nor what its other options might be. Instead of evaluating and exhausting other options, Noranda is back before the Commission again asking for a large subsidy that almost half of the people in the Bootheel region that benefit the most from Noranda's operations will not even pay, and that indeed the majority of Missourians will not pay. If Noranda witness Joseph Haslag's analyses are in substance (if not in actual magnitude) correct – and Ameren Missouri has not disputed that Noranda provides significant benefits to the state as a whole – then why should (primarily) St. Louis metro-area residents foot this bill and, if they are going to foot the bill, shouldn't the General Assembly make that decision?[316]

As noted above, Noranda's Initial Brief contains a lot of rhetoric and definitive statements about what "will" happen if it does not get its way in this case. But, the evidence in

[316] The same can be said of the Department of Economic Development's out-of-time and inappropriate filing (after the record in this case was closed) of a study also designed to show Noranda's economic impact in the state. Obviously neither the Company nor any other party has had any opportunity to test the statements in the study through discovery or cross-examination of a supporting witness. For example, even though the study was described as using the same methodology as the study DED submitted in the Noranda rate design complaint case, the results are significantly higher with no explanation as to why that would be the case. At the end of the day, as with Dr. Haslag, the Company doesn't dispute the general conclusion that Noranda like many large businesses is important to the state and if the smelter were to be closed there would be adverse impacts on the state. As a consequence, the Company will not move to strike the filing, but (a) the Commission cannot rely on it for its decision in this case and (b) in any event, it is nothing more than the view of one party that others have not had the opportunity to test or question.

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this case demonstrates that in order to accept Noranda's premise that the smelter "will" fail, one must accept a sequence of "if's" that the record simply does not support:

- IF Noranda is right to choose a ten-year aluminum price cycle; and
- IF Noranda can predict the shape of that cycle; and
- IF Noranda has accurately depicted a likely cycle; and
- IF that cycle is even reasonably probable; and
- IF Noranda's assumptions regarding capital expenditures withstand scrutiny; and
- IF Noranda chooses to do nothing to avoid the effects of that hypothesized cycle; and
- IF Noranda then chooses not to negotiate with creditors, seek bankruptcy protection, or sell the smelter;

then, and only then, does smelter closure become more than a hypothetical contingency. Noranda's story, however, fails to substantiate each of these "If's."

B. Noranda has not chosen a probable price cycle length.

In its Initial Brief, Ameren Missouri observed that experts from both Ameren Missouri and Noranda agreed: it is not possible to predict the length of aluminum price cycles.[317] Noranda even tacitly acknowledges this in its Initial Brief: "Although one cannot predict the timing of price cycles…."[318] Noranda also admits, as it must, that purporting to forecast "the timing of price cycles would be misleading."[319] Unfortunately, this is exactly what Noranda's scenarios purport to do: predict that one complete cycle (i.e. one trough and one peak) occurs over a ten-year period.

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[317] Ameren Missouri Initial Brief, p. 68.
[318]Noranda Initial Brief, p. 75.
[319] *Id*, p. 75-76.

One might question why, if Noranda purports to agree with the experts (both its own Noranda witness Colin Pratt and Ameren Missouri witness David Humphreys), Noranda still chose the ten-year cycle. The answer, unfortunately, is that Noranda's desire for low prices bred Noranda's choice. Noranda could have simply assumed that prices would drop and stay low for years. But, that assumption would not enjoy even the illusion of economic credibility. In order for Noranda to claim a long period of depressed prices, Noranda in essence made up its own economic theory: that aluminum prices follow a ten-year cycle.

Noranda brought three experts to testify regarding economic issues: Noranda witness Steven Schwartz, Mr. Pratt and Mr. Harris. *None of these three witnesses attempted to model aluminum price cycles.* None of them cited to economic studies, treatises or literature supporting a ten-year cycle. This omission is glaring, and it is telling: Noranda could not get its own "expert" economists to manufacture support for a ten-year cycle. Instead, Noranda had Mr. Boyles, a novice in the industry, make an assumption that Noranda's experts then simply accepted as what Noranda believed to be true.[320]

C. Noranda cannot predict the price cycle's shape.

Noranda's expert and Ameren Missouri's expert agree that one cannot predict the aluminum price cycle's troughs and peaks.[321] Mr. Boyles, the creator of Noranda's analysis, acknowledges this criticism:

> **Q. And so you saw in that surrebuttal where Mr. Pratt said you can't predict peaks and troughs in a cycle. You saw that, correct?**
> A. Yes.
>
> Q. **Peaks being things like this little blue line that goes up and troughs being the one right here that goes down, those are peaks and troughs, correct?**
> A. That's correct.[322]

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[320] Intending no disrespect to Mr. Boyles, who is undoubtedly a fine Chief Financial Officer but, by his own admission, a novice in the aluminum markets.
[321] Exh. 609, p. 16, l. 9-11 (Pratt Surrebuttal); Exh. 19, p. 11, l. 6-8 (Humphreys Rebuttal).

Yet, Mr. Boyles purports to predict just that: a sustained, multi-year price trough, followed by a sharp price increase in the final years. That trough, Noranda implies, dooms the smelter to failure without obtaining a substantial subsidy now.

While Noranda asserts that "it is entirely objective, reasonable, and prudent to rely on representative volatility scenarios based on historical experience…"[323], Noranda did not present evidence, and does not explain in its brief, how its three "representative" scenarios constitute "objective," "reasonable" or "prudent" volatility scenarios. Noranda's Initial Brief says nothing to address *its own expert's* admission that these three scenarios are "not representative."[324] Moreover, what Noranda did not do speaks volumes. Noranda's experts did not independently calculate "objective, reasonable and prudent" downside scenarios. Surely, given the resources Noranda devoted to this case, this omission is not an attempt to cut costs. Noranda's failure to adduce *expert* calculation of volatility scenarios can only be an indication that the experts' analysis would not have been sufficiently frightening for Noranda's purposes.

D. Noranda's Scenarios Fail to Represent a Likely Cycle.

Noranda's inability to predict either the length or shape of a future aluminum price cycle renders Noranda's analysis completely unreliable. Noranda could, quite frankly, just as easily have plucked future aluminum price hypotheticals out of the air.

But even if Noranda simply made the numbers up, it could not credibly rely on "a long sequence of negative variations from trend in the first few years of the forecast."[325] Put simply,

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[322] Tr. Vol. 33, p. 2517, l. 3–11.
[323] Noranda Initial Brief, p. 76.
[324] Mr. Boyles' belated attempt, in his surrebuttal testimony, to at least reference other scenarios does not assist Noranda, because, unlike the three unrealistic scenarios Noranda originally proffered, these other scenarios are much less dire. *See* Tr. Vol. 33, p. 2534, l. 3 – 12.
[325] Exh. 609, p. 6, l. 6-12 (Pratt Surrebuttal).

the only reason Noranda (incorrectly) hypothesized a multi-year run of negative price deviations is because without that run, even Noranda cannot project significant potential liquidity issues. Notably, Mr. Pratt, in his surrebuttal, provides some discussion of a *six-year* cycle. While he does not bill this discussion as a full-blown expert analysis, his comments are telling. In his surrebuttal, Mr. Pratt notes that, in looking at *six*-year periods, he found a relative balance of "up" and "down" years: 14 positive years, and 19 negative years.[326] While Mr. Pratt found the possibility of a single-year negative variation of up to twenty percent, he did not testify to an observation of sustained below-trend pricing.[327] Mr. Pratt's observations are thus consistent with his criticism of Noranda: it is simply unreasonable to hypothesize a multi-year, below-trend price run.

Equally important, an assumed six year "cycle" that is relatively balanced between positive and negative deviations (as discussed by Mr. Pratt) simply does not assist Noranda. Rather than the long run of negative pricing, Noranda must assume to even begin to suggest potential trouble a six-year period with both positive and negative pricing which simply does not allow for the sustained depletion of Noranda's liquidity that is inherent in Mr. Boyle's chosen scenarios.

In short, this Commission need not attempt to find the appropriate price cycle: the experts agree that these price cycles cannot be timed. But, this Commission can, and should, reject Noranda's assumed ten-year cycle with substantial negative deviations in the first six years as being unsupported by any science or sound economic analysis.

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[326] Exh. 609, p. 15, l. 3-4 (Pratt Surrebuttal).
[327] Exh. 609, p. 14, l. 9 to p. 15, l. 7 (Pratt Surrebuttal).

E. Noranda fails to colorably address the deficiencies in its capital expenditure assumptions.

A key assumption to Noranda's model is that it must expend ************ in capital expenditures per year.[328] If capital expenditures are less, Noranda's cash flow is higher, and Noranda's claim of imminent crisis rings hollow.

Ameren Missouri adduced substantial evidence, both in the present case and in the last Noranda case, that Noranda's claimed future capital expenditures have no basis in history, and are so vague with respect to the future as to be incredible.[329] As noted by Mr. Mudge, Noranda's capital expenditure assumptions "depart from historical patterns, have not been featured in Noranda communication to external audiences, and remain in significant part unsubstantiated."[330] Among other matters, "approximately ******* million in growth capital remains unspecified, with no discernable impact on production…and remote in time (years 2019-2021)."[331] Noranda has admitted that, in practice, it only projects capital expenditures for the next year.[332] Although Noranda previously told Ameren Missouri that Noranda was developing a five-year capital expenditure plan, Noranda still has never produced such a document.[333] Noranda has also failed to provide any financial justification for its "hopper" of possible future projects.[334]

Given the importance of its capital expenditure assumptions to the conclusion it wishes the Commission to draw, and given the high-profile nature of this issue, one might expect that Noranda would attempt to further explain these extraordinary assumptions. Noranda's Initial

[328] Exh. 600, Exhibit A2, p 2 (Boyles Direct).
[329] *See, e.g.* Exh. 33, p. 21, l. 9 to p. 24, l. 3 (Mudge Rebuttal).
[330] Exh. 33, p. 21, l. 11-13 (Mudge Rebuttal).
[331] *Id.*, p. 21, l. 14 – 17 (Mudge Rebuttal).
[332] *Id.*, p. 21, l. 17 – 20 (Mudge Rebuttal).
[333] *Id.*, p. 21, l. 20 – p. 22, l. 4 (Mudge Rebuttal).
[334] *Id.*, p. 22, l. 4-7 (Mudge Rebuttal).

Brief, however, devotes a total two paragraphs to defending its capital expenditure claims.[335] In these two paragraphs, Noranda contends, without citation to the record, that it has in the past been unable to make all required capital expenditures due to "poor cash flow and lower liquidity." Noranda does not mention dividends paid to Apollo, or acknowledge that instead of paying those large dividends to Apollo, it could have been investing at the level it now claims it must. Noranda next claims, again with no record citation, that capital expenditures are less than depreciation. Likewise without citation is a sentence claiming that Noranda's current level of capital expenditures is insufficient to sustain the business.

Noranda does provide two actual record citations addressing this ********** per annum claim, but these don't help Noranda. First, Noranda cites to Mr. Thomas Harris' testimony for the proposition that Noranda will have to "increase its level of capital expenditures in the future above what would be normal 'maintenance' levels."[336] How does Mr. Harris know this, and even if he did (a dubious claim at best) by how much will the expenditures be increased, and is ************ even a realistic assumption? Mr. Harris does not say. Next, Noranda concludes that without the *********** in annual capital expenditures, "the smelter is not viable." As support, Noranda cites to two pages of Mr. Boyles' testimony.[337] Review of Mr. Boyles' testimony, however, indicates that he merely repeats, without substantive elaboration, Noranda's claim that it must spend "$70-$75 million" in "sustaining" capital expenditures, and "$20-$25 million" in unspecified "growth" capital expenditures.[338] This testimony is contained in but two lines of text and a small table. Otherwise, Mr. Boyles' cited testimony discusses bits of 2014 and 2015 capital expenditures and not Noranda's claim of ************* in annual

[335] Noranda Brief, p. 73.
[336] Noranda Brief, p. 73.
[337] *Id*. (citing Exh. 600, p. 9 – 10 (Boyles Direct)).
[338] Exh. 600, p. 9, l. 4 – 7 (Boyles Direct).

expenditures. In other words, Noranda apparently asks the Commission to accept this figure simply because Mr. Boyles says it is so.

Noranda, in short, fails to begin to address the shortcomings of its claimed capital expenditure assumptions, let alone provide a fact-based defense. This omission is nothing less than an admission that this **************** per year claim is not grounded in reality, but is rather created especially for this case.

F. Noranda fails to even address, let alone explain, its assumption that it would spend *************** in capital expenditures each year regardless of circumstances.

As Noranda is clearly aware, another key issue regarding Noranda's model, and by extension Noranda's claim of looming crisis; is why Noranda could reasonably assume that it would continue to spend **************** each year on capital expenditures even if such expenditures would cause a liquidity crisis. Noranda knows that this problem exists, as Mr. Boyles was asked a number of questions in cross-examination on this topic. In cross-examination, Mr. Boyles admitted that Noranda would not, in fact, have to keep its "foot on the gas pedal and spend **************** every year even if doing so would put you in default…."[339] He admitted that Noranda had historically adjusted capital expenditures to accommodate circumstances.[340]

Despite knowing that this crucial question had been raised, Noranda failed to devote a single sentence of its brief to explaining why this Commission should reasonably assume that Noranda would pursue such an illogical and counter-historical path. This silence tells all.

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[339] Tr., Vol. 34, p. 2562, l. 5 -10.
[340] *Id.* l. 11-18.

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G. Noranda's only discussion of liquidity crisis options actually supports Ameren Missouri's arguments.

Noranda is also well aware that substantial doubts exist regarding Noranda's assertion that a liquidity problem "will" lead to smelter closure. Mr. Boyles, for example, was asked a number of questions in cross-examination[341] and from the bench[342] on this topic. In responding, Mr. Boyles conceded that closing the smelter was not Noranda's only option, and admitted that Noranda had not even undertaken any sort of closure analysis or prepared a shutdown plan.[343]

In its brief, Noranda simply ignores its own CFO's testimony, and (much as was done in Opening Statement), makes unequivocal assertions that the smelter "will" close.[344] Noranda, however, utterly fails to articulate any argument explaining why closure is truly the only, or even the most preferable, option. Its brief fails to explain why, if Noranda is currently in the throes of a liquidity crisis that will close the smelter, Noranda has done no planning for this extremely serious event.

Noranda does describe some options if it should encounter problems. In its brief, Noranda quotes from its SEC filings on this issue.[345] Notably, these filings never say "close," let alone "will close." They do, however, use the term "curtailment."[346] *Webster's* defines "curtail" as "to make less by or as if by cutting off or away some part," as in "curtail the power of the executive branch."[347] Thus, Noranda discusses reducing its operations, but not closure. In these same filings, Noranda also uses the terms "restructuring," "bankruptcy," and "divest."[348] Thus,

[341] Tr. Vol. 34, p. 2563, l. 13 to p. 2566, l. 9.
[342] Tr. Vol. 34, p. 2597, l. 11 to p. 2600, l. 21.
[343] Tr. Vol. 34, p. 2563, l. 13 to p. 2566, l. 9; Tr. Vol. 34, p. 2597, l. 11 to p. 2600, l. 21.
[344] *E.g.* Noranda Brief, p. 57.
[345] Noranda Brief, p. 78-79.
[346] *Id*.
[347] *Merriam-Webster Dictionary*, found at http://www.merriam-webster.com/dictionary/curtail.
[348] Noranda Brief, p. 78-79.

while Noranda argues to this Commission that closure "will" occur, the fine print in Noranda's SEC filings list every option but closure. Outside of illogical and factually unsupported threats, Noranda presents nothing that suggests the smelter's mandatory closure.

H. Noranda's "Liquidity Graph" is, at best, misleading.

In Opening Statement, during testimony, and again in its brief, Noranda proffers to the Commission a "Noranda Liquidity Trend" graph that, Noranda suggests, shows that Noranda will ***[349] The flaws in this argument are readily apparent. First, if Noranda truly believed that it would encounter a liquidity crisis in **************, it would be bound by law to disclose that fact to investors, particularly in light of its optimistic public statements regarding Noranda's positive outlook. This is another at-the-hearing dramatization much like Mr. Smith's claim on the first day of the hearings in the EC-2014-0224 case that the day before, Noranda had run out of cash. The evidence in this case shows, however, that at mid-month Noranda's cash always dips and that it sometimes must draw on its ABL, but by month's end, its liquidity is back up. Notably, the chart is marked "Highly Confidential" and the record contains no evidence of such a disclosure.

Second, as described above, this assertion runs directly counter to Noranda's positive public statements.

Third, Noranda utterly fails to explain how it could have completely paid off its credit line at the end of the last two fiscal quarters (or, in Noranda's parlance, paid-off its "credit card") yet still face a liquidity crisis that is only months away.

Actually, Noranda's graph is best thought of as a good example of the power to use selective bits of data to mislead. As the saying goes, "[t]here are three types of lies—lies, d**n

[349] Noranda Brief, p. 68.

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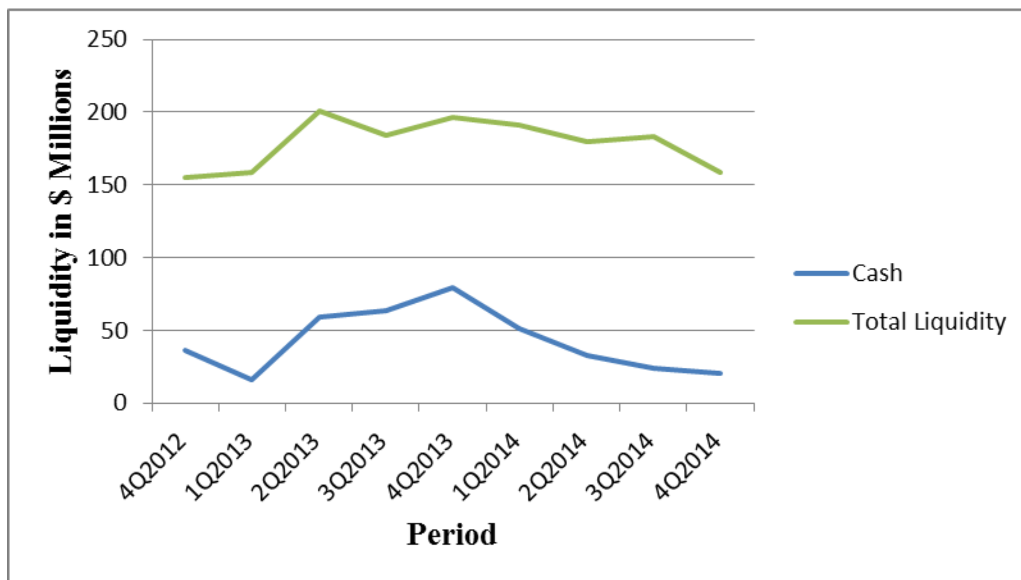
lies, and statistics."[350] Notably, Noranda's chart purports to look at liquidity beginning July 1, 2014. Noranda does not explain this start date or why it is appropriate in the context of this case. Stepping back a bit, however, yields a more truthful picture.

In his testimony, Mr. Kip Smith verified Noranda's cash and "overall liquidity" for each quarter-end from the 4th quarter of 2012 through the 4th quarter of 2014.[351] In tabular form, Mr. Smith verified the following amounts:

Period	Cash	Available Borrowing Capacity	Total Liquidity (Cash + Available Borrowing Capacity)
4Q2012	36.1	118.6	154.7
1Q2013	16.1	142.7	158.8
2Q2013	58.8	143.1	200.9
3Q2013	63.9	120	183.9
4Q2013	79.4	117	196.4
1Q2014	51.2	139.9	191.1
2Q2014	32.9	146.4	179.3
3Q2014	24.3	159.2	183.5
4Q2014	20.5	137.8	158.3

Graphing this data provides a picture of Noranda's liquidity over this time period:



[350] Attributed to Benjamin Disraeli.
[351] Tr. Vol. 31, p. 2410, l. 7 to 2416, l. 15.

Thus, Noranda is actually in a better total liquidity position at the end of 2014 than it was at the end of 2012. Moreover, 2014's liquidity balances need to be considered in the context of Noranda's increased expenditures on the Rod Mill,[352] which will begin producing ******* ******** in additional EBITDA per year.[353] Noranda's liquidity, in short, is nowhere close to the precipice of disaster.

Noranda has not proven the "liquidity crisis" it claims it is in. Having failed in doing so, Noranda has consequently failed to justify the significant subsidy it seeks.

I. Ameren Missouri opposes the relief Noranda seeks because its request is not well taken and it in any event ought to be directed to the General Assembly.

Noranda seems to question why Ameren Missouri objects to the subsidy it seeks and complains about the fact that the Company's rate case expenses in addressing Noranda's "rate design" proposal will be reflected in Ameren Missouri's rates.[354] The "why" should be obvious. For all of the reasons the Commission ruled against Noranda's similar request last summer, Noranda's request now is not well taken and ought to be rejected. Ameren Missouri's other customers should not pay a large subsidy to improve this private firm's finances. If the claim is that an economic retention package is needed, the Missouri General Assembly should decide if the package ought to be provided. Cost of service should remain the lodestar that guides rate setting at this Commission. The last thing the Company wants (and the Company suspects this is the last thing the Commission wants as well) is for the rate design phase of utility rate cases to routinely turn into a debate about the private financial needs of one or more particular customers. That is bad policy. It is also bad policy to imply (as Noranda's complaint about the expenses it has caused the Company to incur implies) that the utility ought to simply roll over on all rate

[352] *E.g.* Tr. Vol. 33, p. 2619, l. 25 to 2620, l. 4.
[353] Tr. Vol. 34, p. 2635, l. 5-11.
[354] Noranda Initial Brief, p. 59.

design issues and let non-utility parties negotiate whatever they want, no matter the impact on the utility's other customers and no matter the justification for policies that do (or do not) support the rate design requests. To do so would imply that cost of service and other sound rate design principles do not matter, are unimportant, and do not affect the Company. They do matter, they are important, and they do affect the Company and all of its customers.

Ameren Missouri didn't file this rate subsidy proposal. Ameren Missouri did not decide to make another run at a rate subsidy based upon "scenario analyses" that are even more suspect than Mr. Smith's analysis from the EC-2014-0224 case. Ameren Missouri simply filed a rate case, largely driven by large rate base additions, and proposed a reasonable rate design (aside from the Noranda subsidy proposal, there is little criticism of Ameren Missouri's rate design proposals in this case).[355] However, Noranda injected its proposal into this case (effectively creating a case within a case) and, like it or not, the Company must address it. It would simply be wrong for the Company to ignore the flaws in Noranda's case – and to not provide a record for the Commission on them – if, in fact, those flaws exist, as they do.

Not only does Ameren Missouri's opposition to Noranda's request make sense because of the flaws in Noranda's case and the poor policy the request reflects, but it also makes sense because as has been addressed in detail, the kind of relief Noranda seeks should be afforded, if it is to be afforded, by action of the General Assembly. Although it is not clear this was the Staff's intention, the Staff's citation to a case that it claimed supported an "economic retention" rate actually reinforces the point that it is the Missouri General Assembly and not the Commission that should decide if such a rate will or will not be provided. The Staff essentially takes no

[355] There are small disputes about class cost of service and there is disagreement about increasing the customer charge, but for the most part, Staff, the Company and MIEC agree on rate design in this case. Walmart has some other ideas (that no one else supports) and OPC's class cost of service study is criticized by all of the parties that also conducted class cost of service studies.

position on the "financial need" aspect of this case, effectively punting to the Commission and indicating that "if" the Commission determines there is a liquidity crisis, then a load retention rate (not necessarily the one Noranda wants) with other conditions could be implemented. Staff cites ***Public Serv. Co of Colorado v. Trigen-Nations Energy Co, L.L.L.P***, 982 P.2d 316, 323 (Colo. 1999) as support for the proposition that a "load retention rate, although below cost of service, is nonetheless reasonable and non-discriminatory if it confers a commensurate benefit on other ratepayers and marginal costs are recovered."[356] The case says no such thing.

Trigen involved a request by an electric utility to enter into contracts with five customers who were threatening to leave the jurisdiction (not shut down – but leave to another location where the claim was that electric rates were lower).[357] The catch: the Colorado Legislature had enacted a *statute* that created an exception to the normal cost-of-service ratemaking in Colorado. The statute, entitled "Manner of Regulation – competitive responses" specifically authorizes the Colorado Public Service Commission to approve a special contract if it determines, among other things, that "marginal cost" (what in this case is being referred to as "avoided cost") is covered.[358] In addition, only the utility can ask for the approval[359] and the commission has to determine what the fully distributed cost to serve would be (i.e., full cost of service) and the difference *cannot be spread to other customers*.[360] The point is that not only did the legislature in Colorado decide (i.e., make the required policy decision) regarding when such arrangements could be approved, but the legislature created a scheme where only if the utility thought such a contract was in its interests and was willing to bear the "subsidy" could there be such a contract

[356] Staff's Initial Brief, p. 93.
[357] "Certain customers of Public Service Company have opportunities as a result of industry restructuring to purchase alternate services from another provider." 982 P.2d at 318.
[358] C.R.S. 40-3-104.3.
[359] 40-3-104.3(1).
[360] 40-3-104.3(2).

at all. Legislation was also enacted in Ohio and in West Virginia before special arrangements with aluminum smelters could be put into place.[361] That this was necessary or at a minimum much more appropriate was the Commission's instinct in the EC-2014-0224 case as well.[362]

In any event, legislation or no legislation: Noranda has come no closer to meeting its burden to convince this Commission that it should receive a large rate subsidy this time than it did last time.

J. Noranda's attempt to prove customers would be better off fall flat.

Acting as though the flaws in its case do not exist, however, Noranda makes the argument that customers are better off giving Noranda a significant rate subsidy then if Noranda closes the smelter. They use testimony from Messrs. Dauphinais and Brubaker to make this argument (whose testimony assumes that all of the "ifs" discussed earlier are no longer "ifs" and that without rate relief closure will certainly occur). The argument is that if one looks at historical energy and capacity prices, and other relevant variables, one can come up with a calculation of an historical "avoidable cost" of serving Noranda and they say that if the subsidized rate is higher than the avoided cost, then customers are better off. However, even if one believed *all* of Noranda's evidence, that claim is also not true, as explained below.

As noted, Noranda keeps talking about "imminent" closure, yet a review of the testimony of its own witnesses demonstrates that "imminent" is certainly not immediate. Assuming every single one of the "ifs" recited above occurred, the earliest date for a risk of closure would be February 2017. That is the earliest date because that is when Noranda's asset-based loan

[361]Ohio Rev. Code § 4905.3I(E); W.Va. Code § 24-2-1j.
[362] *Report and Order*, File No EC-2014-0224 ("Finally, and importantly, a request for an economic development subsidy of this magnitude is more properly directed to the Missouri General Assembly."). We discussed these issues in detail in the Company's Initial Brief.

("ABL") comes due.[363] Again, *all* of the negative things assumed in Noranda's very pessimistic scenarios have to occur, and Noranda has to choose to take no actions to avert a liquidity crisis. If all of those things happen, Noranda could still operate until at least February of 2017.

But, Noranda's discount would, under its proposal, begin immediately (less than two months from now). Consequently, any attempt at a calculation of a purported "benefit" to customers from providing a discounted rate to Noranda, as compared to the alternative of Noranda closing the smelter, must be made with the acknowledgement that until the smelter would really close, the discounted rate can only be compared to the traditional, class cost of service rate that Noranda would otherwise be paying, and not the avoided cost (sometimes also referred to as the market opportunity cost) of serving the smelter.

For the 21 month period from June of 2015, when the subsidized rate would become effective, until the date that the ABL expires and, under this assumed scenario, the smelter could actually close, Noranda will receive $56 million of rate relief at the $34 per MWh rate proposed in the stipulation,[364] just for those initial 21 months.[365]

Simply put, for other customers to be better off under the stipulation than they would be if Noranda were to cease operations after February of 2017, the revenue that would be received from Noranda *over the final 8 years* of the ten-year term the stipulation proposes must be more than $56 million higher than the cost-savings and revenues Ameren Missouri would receive from the market over that same time period or there will be no revenues at all to actually cover any of Ameren Missouri's fixed costs. Getting back to a break-even point of $56 million is a very steep

[363] Ex. 600, pp. 21-22 (Boyles Direct); Ex. 612, pp. 5-6 (Smith Surrebuttal).
[364] References in this section to the stipulation are to the *Nonunanimous Stipulation and Agreement Regarding Economic Development, Class Cost of Service, Revenue Allocation and Rate Design* filed by OPC, Noranda Aluminum, the Consumers Council of Missouri, Missouri Retailers Association and the Missouri Industrial Energy Consumers on March 10, 2015.
[365] 4.2 million MWh (Ex. 526, p. 4, l. 15-16 (Phillips Surrebuttal)) / 12 months x 21 months x ($41.61/MWh CCOS (Ex. 9, p. 20, l. 8-10 (Davis Rebuttal)) - $34/MWh (Stipulation).

hill to climb. To actually contribute revenues to cover fixed costs is even more difficult. This difficulty is compounded yet again when one recognizes that even if granted the rate relief requested, Noranda itself acknowledges that this does not guarantee their survival.[366] Thus, the very real possibility exists that customers would never have the opportunity to recover this $56 million subsidy, even if future market prices never increased from Mr. Dauphinais' low end of his normalized, historical market price assumptions of $28.03. As MECG points out in its Initial Brief, all of these figures completely ignore the fact that if Noranda is given a subsidy in this case, it will avoid its share of the rate increase in this case, actually making the hill even steeper.

In both its testimony and brief, Noranda has repeatedly reminded the Commission that it can revisit the rate established for Noranda and they point to the historic frequency of rate cases filed by Ameren Missouri in the past several years to allay concerns that Mr. Dauphinais' calculation of the market value Ameren Missouri would receive if Noranda ceased operations does not cover the full time period of either Noranda's original proposal or that in the stipulation.

Ameren Missouri witness Matt Michels is the only witness in this case who presented testimony about the benefit (or lack thereof) over 10 years. In fact, when questioned by Staff Counsel as to whether he could calculate a load retention rate for the ten-year period of the non-unanimous stipulation, Mr. Dauphinais answered "We're not – a rate for ten years has been requested, but this Commission can't bind future commissions."[367] When pressed further, he stated that "the proper comparison is what we're likely dealing with by the time Ameren files a new rate case…." When asked if he could calculate it successfully for 18 months, he stated "You can reasonably calculate it for 18 months."[368] This 18-month period is meaningless, however, as even Noranda's own evidence places the risk of closure no earlier than 21 months

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[366] Ex. 600, p. 27, l. 5-6.
[367] Tr. Vol. 35, p. 2807, l. 1-20.
[368] *Id.*

after the subsidy starts, coincident with the expiration of the ABL, which is obviously more than 18 months. Consequently, if Mr. Dauphinais is right about the likelihood of further rate cases, then why is Noranda insisting on rate relief now, which if granted will simply put customers in the $56 million hole outlined above; a hole that they likely could never dig out of over the remaining period for the rate relief Noranda seeks.

Mr. Dauphinais has also stated that it is "highly likely" that the incremental cost of power will be below $34/MWh for the next 36 months.[369] Again, even if true, this is virtually meaningless in the determination of whether or not customers are better off with Noranda on the system at a heavily subsidized rate or off the system, as only 13 months of that 36-month period (which would end in March 2018) fall beyond the earliest date that the smelter could possibly be closed. Using Mr. Dauphinais' own low-end estimate of $28.03 as the market opportunity cost for the entire first 36 months, this would still leave customers worse off after that period by at least $29 million because Noranda would still have avoided paying cost-based rates during a period when the smelter would not otherwise be closed.[370]

Similarly, Noranda concludes that "the substantial and credible evidence is that the incremental cost to serve Noranda is highly likely to be less than $34/MWh while the rates set in this case are in effect," based upon Mr. Michels' admission that for the period of June 2015 – May 2017, the incremental cost of power is "well below $34/MWH."[371] Once again, as this time period does not cover the period when the smelter would be closed, this is meaningless. For that time period, if Noranda does not receive a discount, Ameren Missouri would receive full class cost of service rates from Noranda, not a market opportunity rate. This raises the question –

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[369] Tr. Vol. 35, p. 2801, l. 10–19; Noranda Initial Brief, p. 63.

[370] $41.61 per MWh at Noranda's usage for the 21 months until the smelter would actually close offset by the last 13 months of the 36 month period at Mr. Dauphinais' low case historical price of $28.03 at Noranda's usage.

[371] Noranda Initial Brief, p. 63.

what is the potential cost or benefit to customers for the full ten-year period when one recognizes that the smelter would not close for at least 21 months?

No party to this case has attempted this calculation - rather these calculations were all made assuming a risk of closure commensurate with the effective date of the rates in this case. However, since the Noranda rate during the first 21 months, absent their requested rate relief, would be at least $41.61,[372] recognition of this would increase cost (reduce benefit) in any of these calculations by at least the $56 million noted above.

Mr. Michels, whose calculation also effectively assumed a closure now if a rate subsidy were not granted (because it did not include recognition of Noranda continuing to operate at full class cost of service rates until at least February of 2017),[373] nonetheless estimated that the non-unanimous stipulation would cost Ameren Missouri's other customers about $550 million over the ten-year term.[374] Including the additional $56 million for the first 21 months, this estimate rises to over $600 million.

Regardless of the point at which Noranda faces the risk of closure, it is impossible to determine those costs/benefits with much certainty at this point for the period is simply too long for such costs/benefits to be accurately predicted. As MIEC witness Dauphinais notes in his surrebuttal testimony, "a lot can happen in the six years between now and 2021."[375] While he was referring to the original seven-year proposal, it is certainly just as true, if not more so, when the period is extended by an additional three years.

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[372] Ex. 9, p. 20, l. 9-10.
[373] Tr. Vol. 35, p. 2930, l. 17 to 2931, l. 14
[374] *Id.*
[375] Ex. 509, p. 23, l. 13-14 (Dauphinais Surrebuttal).

K. MRA's argument in support of Noranda fails as well.

One last point about Noranda's claimed justification for a significant subsidy must also be addressed in light of an inaccurate statement in the Missouri Retailers Associations' ("MRA") Initial Brief. MRA claims that the evidence shows that since 1980, 24 smelters in the United States have closed primarily due to high power costs.[376] This is not true. As Mr. Mudge showed using CRU data, the last six smelters to close all had *total* production costs significantly above the average, and three of them had electricity costs *below* the average.[377] As MECG points out in its Initial Brief, one of those smelters, Massena East, had the *lowest* electricity costs, yet it closed anyway.[378] These facts are based on CRU data, which Noranda itself relies upon and admits is reliable. By comparison, Noranda witness Fayne, who is the sponsor of the myth that electricity costs are the reasons these smelters closed, relied on "press accounts." He admits that the claim is "somewhat exaggerated."[379] It is not "somewhat exaggerated"; it is made up.

L. The protracted discussions about a wholesale contract that Noranda does not want to enter into are largely moot.

Much ink was spilled in the Initial Briefs of MIEC and OPC about the wholesale contract option discussed in Ameren Missouri's rebuttal testimony and briefly addressed in Ameren Missouri's surrebuttal testimony. The Company understood the need to address Commissioner Hall's questions about the wholesale option, and the Company addressed those questions. It was proper for others to do so as well. However, the extended discussions about the alleged virtues or flaws in the wholesale option are curious insofar as from the beginning, Ameren Missouri has recognized – and stated – that absent Noranda's agreement to a wholesale contract, there will be no such contract. Ameren Missouri never attempted to force such a contract down Noranda's or

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[376] MRA Initial Brief, p. 2 n.3.
[377] Ex. 33, p. 43, l. 1-2 (Mudge Rebuttal).
[378] MECG Initial Brief, pp. 69-70 (citing Mr. Mudge's testimony based on CRU data). By comparison, Noranda witness Fayne relies on "press accounts" for his contention that it was electricity prices that closed these smelters.
[379] Tr. Vol. 33, p. 2716, l. 6-22.

any other party's throat. Ameren Missouri simply pointed out that the requirements of the regulatory compact inherent in a customer taking regulated, retail service under Commission-approved tariffs did not apply to a wholesale arrangement between power supplier A and power customer B. Since Noranda is unwilling to take wholesale service, the entire wholesale contract debate is moot.

Noranda identified risks and did not want to bear them. Regardless of how likely those risks were to come to pass, Ameren Missouri could not say there were no risks, and did not want to bear them. Noranda does not think the risks can be mitigated by the General Assembly. Ameren Missouri thinks they probably can be. But, in the end, the point truly is very likely moot as far as the Commission – in this rate case – is concerned. For that reason, the Company will not address the various criticisms lodged by others on the proposal.

The Company will note that removing Noranda from its status as a retail customer, setting Ameren Missouri's billing units so that they reflected the loss of Noranda retail revenues and inclusion of the wholesale revenues in the FAC, and any other changes needed to the FAC tariff or other orders needed from the Commission to implement such a structure, were always contemplated to be approved by the Commission in this rate case. That necessarily means that all other parties would have had the opportunity to weigh-in. Indeed, the Company always contemplated that if an agreement could be reached with Noranda it would be reflected in a stipulation (either between the Company and Noranda or including others). The Company always contemplated that if not unanimous, others could object and if they did the issues would have had to have to be tried. The bottom line is that we never got that far.[380]

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[380] Noranda seems disproportionately concerned that the Commission will be "distracted" by a now-moot wholesale contract idea. We discuss below why that might be.

Other parties did weigh-in through surrebuttal testimony and in briefs, but some of their points simply make no sense. In its Initial Brief, OPC says that a wholesale contract would "result in higher bills for [Ameren Missouri's] other customers both immediately and in the future."[381] The same can undoubtedly be said of the $34 rate OPC supports.[382]

M. While moot, Noranda's Initial Brief relating to the wholesale contract contains certain statements that need to be addressed.

Before addressing these statements, some key and undisputed facts must be remembered.

First, Noranda has something no other customer in Missouri has: its own retail choice statute.[383] Noranda relinquished the right to use it when it signed a contract with Ameren Missouri in late 2004, but on and after May 31, 2020 (assuming notice is given by May 31, 2015) Noranda's right to use it will come back to life. This means that unlike every single one of Ameren Missouri's other 1.2 million customers, Noranda could –if the certificate of public convenience and necessity ("CCN") remains – have the best of both worlds: a *right* to service from Ameren Missouri at the rates this Commission sets *and* the right to walk away from that service anytime it suits Noranda. This would make Ameren Missouri a standby provider. Ameren Missouri would have to have the capacity and other means to provide service to Noranda and would have to assume that Noranda's load will be on its system whenever it performs integrated resource planning. Yet, Noranda would have no commitment to Ameren Missouri (or, indirectly, to Ameren Missouri's other customers). The point is that as long as this statute is on the books, the idea – that Noranda champions in via MIEC's Initial Brief – that "of course" the CCN should always remain in place and Ameren Missouri is somehow being insincere in suggesting that it be cancelled, is decidedly wrong. One should question whether

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[381] OPC's Initial Brief, p. 45.
[382] The signatories readily admit it will raise other rates by approximately 1.5% or more (Tr. Vol. 31, p. 2269, l.3).
[383] Section 91.026, RSMo.

Noranda should be allowed to have it both ways. In fact, what Noranda's subsidy request in this case shows (coupled with its insistence that it must also always have a "right" to "regulated service") is that Noranda wants the benefits of the regulatory compact inherent in that regulated service – the customer is assured of service so long as the customer pays rates that reflect cost of service – but does not want to bear the *burdens* that go along with the regulatory compact.

Second, Noranda's second attempt in less than a year for a non-cost based rate and the large subsidy for such a rate reflects a complete about-face on Noranda's part. When Noranda asked to become a Commission-regulated customer it said that it "can reasonably expect to receive fair treatment [from the Commission] in future rate proceedings with rates that *reflect the cost of the service provided to Noranda.*"[384] It told the Commission that its goal in becoming a regulated customer was to obtain a "cost based supply."[385] Make no mistake: no one was talking about or considering "some" contribution to fixed costs. To the contrary, Noranda said it wanted rates set based upon cost of service, that it needed such rates, and that it was fair for it to pay such rates. *If* (and this is a big if, as discussed above and in the Company's Initial Brief), aluminum prices are highly volatile, and *if* there are ten-year cycles applicable to aluminum prices, and *if* Mr. Boyles' three pessimistic scenarios are best reflection of these ten-year cycles; and if those and all of the other "ifs" noted earlier are true, then they were also true in 2005 when Noranda made those statements.

The truth is that Noranda does not like the choice it made. The truth is that Noranda (really, Apollo, who even Mr. Smith would agree clearly did control Noranda's actions entirely before it sold part of its greater-than-50%-share in March of 2014) made some bets that did not pan out. Noranda bet that when it paid several hundred million dollars of special dividends from

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[384] Ex. 9, p. 31, l. 13-20 (Davis Rebuttal), quoting Noranda's brief in the CCN case (emphasis added).
[385] *Id.* p. 32, l. 1-2, also quoting Noranda's brief in the CCN case.

2009 to 2012[386] that aluminum prices would stay strong enough in the future so that it would have enough liquidity to do what it now claims it must. Noranda bet that when it was spending far less than the ************ of capital expenditures annually *while* it was paying those large special dividends that it would be able to catch up later.[387] Apollo bet that when it levered Noranda's balance sheet with almost total debt (including repaying itself for its initial "investment" with borrowed funds), that things would work out such that Noranda could service that debt, still make enough money and still have enough liquidity.[388] And one can probably assume that Noranda bet that it would pay lower electric rates via that fair, cost-based treatment at this Commission than it would pay if it did what it had done before: bought power from a wholesale supplier.

Those bets did not pay off. It is really that simple. And because they did not pay off, Noranda is here at this Commission, hoping the Commission will help it cut its betting losses, with the promise to do better in the future and with the threat that if the Commission does not act, Noranda may take its ball and go home.

N. Given Noranda's claims about avoided cost, it should want to avoid regulated service entirely.

If the testimony of Noranda's experts, Messrs. Brubaker and Dauphinais, is accurate, then Noranda should be pursuing a release from its commitment not to use its special electric choice statute until 2020 so that it can use it right now instead of insisting that the Commission give it a special, heavily-subsidized rate. Why? Because Mr. Dauphinais' avoided costs and even the forward prices he predicts are all less than the base-stipulated sum of $34 per MWh, and they are

[386] Ex. 33, Sch. RSM—R2, p. 38-39 (Mudge Rebuttal).
[387] This all assumes that Noranda really needs to catch-up. It says it does. It has no concrete capital expenditure plans beyond 2015, however, so who knows?
[388] Apollo may have lost on that bet, but it has been a big winner on its bet to acquire Noranda in a leveraged buy it. As of last Spring, Apollo had realized about $360 million (plus $31 million in management fees) *above* the initial investment of $214 million it made to acquire Noranda, which it also has recouped through funds it caused Noranda to borrow. Ex. 33, Sch. RSM-R2, p. 38-40.

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even farther below what that $34 per MWh would presumably become over the next ten years as Ameren Missouri has additional rate cases. And if Noranda were to just leave – use its electric choice statute – then it does not have to make commitments to restrict "special" dividends or about what it will or will not invest or otherwise. But Noranda seems uninterested in using the retail choice option it has and one can conclude that is because the testimony of Messrs. Brubaker and Dauphinais is simply not accurate.

O. Noranda's Initial Brief outright misrepresents the discussion of the wholesale option.

That brings us to Noranda's claims, among other things, that Ameren Missouri's exploration of making Noranda a wholesale customer at a rate that would have been lower than a cost-based rate set by this Commission was, to use MIEC's words, "at best half-baked, and at worst specious."[389] Once again, it is decidedly helpful to review the *facts of record* as compared to the statements of Counsel in a brief.

The following is what Noranda CEO Kip Smith had to say about Ameren Missouri's efforts, which were undertaken with the Commission's encouragement in the EC-2014-0224 order. The quotes are rather lengthy, but are provided in full so that the context can be appreciated:

> A. Thank you very much for asking that question, because I was in those meetings with Michael Moehn, and we had numerous meetings, at least seven face-to-face meetings that I can count going back through my calendar, numerous phone calls, lots of texts.
>
> There was an enormous amount of interest in coming together on a transaction with Ameren, *and I want to compliment Michael Moehn for his extraordinary commitment to try and make something happen. This is an individual that I gained an enormous amount of respect for.*
>
> But in the end, and since there's been a lot of discussion and speculation about what went on inside those settlement discussions, my only response is that it is – it is not true, it is just not true that Noranda didn't want that deal, Noranda didn't want to make any deal or this one specifically.

[389] Noranda's Initial Brief, p. 95.

Unfortunately, we got down to a single issue where at the end – and I feel the only thing that's fair, given the confidentiality of those discussions – to remark is both Michael and I looked at each other and I certainly felt deep regret, and I believe he did as well, and we said, look, we're at an impasse. We're just not going to get past this.

We tried over the next few days to see if there was some way we could come up with an alternate structure. But at that point in time, it was decided that we would proceed ahead with the rate case and perhaps there would come another time when we could get together to come together on a deal.[390]

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So we didn't have an issue with the concept of wholesale in itself. The issue became how would we – how would we make sure that the risk was no greater than the risk that we were taking with the retail deal. And that's where I think we couldn't get to an answer. [391]

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Q. (BY MR. MALLIN) Do you believe in any way, sir, you breached any sort of fiduciary duty as the CEO off Noranda in not reaching that agreement with Ameren?
A. Absolutely not.

Q. Why not?
A. First and foremost we entered into good faith negotiations with Ameren. We, for a number of reasons. First and foremost they're our largest supplier and we felt, we've always in every one of the rate cases we've always tried to get to a global settlement and we became very passionately committed to trying to get to a global settlement in this case in part to address some of the questions and directions from the Public Service Commission itself. So we undertook these negotiations in the best of faith *and I can tell you that I believe that Ameren did as well. Their focus and their commitment of time, Michael Moehn was very professional*, we routinely met at the drop of a hat, we had at least eight meetings face to face, the first started with our teams and then typically as we got later in the negotiations he and I, well in all the negotiations he and I would always have one-on-one time together and in many of our later meetings it was just he and I meeting together. We went through and looked at both retail and wholesale structures, a wholesale structure was proposed by Ameren to provide a rate. We spent a lot of time on this and we ultimately got to a point where we, there was risk created by this structure that was, our principle had always been if we could get the available value at the same risk we were really quite indifferent to the

[390] Tr. Vol. 31, p. 2419, l. 6 to 2420, l. 14.
[391] Tr. Vol. 31, p. 2421, l. 15-21 (emphasis added).

structure as long as our behaviors and the behaviors that we wanted to exhibit could still, we would still be participating in the process, things like that, and we just got to a point where we had an impasse because we weren't willing to take the incremental risk associated with the wholesale structure and nor was Ameren.

Q. ***Mr. Smith, was it your opinion that any party walked away from those negotiating tables?***
A. No, not at all. In fact there was, you know, I certainly left that last meeting very, very disappointed and I obviously can't speak for Mr. Moehn but there was no, nobody stormed away from a negotiating table.[392]

Ameren Missouri takes Mr. Smith at his word with respect to the foregoing remarks, and despite what appears to be Counsel's reaction to the mention of fiduciary duty in Ameren Missouri's opening statement on the Noranda subsidy issue, did not – and does not now – suggest that Noranda made no effort to work through a possible wholesale arrangement. When MIEC's Counsel attempted to characterize Ameren Missouri as having claimed that someone at Noranda violated a fiduciary duty, Ameren Missouri's Counsel objected, pointing out that such a claim was a mischaracterization and Judge Woodruff recognized that in fact no such claim had been made, stating that was "what I recollect as well."[393]

While the Company will not delve into the details of settlement offers – on either side – that were made, it is simply not true that the proposals being discussed were "half-baked" and they were absolutely not specious. If they were, then Mr. Smith was not telling the truth as quoted above. The proposed terms – including specific means to attempt to address the risks that Noranda identified – were exchanged in writing on several occasions and discussed at length and in detail. It is extremely misleading to claim that "no price term and no provision regarding creation of how a wholesale structure could even be created" was proposed.[394] Prices were disclosed. Data on how Ameren Missouri had developed a range of possible prices (depending

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[392] Tr. Vol. 33, p. 2480, l. 10 to p. 2482, l. 8 (emphasis added).
[393] Tr. Vol. 33, p. 2480, l. 1-6.
[394] Noranda's Initial Brief, p. 95.

on the length of an agreed upon term; depending on whether the price was fixed for the entire term or could change) was provided to Noranda. The *only* truth in the just-quoted statement is that the parties did not reach the point where a final, specific dollar price was put on the table – by either side – because the risks that were at the fore of Noranda's discussions with the Company could not be resolved it didn't matter what the price would be – that much was very clear. Also, the use of an intermediary – and how this was commonly done in such transactions (Noranda bought power in just this way before it was Ameren Missouri's regulated customer) – was also discussed. Were all of the "i's dotted" and "t's crossed" on price and structure? No. As Mr. Smith testified, resolution of the risk issue simply could not be reached so we never got that far. That does not make either side's effort half-baked or specious, notwithstanding the shrill claims to the contrary made by Noranda's Counsel in its Initial Brief.

P. A brief discussion of Noranda's responses to Commissioner Hall's Noranda subsidy-request related questions.

A few statements made by MIEC in response to Commissioner Hall's Noranda subsidy request-related questions warrant addressing.

Noranda lists three major risks of a wholesale structure, one of which was the end to the CCN covering its property. As noted earlier, Noranda wants both a perpetual CCN and its special retail choice option. That's understandable, but it does not make it appropriate. Noranda lists as another risk the loss of an "assured supply and reliability protection essential to the survival of the New Madrid smelter." That *is* an inaccurate claim. For thirty-plus years before Noranda's contract or series of contracts with AECI ended, Noranda took service under a *contract* from a generation and transmission cooperative (AECI) that had no "service territory" or obligation to serve, other than to the extent its contract required it to perform. Then, Noranda had a wholesale contract with another provider. And finally, in terms of reliability, Ameren Missouri connects to

AECI's transmission system 40 miles from the smelter. The greatest reliability risk Noranda has is completely divorced from Ameren Missouri's system.[395] In summary, the smelter survived for about 35 years without regulated electric service supervised by this Commission. Such service is not needed for its survival now and if it were, then Noranda should have to pay for it at cost-based rates like everyone else.

Noranda also opines that the General Assembly can't eliminate or mitigate these risks it sees with a wholesale arrangement. On the face of it, this conclusion seems suspect. Consider that the General Assembly already enacted one statute pertaining to Noranda's electric service and choices, and the General Assembly can define the powers this Commission has and what it can decide and what can and cannot be reflected in rate adjustment mechanisms, like fuel adjustment clauses.

But the fact that Noranda has such an option – and in fact swore that what it needed was a regulated, *cost-based* rate set by this Commission - makes Noranda's apparent attack on Ameren Missouri's motives and on the sincerity of its attempts to find a solution (notwithstanding Ameren Missouri's substantial skepticism about whether a solution is needed) all the more inappropriate. The attack is also inappropriate in light of Mr. Smith's sworn testimony during the evidentiary hearings.

[395] This is no suggestion that AECI does not operate a good system – it does. The point is that there is no physical tie between Noranda and Ameren Missouri, and given that MISO functionally controls Ameren Missouri's transmission system and is responsible for regional transmission planning and reliability, along with NERC, Noranda's supply reliability simply has little to do with whether it is paying Ameren Missouri for electricity at retail under Commission-approved rates, or is paying for wholesale power (with Ameren Missouri as the seller through an intermediary, or from AECI, or from Power Marketer X).

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 10th day of April, 2015.

/s/Wendy K. Tatro______________
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