BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Application of Union Electric Company (d/b/a AmerenUE) for an order authorizing the sale, transfer and assignment of certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company (d/b/a AmerenCIPS) and, in connection therewith, certain other related transactions.	)))))))))	Case No. EO-2004-0108

INITIAL BRIEF OF STAFF

SUMMARY

I. Legal Issues

This case is the first contested sale/transfer case filed since the Missouri Supreme Court issued its *AG Processing* decision: *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n, 120 S.W.2d 732* (Mo. banc 2003). The Missouri Supreme Court found that the Commission must evaluate the present and future effects of a proposed transaction at the time it makes its decision regarding the transaction. Analysis and consideration of the future effects of this proposed transaction cannot be deferred to be addressed at a later date. It also should be noted that Union Electric Company, d/b/a Ameren (AmerenUE) has included elements in its Application that have higher standards than the "not detrimental to the public" standard that is applied to mergers, sales, transfers and encumbrances, among other transactions, while asserting that the Commission should approve these proposed actions pursuant to the less rigorous Section 393.190.1 RSMo (2000) standard.

AmerenUE has requested certain ratemaking determinations to which a "just and reasonable" standard applies. (Tr. 1696, ls. 10-17, Vol. 17; Sections 393.130.1 RSMo Cum. Supp. (2003) and 393.150.2 RSMo (2000)). For example, Ameren has requested in item (c) on page 10 of its Application in this case, for the Commission to approve "as reasonable and prudent the consideration received by AmerenUE from AmerenCIPs for the transferred assets and liabilities." Ameren has also requested in item (e) on page 11 of its Application in this case, for the Commission to grant "a waiver from the requirement of electric and gas affiliate transaction rules that a utility transfer goods and services to an affiliate at the higher of cost or market." The Commission's standard for a waiver from its affiliate transaction rules is in the best interests of regulated customers. (Tr. 1042, ls. 2-10, Vol. 11). AmerenUE acknowledges that Ameren Corporation is a party to this transaction, and is not regulated by a State Commission. (Tr. 1032, ls. 1-12, Vol. 11). AmerenUE has fashioned the transaction and its Application in such a manner that the Commission is placed in the role of "ensuring that the property transferred, that there was no subsidy and it was fair and reasonable and no detriment." (Tr. 1039, ls. 9-22, Vol. 11). While the Staff asserts that AmerenUE has not met the "not detrimental to the public" standard, it is doubtful that this is necessarily the appropriate standard, given the various items of relief requested in AmerenUE's Application. The Staff would assert, that to the extent AmerenUE seeks Commission approval of these items, then the transaction must meet the higher standard.

The economics and the related risk of the proposed transaction are the central issues of this case. AmerenUE takes the position that the Commission must not seriously address these issues in this case. AmerenUE argues in essence that the Commission only needs to perform cursory review to approve this transaction and rely on the parties to fix any detriments in future

rate cases. (Ex. 6, Nelson Surr., p. 3, 1s. 1-6). Staff does not agree that that the current legal standard for this case allows the Commission not to identify detriments and ensure that adequate protections are implemented before Commission approval is granted.

Ameren provides no assurance that it will even maintain its books and records in a manner to allow parties to have the information to address the detrimental aspects of this transaction in future cases. Parties must have adequate information to be able to identify the impacts of the transfer, separate and distinct from AmerenUE's other operations, in order to be able to review and address these items in a future rate case. AmerenUE makes no provision for such record keeping.

If the Commission approves the transfer as proposed, it may be asserted that any party recommending an adjustment of the impacts of the transfer in a future rate case will have the burden of overcoming a Commission decision that the item was at least "not detrimental to the public" or met one of the higher standards that is applicable to this transaction as requested by AmerenUE. In some areas of this transaction, the Commission is being asked to issue a ratemaking decision, making it difficult to envision how a future rate case adjustment might be pursued without it being contended that the Commission has already made a ratemaking determination.

Finally, any disallowance after the transfer occurs is not without negative financial consequences. Every disallowance of actual expenditures means these obligations must be met at the expense of shareholder earnings. In most cases, disallowances are made related to management decisions that did not require Commission approval. In such instances, the utility places itself in harm's way on its own. In this case, AmerenUE cannot incur the obligation, expense, or liability without Commission concurrence. The Commission plays a role in placing

the utility in the position of having its particular customers looked to for resolution of the obligation, expense, or liability. The possibility of future ratemaking disallowances of the impacts of this transaction after the Commission has approved the actions that address these responsibilities should not be viewed in the cavalier manner proposed by AmerenUE. It is this very point that Staff believes was made by the Missouri Supreme Court in the *AG Processing* case. Ameren has been very clear that it views that the ratepayers are the ones to bear the risk of this transaction going wrong. (Tr. 1748, ls. 14-25, Vol. 17).

The Staff will further address the elements of this aspect of the case in the Legal Issues section of its initial brief which follows below.

II. Least Cost Analysis

There is substantial disagreement in this case regarding whether the proposed transfer is the least cost option for AmerenUE's Missouri operations to address its long-term capacity and energy needs. It is important to note that this disagreement is not that any transfer is detrimental to AmerenUE's Missouri operations. The disagreement is that the specific transfer proposed in this case by AmerenUE is detrimental and AmerenUE fails to provide adequate safeguards to address these detriments.

1. The study performed by AmerenUE is inadequate to support any definitive conclusion regarding the economics of the proposed transfer.

An analysis of the asserted benefits included in the AmerenUE least cost study and the potential detriments that were excluded show that the proposed transaction will likely be detrimental to AmerenUE. These benefits and detriments are generally shown in the following table:

Proposed Benefits Included	**Potential Detriments Excluded**

Initial Study showed $2.4 million/year of purported benefits when comparing the Metro East transfer to building 597 megawatts of combustion turbine capacity.	1. Initial study benefits are acknowledged by all parties as being extremely "thin". 2. Initial study presents a mix of test-year results with multi-year analysis. • Study failed to properly account for changes in savings in variable production costs that will occur in the case of the Metro East transfer due to future load growth. • Study applied a mark-to-market analysis for the combustion turbine generator alternative taking into account forecasted market prices for electricity, but failed to apply this same analysis to the case of the Metro East transfer. • Study assumed no inflation on AmerenUE's generation function for 25 years, yet included an inflation factor for fixed O&M costs for the combustion turbine generator alternative. 3. Initial study failed to include differences in revenue requirements for transmission (transmission cost of service – transmission revenues) for the transfer and non-transfer cases. This was later studied and found not to be detrimental after the data was provided to the Staff. 4. Initial study failed to recognize the transfer responsibility of the unfunded Illinois decommissioning liability for Callaway to Missouri consumers. 5. Study ignored current and future environmental costs for AmerenUE including Iowa and Illinois manufacturing gas sites as well as increasing responsibility for the consequences of Ameren's SO2 allowance sales. 6. Initial study failed to quantify possible detriments from liabilities that would become the responsibility of Missouri customers if the Metro East Transfer is approved. 7. Study did not include analysis of transfer of AmerenUE's natural gas operations to AmerenCIPS.

Included Proposed Benefits	**Excluded Potential Detriments**
Transmission Study showed $385 thousand/year of benefits from the transfer of transmission plant located in Illinois to AmerenCIPS. The Company agreed to modify one aspect of Joint Dispatch Agreement (JDA)	The Staff's review of the late-filed transmission study submitted by AmerenUE found indications that the AmerenUE's study underestimated benefits. The Staff's corrections show this benefit to be in the range of $1.8 to $2.0 million/year. This review shows that when a component of the transfer is adequately documented the Staff can provide the Commission with an opinion regarding whether a detriment, benefit or adequate safeguards exists. **1.** The Staff disagrees with AmerenUE's estimate of benefit from the proposed modification to the JDA. The benefit of the proposed modification to the JDA attributable to the Metro

regarding the distribution of profits from off-system sales, purportedly increasing the proposed benefits by $7 million/year.	East transfer is $3.6 million per year. This is the major driver to AmerenUE's assertion that the transfer has significant benefits. This benefit is subject to regulatory approval and cannot be implemented by AmerenUE on its own. **2.** AmerenUE is currently subsidizing affiliated entities through the Joint Dispatch Agreement (JDA) to its detriment in the range of $100 million per year. Changes to this agreement are needed independent of the Metro East transfer. The Staff proposes opening a separate complaint case regarding the overall issue of the JDA.

The least cost study presented by AmerenUE in this case would not even meet the requirements of the Commission's resource planning rules. (Tr. 1773, ls. 6-24, Vol. 17). The least cost study failed to include a sensitivity analysis that would identify the factors that were significantly contributing to the result. (Tr. 1686, ls. 10-25, Vol. 17). It is interesting to compare the reluctance of the AmerenUE witness Mr. Redhage to render a conclusion regarding the nuclear decommissioning trust fund without performing a sensitivity analysis (Tr. 235, ls. 4-15, Vol. 6) to the ease with which Ameren asserts the transfer will save Missouri retail ratepayers money without the benefit of a sensitivity analysis.

2. Approval of the Metro East Transfer is essentially irreversible and should therefore be based on a robust study of the key assumptions regarding the least-cost alternatives.

The study underlying AmerenUE's case does not support AmerenUE's decision to transfer the Illinois portion of AmerenUE's business to AmerenCIPS. The decision was made before the study was completed. (Ex. 77; Tr. 1601, 1s. 14-20, Vol 17). The study was performed to justify the decision and was performed in a time frame to implement the decision quickly under time pressures. In some circumstances, a less than robust study might be justified if the proposed transfer could easily be reversed at a later date in the event that the transaction is shown to be detrimental based on actual experience. However, the proposed Metro East transfer

is not such a transaction, but instead is essentially irreversible after it has been implemented. Therefore, this Commission and AmerenUE's senior management and Board of Directors, need a detailed study of all the present and future effects of the proposed Metro East transfer that tests key assumptions regarding the comparative economics of the transfer, versus the no transfer alternative, before the proposed transfer is approved.

3. AmerenUE operations without the proposed transaction have certain other economic advantages to the State of Missouri.

AmerenUE would invest more money in Missouri if it built new combustion turbines and would create additional new jobs to staff such an investment. The Staff would not recommend that the Commission endorse new investment and jobs when the economics to utility consumers clearly indicate that such a course of action would needlessly result in higher rates. However, the proposed Metro East transfer does not enjoy a clear economic advantage over the alternative as indicated in the above table. Transactions to expand a company's operations may be viewed as having a presumption of potential benefit, as the firm's fixed costs can be spread over more customers and revenues. The proposed Metro East transfer, however, is a transaction that reduces AmerenUE's operations and, thereby, does not have a presumption of benefit, as AmerenUE must recover its fixed costs over fewer customers and revenues.

4. Transfer treats Missouri ratepayers unfairly regarding Callaway Decommissioning Trust Fund issues.

This is an area in which AmerenUE is seeking ratemaking determinations. (Tr. 1696, ls. 10-23, Vol. 17). The proposed transfer will cut the funding to the Callaway Decommissioning Trust Fund outside the normal triennial review. (Tr. 244, line 19-245 line 7, Vol. 6). Under AmerenUE's existing organization and structure, if there were a valid decision to reduce the funding to the Callaway Decommissioning Trust Fund based on a determination that such an

action not the required standard, then Missouri consumers would receive a majority (i.e., approximately 92%) of the benefit from the reduction in funding. Ameren has fashioned the reduction in funding to the Callaway Decommissioning Trust Fund in such a way that Illinois consumers receive 100% of the funding reduction in the form of reduced electric bills. (Tr 231, ls. 15-24, Vol. 6). The proposal to cut the funding is based principally on the parameters from the last triennial review. If such proposal had been considered and approved at that time, then a majority of the funding reduction would be a reduction to Missouri consumers. At the time Ameren is proposing to cut the funding to the Callaway Decommissioning Trust Fund, Ameren is requesting the Commission to make a ratemaking decision to transfer a majority of the Illinois decommissioning liability in excess of Illinois assets (approximately $22 million) to Missouri consumers. (Tr. 255, ls. 9-20, Vol.6). Ameren is proposing a cut in the funding to the Callaway Decommissioning Trust Fund when the cost to decommission Callaway has increased each time a triennial review has occurred (Tr. 235, ls. 16-19, Vol. 6) and is requesting the Commission to make a ratemaking decision to transfer an additional $22 million liability to Missouri consumers. Such a decision could only be made if there was reasonable assurance that the transfer would produce benefits that offset this detriment. The Staff does not believe that this transaction in its present state provides the needed assurances. It should be noted that near the end of the hearing AmerenUE included the annual Illinois portion of the cost to decommission the Callaway nuclear unit in Mr. Voytas' least cost study. (Tr. 1601, ln. 24, 1602, ln. 8, Vol. 17). However, Mr. Nelson noted that AmerenUE did not intend to contribute these monies to the Callaway Decommissioning Trust Fund, thereby depriving the fund from having these assets. (Tr. 1698, ls. 10-20, Vol. 17). The Staff will address the detailed elements of this aspect of the case in the Decommissioning section of its initial brief.

5. Least Cost Study inadequately addresses sales of SO2 allowances.

A significant portion of the benefits of the transfer in the least cost study is attributable to an adjustment made by AmerenUE to increase its revenues from SO2 allowance sales. AmerenUE admitted that the level of sales included in its least cost analysis case is not sustainable and it did not consider the compliance costs that are required for the AmerenUE units. This item alone would show the inadequacies in AmerenUE's position that the transfer should be approved. These items would need to be examined before any reasonable assurance could be provided to the Commission to approve the proposed transfer. The Staff will address the detailed elements of this aspect of the case in the SO2 Allowances section of its initial brief

6. Least Cost Study fails to address all significant aspects (e.g., liabilities) of the proposed transaction.

AmerenUE has failed to quantify the costs for any of the liabilities (e.g., asbestos, environmental and decommissioning) for which it is at risk as potential future costs and for which there would be an increasing risk for Missouri retail customers under the proposed Metro East transfer. A complete least cost analysis would have included a quantification of these costs and an assessment of the likelihood of their occurrence. Absent this quantification, Missouri retail customers should be held harmless from the AmerenUE Illinois share of these potential future costs.

7. Least Cost Study does not analyze the cost impacts of the transfer on AmerenUE's Missouri jurisdictional natural gas customers.

Unlike the least cost study that it provided for its electric operations, AmerenUE did not provide a least cost study for the proposed transfer of its natural gas operations in Illinois to AmerenCIPS. The Staff has identified potential detriments that AmerenUE has failed to address.

III. Transfer of AmerenUE Transmission Facilities Connecting AmerenUE Generators to Missouri Load.

1. Provision of Service From AmerenUE Generation That Would No Longer Be Connected To AmerenUE's Transmission Facilities

The proposed Metro East transfer will transfer ownership of in essence all of AmerenUE's transmission facilities located in Illinois to AmerenCIPS. If approved, this transfer of transmission facilities will in effect disconnect AmerenUE generating facilities located in Illinois and Iowa from AmerenUE owned transmission facilities. While this does not impose an immediate problem because AmerenUE and AmerenCIPS operate jointly as a single transmission control area and jointly dispatch generation to meet the native load of both companies, there are no guarantees that this arrangement will continue into the future. Moreover, Illinois has moved from traditional regulation to allow retail competition and the continuation of the joint operation of production and transmission by AmerenUE, Ameren Energy Generating (AEG) and AmerenCIPS on the same basis as it is today is not guaranteed. In this context of present and increasing differences between Missouri and Illinois, it is prudent for the Commission to require a hold harmless condition regarding the provision of network service from AmerenUE generation that would no longer be connected to the AmerenUE owned transmission system.

2. Transmission Revenue Requirements Subsequent To The Transfer of AmerenUE's Illinois Transmission Facilities

After a request of Chair Gaw, AmerenUE provided an analysis of transmission revenue requirements in which the costs for Missouri retail ratepayers are compared with and without the Metro East transfer. While this comparison shows that the proposed Metro East transfer will result in bwer transmission revenue requirements for AmerenUE's Missouri retail customers, there are no assurances that these customers will not be subjected to additional costs at a future date. Such additional costs might occur in a renegotiated Joint Dispatch Agreement. Such

negotiations over the Joint Dispatch Agreement may result in a significant loss in current benefits to both AEG and AmerenCIPS. One way for AmerenCIPS and AEG to recoup a portion of those losses would be to place additional costs on AmerenUE. The Commission should require that Missouri retail customers be held harmless from any possible reallocation of transmission costs onto AmerenUE.

IV. Normal Safeguards Missing from Proposed Metro East Transaction.

Typically transactions of this nature have an assumed protection based on the premise that an organization will not enter into a transaction that is detrimental to itself. Such transactions are referred to as arm's-length transactions. The proposed Metro East transfer transaction in this proceeding is between affiliated companies so the traditional safeguards of an arm's-length transaction are not present. AmerenUE is transferring a portion of its business operations to an affiliate entity. The Commission has affiliate transaction rules to provide a level of protection when affiliates enter into such transactions: 4 CSR 240-20.015 and 4 CSR 240-40.015. Unfortunately, this transaction does not comply with the Commission's affiliate transaction rules and cannot satisfy the affiliate transaction rules criteria for waiver of being beneficial to customers. It would be difficult to show that this proposed transfer is in the best interest of its regulated customers given the multitude of deficiencies noted in AmerenUE's least cost analysis.

This filing of AmerenUE is fraught with negative consequences for Missouri ratepayers . AmerenUE has made it very clear that the Missouri retail ratepayers bear the risk of this transaction going wrong. (Tr. 1748, ls. 14-25, Vol. 17). The proposed transaction defines the revenues, expenses, liabilities and assets that will be transferred to AmerenCIPS and the revenues, expenses, and assets that will remain with AmerenUE. It is the expenses and

liabilities, that would otherwise be assigned to AmerenUE's Illinois business, that remain with AmerenUE after the transfer, that create a major detriment in this case.

AmerenUE is providing no assurances, guarantees, safe harbors, or hold harmless commitments to support its assertions that the Metro East transfer is not detrimental for AmerenUE. The Staff and the Office of the Public Counsel (OPC) oppose this transaction. No one has or can assert that the Staff and OPC would not support a least-cost option for Missouri ratepayers. But this is not an arm's-length transaction, so the Commission does not have the traditional safeguards that AmerenUE would not enter into a transaction detrimental to itself. AmerenUE was never represented by individuals charged solely to protect its best interests. The individuals responsible for the details of this transaction represented both buyer and seller.

The Illinois Commerce Commission has already approved the electric portion of this transaction. AmerenUE has not adequately explained how it could fashion a transfer that is not detrimental to its Missouri retail customers in this instance. The Staff asserts that Ameren did not create such a transaction. Instead, Ameren created a transaction that benefits Ameren's Illinois operations to the detriment of AmerenUE's Missouri operations. The Commission is being asked to approve this transfer based on Ameren's testimony, against the evaluation of both the Staff and OPC, without any meaningful guarantee by Ameren under the circumstances, to warrant its representation that the transfer is not detrimental to Missouri. Ameren is asking the Commission to accept full responsibility for the detrimental aspects of the Metro East transfer.

V. AmerenUE Decisions Not Shown to be Not Detrimental to the Public

The instant case reveals three significant areas where AmerenUE may be operated in a manner that benefits its parent, or an affiliate, to AmerenUE's detriment. These three areas are

the Joint Dispatch Agreement (JDA), SO2 allowance sales, and energy received from AmerenUE's share of the Joppa, IL. plant/Electric Energy Inc. (EEInc).

The record in this case shows that AmerenUE is experiencing a significant economic detriment operating under two facets of the JDA while the non-regulated affiliate company, AEG, is enjoying a significant economic benefit at AmerenUE's expense. As Staff has pointed out in its testimony, the Metro East Transfer will only make the situation worse. Ameren has "offered" to seek to amend the JDA respecting the item that is of the much smaller dollar consequence to AmerenUE in an effort to obtain Commission authorization of the proposed Metro East transfer. This one JDA change does nothing to address the other JDA detriment and other significant detriments, such as the failure to consider such significant environmental costs.

Regardless of whether the Commission authorizes or denies the proposed Metro East transfer, the JDA will still remain a detriment to AmerenUE and in need of modification. The Staff does not recommend that the Commission ignore this situation nor rely on the Ameren proposal to delay pursuit of necessary revisions/modifications to the JDA. The Staff has suggested that the Commission direct an investigation of the matter with recommended courses of action, within time frames acceptable to the Commission in its Report And Order in this case. The Commission may want to consider additional courses of action.

Ameren has engaged in aggressive sales of AmerenUE's SO2 allowances. If these allowances are not available to be used in the future their unavailability can result in increased environmental expense or capital expenditures at AmerenUE's generating units. Even if the Commission rejects the Metro East transfer as proposed by AmerenUE, the potential harm from Ameren's sale of AmerenUE's SO2 allowances will remain, although at a reduced level for AmerenUE's Missouri consumers. There are outstanding questions regarding AmerenUE's sale

of SO2 allowances including whether there is Commission approval to sell the AmerenUE SO2 allowances that are being sold.

AmerenUE is entitled to forty percent (40%) of the output from the Joppa, IL./EEI plant. AmerenUE owns transmission facilities connecting the Joppa plant to its system. AmerenUE's Missouri and Illinois ratepayers have paid for these transmission facilities. AmerenUE proposes to transfer these facilities to AmerenCIPS by Commission authorization in this case. This Joppa energy is a very low cost power resource for AmerenUE. The record in this proceeding is clear that this low cost energy will not be available to AmerenUE after the present contract terminates on December 31, 2005. This situation has serious negative consequences to AmerenUE's cost structure. The Staff recommends that the Commission open an investigation to inquire into this matter sooner rather than later, and now rather than not at all.

ARGUMENT

I. LEGAL ISSUES

1. Missouri Commission's Jurisdiction

A. AmerenUE Assets in Illinois in Rate Base Setting Missouri Retail Rates

If there is any question why AmerenUE needs this Commission's authorization for the Metro East transfer, this question should have been dispelled by the evidentiary hearing. Dr. Proctor testified that the AmerenUE response to Staff Data Request No. 36 showed that when the Staff requested a copy of the AmerenUE analysis of the impact of the proposed transfer on AmerenUE's Missouri cost of service related to its transmission operations, Ameren responded with a page of the analysis prepared showing the impact on transmission plant allocated to Missouri. Ameren's response to Staff Data Request No. 36 showed that AmerenUE's Missouri retail customers are paying in rates for $40 million of assets located in Illinois that after the

proposed transaction, if approved by the Commission, would no longer be in AmerenUE's Missouri retail electric rate base. Dr. Proctor said that this decrease is significant. (Tr. 1215, l. 7 – 1217, l. 3, Vol. 13; *See also* Tr. 1757, l. 1 – 1758, l. 24, Vol. 17; Ex. 71).

Mr. Nelson in a colloquy with Judge Thompson characterized AmerenUE's Metro East assets as not being in AmerenUE's Missouri rate base. (Tr. 1705, l. 9 – 1706, l. 17, Vol. 17). He characterized how AmerenUE's transmission facilities in Illinois are treated for ratemaking purposes as a portion of those facilities being allocated to Missouri, and, similarly, for ratemaking purposes, a portion of AmerenUE's transmission facilities in Missouri are allocated to Illinois:

> **Nelson:** . . . The transmission piece of property that's in Illinois is in Illinois. It's Illinois property. However, the overall transmission plant owned by UE for rate-making purposes is an allocation effort. So I don't know if you can specifically pinpoint any one particular piece of property to a rate-making jurisdiction. It's just a percent of the total.
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> **Dottheim:** And when you say "allocated," then a portion of that facility is allocated to Missouri?
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> **Nelson:** And a portion of Missouri is allocated to Illinois. But, again, you can't specifically trace any item. It's just a rate-making methodology.
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> **Dottheim:** Are assignments rather than allocations also made?
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> **Nelson:** Yes. And, in fact, that's what will happen, assuming the Commission actually allows this transfer. The transmission plant in Illinois -- there won't be an allocation process for that because it will be in CIPS and it will be the specific plants in Illinois that's in CIPS. There won't be a need to allocate for Missouri purposes.

(Tr. 1745, l. 23 – 1245, l. 17, Vol. 17).

B. Missouri Commission Case Nos. EM-92-225 and EM-92-253

It should not escape comment that Ameren has made no reference to two consolidated 1992 cases in which UE sought Commission authorization to sell and assign: (1) certain of its

Iowa facilities to Iowa Electric Light & Power Company (Case No. EM-92-225) and (2) its northern Illinois facilities to Central Illinois Public Service Company (CIPS) (Case No. EM-92-253). *Re Union Electric Co.*, Case Nos. EM-92-225 and EM-92-253, Report And Order, 1 Mo.P.S.C.3d 501 (1992). At that time, UE's Illinois service territory consisted of two separate geographic areas: the metropolitan St. Louis area including East St. Louis and Alton, and an area across the Mississippi River from UE's Iowa service territory. UE's sale of its northern Illinois service area to CIPS was coincidental to UE's sale of its Iowa service area because after the Iowa sale, UE would have no practical means of serving the northern Illinois service area. The Commission consolidated the two proceedings, which went to hearing on September 28-30, 1992. On December 22, 1992, the Commission issued a Report And Order authorizing the proposed transactions. *Id.* at 501-02.

UE stated that it was selling the Iowa property so as to eliminate the high regulatory and administrative costs associated with serving a small portion of its electric business, 2.5%, in another state. UE was to receive $59 million from Iowa Electric and $8.5 million from CIPS which according to UE would produce a total gain (sales price in excess of net book value) of approximately $34 million, or $14.8 million after taxes. UE indicated that a distinct benefit for its remaining customers from the sales would be that the sales would allow it to eliminate or defer the need to add new or high-cost generating capacity. 1 Mo.P.S.C.3d at 502-03.

UE acknowledged that the allocation of costs and benefits between shareholders and customers would be affected by the timing of its next rate case. Pursuant to a Stipulation And Agreement entered into and filed with the Commission on August 24, 1992, establishing Case No. ER-93-52, which was approved and adopted by the Commission on November 3, 1992, UE reduced its annual Missouri electric revenues by $40 million for electric service provided on and

after January 1, 1993 and there was a moratorium on the filing of a general rate increase case or a general rate decrease case prior to September 1, 1994 by the parties. Thus, as a consequence of Case No. ER-93-52, the earliest that a rate case could take effect was 1995. 1 Mo.P.S.C.3d at 504.

UE stated that with a rate case in 1995, the net benefits to the customer would not become positive until 2006. UE contended that in all other cases the cumulative benefits would become positive at an earlier date and would always be positive if the next rate change did not take effect until 1998 or later. The Staff expected costs to exceed savings for the five-year period after the rate case moratorium (1995-1999) and believed that in UE's first rate case after the moratorium rates would increase. 1 Mo.P.S.C.3d at 504.

The total net benefits for customers according to UE would be approximately $1.4 billion. UE also contended that the net present value of customer savings ranged from $149 million (assuming a 1995 rate case) to $179 million (assuming a 2000 rate case). 1 Mo.P.S.C.3d at 504.

The Commission's Report And Order in Case Nos. EM-92-225 and EM-92-253 held that "UE's proposed sale is in the overall interest of the public despite an initial short-term detriment." 1 Mo.P.S.C.3d at 504. There is no language in the Commission's Report And Order that supports Mr. Nelson's contention in his surrebuttal testimony and the argument in AmerenUE's Reply To Staff's List of Conditions that "[f]uture and uncertain ratemaking consequences are not properly an issue in this case." (Ex. 6, Nelson Sur., p. 3, ls. 24-25; AmerenUE's Reply To Staff's List Of Conditions, pp. 8-10, 14). Mr. Nelson's contention that arguments that there is insufficient information to determine what ratemaking consequences might occur in the future are not properly an issue in this case runs counter to the Missouri

Supreme Court's recent decision in *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n,* 120 S.W.3d 732 (Mo. Banc 2003) (hereinafter referred to as AG Processing) (*Id.* at 3, ls. 20-25). In the recent *AG Processing* decision, the Court stated: "While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. [Footnote omitted.]"[1]

C. Section 393.190.1 RSMo. 2000 and Applicable Case Law

The statute under which AmerenUE seeks authority to transfer part of its franchise, works or system, necessary or useful in the performance of its duties to the public in Missouri, Section 393.190.1 RSMo 2000, does not specify a standard by which the Commission is to measure such an application. The Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission*[2] stated as follows:

> We conclude that part of the opinion [in *In Re Rahn's Estate,* 291 S.W. 120, 124 (Mo. 1926)] dealing with public policy as follows: "So it is clearly apparent, from the foregoing decisions, that it is not the function of the judiciary to create or announce a public policy of its own, but solely to determine and declare what is the public policy of the state or nation as such policy is found to be expressed in the Constitution, statutes, and judicial decisions of the state or nation."
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> The "public policy" of a state is primarily a legislative and not a judicial function, and is to be found in the Constitution and statutes, and that only in the absence of any declaration in these may it be determined from judicial decisions. 6 R. C. L. 108, 109; 25 R. C. L. 1040-1043.

Section 393.190.1, among other things, prohibits gas and electrical corporations from selling, assigning, leasing, transferring, mortgaging, or otherwise disposing of or encumbering any part of their franchise, works or system, necessary or useful in the performance of their duties to the public without first obtaining from this Commission authorization to do so.

[1] *Id.* at 736.
[2] 73 S.W.2d 393, 399-400 (Mo. banc 1934).

The Staff believes that the language of the Missouri Supreme Court in *City of St. Louis*[3] is a better statement of the standard of "not detrimental to the public" as the Staff has applied it, than the language of the Western District Court of Appeals in *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz.*[4] The Court in *City of St. Louis* stated, in relevant part, as follows:

> . . . The whole purpose of the act is to protect the public. The public served by the utility is interested in the service rendered by the utility and the price charged therefore; investing public is interested in the value and stability of the securities issued by the utility. State ex rel. Union Electric Light & Power. v. Public Service Commission et al. (Mo. Sup.) 62 S.W. (2d) 742. In fact the act itself declares this to be the purpose. Section 5251, R.S. 1929 Mo. Stat. Ann. Section 5251, p. 6674), in part reads: "The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and *substantial justice between patrons and public utilities.*" (Italics ours.)
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> The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of *Electric Public Utilities Co. v. Public Service Commission*, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public good in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'"

The meaning of the phrase "not detrimental to the public" respecting section 393.190.1 was not addressed by the Missouri Supreme Court in its opinion that was handed down on October 28, 2003 in *AG Processing* although there is language in that decision worth noting.

At the evidentiary hearing questions arose as to what dollar amount constituted a detriment to the public. Statute and case law relating to the Commission do not provide any definitive guidance. The Staff can think of only one court decision involving the Commission to

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[3] *Id.*

[4] 596 S.W.2d 466 (Mo.App. 1980).

which the Commission might look: *Love 1979 Partners v. Public Serv. Comm'n*, 715 S.W.2d 482 (Mo. banc 1986) (hereinafter referred to as *Love 1979 Partners*). In said case, UE sought, and obtained, Commission authorization, pursuant to Section 393.190.1, to sell the Ashley generating plant and the Downtown St. Louis steam loop and discontinue its operations in St. Louis as a regulated steam heating company. Among other things, the Commission rejected certain steam customers' argument that the plan of UE, Bi-State Development Agency and Thermal Resources of St. Louis, Inc. would produce an unreasonable increase in rates for steam and held that the fact of an initial rate increase was not ground for disapproving the plan. *Id.* at 485-86. The contract documents provided for initial price increases, with future increases to be controlled by a formula. *Id.* at 490.

The Missouri Supreme Court remanded with directions to sustain the order of the Commission stating, in part, as follows:

> . . . As we have said earlier, *the customers are not entitled to a guarantee of the status quo* in the furnishing of steam. The Commission could conclude that the present facilities are obsolescent and uneconomic, and that rate increases would be anticipated even if UE were to continue the operation. It is also possible that UE would seek to discontinue the furnishing of steam, without the prospect of a successor, if it continued to lose customers. The contract documents provide for initial price increases, but with future increases to be controlled by a formula. The users complain of a "ratchet" effect, in which the new rates may go up but not down. The Commission might well conclude, however, that the new level had to be guaranteed in order to provide a stable project, and that the over-all plan provides the most reliable method for assuring a continued, reliable and economical supply of steam.
>
> . . . The problems presented to the Commission involve subjective evaluations of economic factors. There is no sure method for predicting whether a project will succeed. Questions of analysis and judgment are committed by law to the decision of the Commission, which has the assistance of a technically trained staff and is better equipped to make decisions of this kind than we are. . . .

715 S.W.2d at 490; Emphasis added.

In *Re Missouri-American Water Company*, 9 Mo.P.S.C.3d 56, 59 (2000) (hereinafter referred to as *MAWC*.), the Commission stated that "[t]he Commission reads *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. At 459, 73 S.W.2d at 400 to require a direct and present public detriment." The words "a direct and present public detriment" do not appear in Section 393.190.1 or in the three Missouri Supreme Court decisions noted above, which address the application of Section 393.190.1. In fact, in the recent *AG Processing* decision, the Court stated, as previously noted above: "While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. [Footnote omitted.]"[5]

The Staff notes that the Commission referred in its *MAWC* decision to the "obvious purpose" of ensuring the continuation of adequate service to the public served by the utility as being an appropriate factor to consider in determining whether to grant the authority sought pursuant to section 393.190.1:

> . . . *"The obvious purpose of [section 393.190] is to ensure the continuation of adequate service to the public served by the utility."* State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). To that end, *the Commission has previously considered such factors as* the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the asset safely and efficiently. *See* In the Matter of the Joint Application of Missouri Gas Energy et al., Case No. GM-94-252 (*Report and Order*, issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220.[6]

Emphasis supplied.

The Staff does not concur with the meaning that some utilities are ascribing to language of the Missouri Supreme Court in the *City of St. Louis* case regarding the time frame for which

[5] *Id.* at 736.

[6] 9 Mo. P.S.C.3d at 58.

the Commission is to consider whether the proposed transaction would result in a detriment to the public. These utilities contend that this time frame is immediate, i.e., the utility need only guarantee that there must not be a detriment to the public reflected immediately in the utility's rates or quality of service. Adoption of this contention would render the standard of "not detrimental to the public interest" a nullity because a utility could structure its proposal to the Commission in a manner such that there would be no immediate increase in rates or charges and no immediate deterioration in the quality of the service. But some time after the proposed transaction was authorized by the Commission and effectuated, the utility might apply to the Commission for an increase in rates or charges, or there might be a deterioration in the quality of service, either, or both of which, were predestined by the utility maintaining the status quo for the period immediately following the action for which the Commission's authorization was sought. Thus, if the Staff and/or the Commission sought to address this matter in the context of a subsequent rate case, or other proceeding, the utility would invariably argue that the Staff's proposal and/or the Commission's action was inappropriate or unlawful because the Commission had previously authorized the action when there had been no compelling evidence produced of the likelihood of a present or direct detriment to the public.

2. Jurisdiction Under Sections 393.130.1 RSMo. Cum. Supp. 2003 and 393.150.2 RSMo 2000 and 4 CSR 240-20.015 and 4 CSR 240-40.015.

As will be addressed further herein, in that some of the relief that AmerenUE is seeking entails ratemaking determinations, the Commission has jurisdiction over such determinations and the standard is "just and reasonable," pursuant to Sections 393.130.1 RSMo. Cum. Supp. 2003 and Section 393.150.2 RSMo 2000. Also to the extent the Commission's affiliate transactions rules are applicable, the standard is in the best interests of the regulated customers, pursuant to 4 CSR 240-20.015 and 4 CSR 240-40.015.

AmerenUE refers at length to the Commission's November 20, 2003 Report And Order in *Re Missouri-American Water Co.*, Case No. WM-2004-0122, as a post- *AG Processing* case. In that case, hereinafter referred to as *Missouri-American*, Missouri-American Water Company (Missouri-American) and Warren County Water & Sewer Company (Warren County Water), among others, sought Commission authorization for Warren County Water to sell its assets to Missouri-American. Warren County Water had 393 water customers and 374 sewer customers. (Report And Order, p. 4). At page 13 of its Report And Order, the Commission notes that Section 393.190 "does not contain a standard to guide the Commission in the exercise of its discretion." The Report And Order at page 14 reflects that "the parties all agreed that because of the current state of the system, a sale of the assets will be beneficial to the ratepayers." The Commission held at page 16 of its Report and Order that Warren County Water and its customers were in a dire situation: "[it] simply cannot continue to function as a public utility" and "[i]t does not provide reliable and adequate service to its customers and a sale of the assets is the only reasonable solution."

At page 9 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE states that there is definitive criteria for the "not detrimental to the public" standard, but that is not what the Commission has said either in the *Missouri-American* case or the UtiliCorp United, Inc. (UtiliCorp) - St. Joseph Light & Power Company (SJLP) merger case. AmerenUE asserted that the Missouri Commission "applies" certain criteria: "This Commission applies the following factors when considering whether a Section 390.190.1 transaction meets the 'not detrimental' standard . . ." AmerenUE cites *the Missouri-American* case as the source of its definitive statement regarding what the criteria is evaluating for the Commission to evaluate in determining whether a proposed transaction if not detrimental to the public. What the Missouri Commission

actually said at page 14 of its Report And Order in the *Missouri-American* case is that "the Commission has previously considered such factors as . . . " Similarly, the Commission said in *Re UtiliCorp United, Inc. and St. Joseph Light & Power Co.*, 9 MoP.S.C.3d 454, 472 (2000) respecting its definition of terms: "There does not, however, appear to be any controlling authority that would firmly limit the Commission. Nevertheless, the Commission will generally adhere to those definitions in this decision."

Also at page 9 of AmerenUE's Reply To Staff List Of Conditions, AmerenUE cites the Commission's Order Approving Stipulation And Agreement And Closing Case in Case No. EM-2001-464, 10 Mo.P.S.C.3d 394 (2001), the reorganization of Kansas City Power & Light Company (KCPL) into a subsidiary of a registered public utility holding company under the Public Utility Holding Company Act of 1935, for a reference to *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d 393 (Mo. banc 1934). AmerenUE does not relate that as a result of the first on the record presentation of the Stipulation And Agreement, KCPL filed a First Amended Stipulation And Agreement. The Commission's Order Approving Stipulation And Agreement And Closing Case identifies the difference between the Stipulation And Agreement and the First Amended Stipulation And Agreement: Great Plains Power, Inc. was added as a signatory and "Section 9, relating to Combustion Turbines, has been largely rewritten." 10 Mo.P.S.C.3d at 396. While touting the lack of Commission jurisdiction, AmerenUE fails to mention that the Commission's Order Approving Stipulation And Agreement And Closing Case notes that "KCPL, GPE and GPP further stipulated, at the on the record presentation on July 5, 2001, that they will not form a marketing subsidiary" and Commissioner Gaw still dissented and filed a dissenting opinion in which he stated, in part, as follows regarding the burden of proof:

> . . . Missouri law requires that this request for reorganization of a regulated public utility be reviewed to determine whether it is detrimental to the interest of the public.[7] On this point there is a subtle but important distinction on the proper test. The majority cites ***Fee Fee Trunk Sewer*** for the proposition that this Commission "may not withhold its approval of the [reorganization] unless it can be shown that such [reorganization] is detrimental to the public interest." But that formulation of the test does not emphasize the fact that it is the applicant's burden to show that the reorganization poses no threat to the public interest. The Missouri Supreme Court has stated that it is the duty of this Commission "to see that no such change shall be made as would work to the public detriment."[8] In other words, Kansas City Power & Light should be required to show that the reorganization is not against the public interest.

At pages 9-10 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE chose to cite various quotations as follows:

> . . . To deny a public utility the right to have that say (to decide whether to dispose of their property) is to deny it an incident important to its ownership of property. State ex rel. City of St. Louis, 73 S.W.2d at 400. The law is clear that in order to deny a private, investor-owned company this important incident of property ownership, there must be "compelling evidence on the record showing that a public detriment is likely to occur" (emphasis added). Id. And, the detriment must be a "direct and present detriment" (emphasis added). Id. . . .

The above manner of citation leaves the impression that the principal judicial decision respecting Section 393.190.1, *City of St. Louis*, is the source of the above quotes. That is not the case. The above quotes are not found in *City of St. Louis* or *Fee Fee Trunk Sewer* either, which is the other judicial decision frequently cited respecting Section 393.190.1. The source of the quotations above is the previously noted *Re Kansas City Power & Light Co.*, Case No. EO-2001-464, 10 Mo.P.S.C.3d 394, the Commission's decision respecting KCPL's application for authorization to reorganize as a registered public utility holding company under PUHCA, which AmerenUE cites on page 9 before it cites twice the *City of St. Louis* decision. A review of the Commission's KCPL – Great Plains Energy, Inc. reorganization decision reveals that the source of these quotes

[7] *See State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

[8] *See State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (banc 1934).

is the Commission's decision in *Re Missouri Gas Energy*, Case No. GM-94-252, Report And Order, 3 Mo.P.S.C.3d 216, 221 (1994) and the Commission's reading of *City of St. Louis*, 73 S.W.2d at 400. 10 Mo.P.S.C.3d at 399-400. (The Commission also used this language in a Missouri-American Water Company case, *Re Missouri-American Water Company*, Case No. WM-2000-222, Report And Order, 9 Mo.P.S.C.3d 56, 59 (2000) that pre-dates the Missouri Supreme Court's *AG Processing* decision.)

Historically, the Commission has used language about a "direct" and "present" public detriment to authorize a Section 393.190.1 transaction and to put off a decision about recovery of an acquisition premium until a later rate case. However, the Commission has not used this language in every instance. The Commission did not use this language about a "direct" and "present" public detriment in either its Report And Order in the UtiliCorp-SJLP merger case[9] or in its Report And Order in the UtiliCorp – Empire District Electric Co. (EDE) merger case[10], both of which, like the Commission's *Missouri-American* decision in Case No. WM-2000-222, were issued by the Commission in 2000, but after the *Missouri-American* decision in Case No. WM-2000-222.

AmerenUE fails to note the very different approach taken by the Commission in the Union Electric Company – CIPSCO, Inc. merger case respecting conditions set by the Commission to address the "not detrimental to the public" standard. Union Electric Company (UE) filed a merger application on November 7, 1995 to merge with CIPSCO Inc. (CIPSCO). The application created Commission Case No. EM-96-149. On July 12, 1996 a Stipulation And Agreement respecting the merger was filed with the Commission. On September 5, 1996, the Commission conducted a hearing on the Stipulation And Agreement. On September 25, 1996,

[9] *Re UtiliCorp United, Inc. and St. Joseph Light & Power Co.*, Case No. EM-2000-292, Report And Order, 9 Mo.P.S.C.3d 454 (2000).
[10] *Re UtiliCorp United, Inc. and Empire District Electric Co.*, Case No. EM-2000-369, Report And Order (2000).

the Commission issued an Order Requesting Additional Information in which it stated that "the Commission is concerned that the issue of market power has not been adequately explored either in the proposed stipulation, the filed testimony, or at the hearing. Therefore, the Commission requests the parties to submit additional testimony . . ." *Re Union Electric Company*, Case No. EM-96-149, Order Requesting Additional Information, 5 Mo.P.S.C.3d 157, 158 (1996). The Commission did not request that the parties submit market power studies. The Commission identified three "points of analysis" that it wanted the parties to address with testimony in less than 40 days: (1) "relevant market," (2) "measuring market power," and (3) "mitigation of market power." *Id*. at 158-59.

In the February 21, 1997 Report And Order of the Commission approving the merger, the Commission noted that the UE witnesses testified that the time to address market power is when the decisions are made to deregulate generation supplies and permit retail competition. *Re Union Electric Company*, Case No. EM-96-149, Report And Order, 6 Mo.P.S.C.3d 28, 35 (1997). Nonetheless, the Commission found that there were sufficient facts in evidence to be concerned about the potential increase in market power from the proposed merger. To address vertical market power concerns, the Commission approved the merger conditional upon UE participating in a regional independent transmission system operator (ISO) that eliminated pancaked transmission rates and that was consistent with the ISO guidelines set out in Federal Energy Regulatory Commission (FERC) Order No. 888. *Id*. at 38. The Commission found that there were sufficient facts in evidence for it to be concerned about horizontal market power for both generation and aggregation. The Commission further held that a market power study should be performed, but that it should not prevent the merger from being completed:

> . . . the Commission will require UE and interested parties to assess the potential ability of the merged companies to exercise vertical and especially horizontal

> market power in price deregulated retail generation markets. . . . Because the level of detail and development of a study of horizontal market power will require significant effort and time, the Commission will require UE to undertake the study with the participation of Staff and OPC, with a completion date of January1, 1998. This study need not be submitted before the merger is completed.

Id. at 39.

A concurring opinion by Chairman Karl Zobrist stated that any future electric merger case brought before the Commission should include a careful analysis of market power issues. 6 Mo.P.S.C.3d at 41-42. The concurring opinion of Commissioners Harold Crumpton and M. Dianne Drainer asserted that the appropriate time for a market power study is "[i]f and when competition and restructuring become a part of the electric utility environment in Missouri, there should be an assessment of all market power issues for all electric companies in the state" (*Id*. at 43):

> With respect to the obligation placed on UE to complete a market power report in this docket, we agree with UE witness Rodney Frame that it was premature to require an analysis of the market power implications of the proposed merger, given the many uncertain and unknown changes facing the electric industry. It would be more prudent at this time to open a new docket to review the restructuring of the electric industry and retail wheeling in Missouri, in which all interested parties may participate. If and when competition and restructuring become a part of the electric utility environment in Missouri, there should be an assessment of all market power issues for all electric companies in the state. This was not the case to demand such an assessment. We should not be bureaucratic in demanding a report in this docket which will be incomplete because numerous variables needed for the future market power analysis are currently unknown. In addition, parties essential to providing a thorough market power report have not been given the opportunity to participate in the drafting of that report.

Re Union Electric Company, Concurring Opinion of Commissioners Harold Crumpton and M. Dianne Drainer, 6 Mo.P.S.C.3d at 43.

Commissioners Crumpton and Drainer in Case No. EM-96-149 also took issue with the directive that a condition of Commission authorization of the UE-CIPSCO merger was that UE become a member of an ISO:

> . . . It is premature to state that participation in an independent system operator (ISO) company is a necessary condition in order to assure that the merger is not detrimental to the public interest. Although we would encourage UE to recognize that becoming a member of an ISO is a prudent move in the current pre-competitive electric environment, it is going too far to make it a necessary condition when, in fact, there is presently no Midwest ISO established for UE to join in Missouri. Additionally, although the Commission states "that joining an ISO at 'any cost' would be unwise," it does not define the criteria that UE should use to evaluate when the ISO concept has become too costly to join.

6 Mo.P.S.C.3d at 43.

AmerenUE on page 10 of AmerenUE's Reply To Staff List Of Conditions goes on to contend that "those who assert the existence of a detriment bear the burden of going forward with compelling evidence of a likely direct and present detriment," and cites *Re Gateway Pipeline Company, Inc.*, Case No. GM-2001-585, Report And Order, 10 Mo.P.S.C.3d 520 (2001); *State ex rel. City of St. Louis v. Public Serv. Comm'n*, 73 S.W.2d at 400; Sections 386.430 and 386.490; and *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. banc 1991).

The Commission recently addressed the "not detrimental to the public" standard of Section 393.190.1 in its February 24, 2004 Report And Order in the Aquila, Inc. collateralization case, Case No. EO-2003-0465. The Commission concluded, at page 6, that "a detriment to the public interest includes a risk of harm to ratepayers." In considering the Missouri Supreme Court's decision in *AG Processing*, the Commission stated, at page 7, that the Commission should look at the reasonableness of the risk of rate increases, and that "[t]his analysis conforms to the concept that . . . '[n]o one can lawfully do that which has a **tendency** to be injurious to the

public welfare.'" (Emphasis in Report And Order; footnote omitted). The Commission further stated, at page 7, that "[t]he detriment to the public interest is the unreasonable risk of harm to Missouri ratepayers compared to the minimal benefit Aquila would receive." The Commission, by footnote, referred back to *City of St. Louis* where the Missouri Supreme Court stated that it had previously with approval quoted the definition of "public policy" found in *In re Rahn's Estate*, 316 Mo. 492, 291 S.W. 120. loc. cit. 122, 51 A.L.R. 877 taken from *Gordon v. Gordon's Adm'r*, 168 Ky. 409, 182 S.W. 220, 221, L.R.A. 1916D, 576, Ann. Cas. 1917D, 886:

> "'It is probable that a satisfactory or precise definition of public policy has never been given. The courts have, however, frequently approved Lord Brougham's definition of public policy, as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.'"

73 S.W. at 399-400.

Two days after the Commission issued its Report And Order in the Aquila collateralization case, the Commission issued its Second Report And Order in the Aquila – St. Joseph Light & Power Company merger case, Case No. EM-2000-292. Among other things, the Commission concluded, at page 8, that (1) the net original cost standard to place a value on utility plant after a merger has proven to be fair to utilities and ratepayers, (2) it would not vary from that standard and (3) the acquisition premium paid by UtiliCorp in its acquisition of SJLP was reasonable because "[a]ll evidence before the Commission indicates that UtiliCorp's acquisition of SJLP was an arms-length transaction between a competent and informed buyer and seller." The Commission's Report And Order notes that UtiliCorp cited *State ex rel. Martigney Creek Sewer Co. v. Public Serv. Comm'n*, 537 S.W.2d 388 (Mo. banc 1976), which includes a quotation from Priest, Principles of Public Utility Regulation; the quotation from Priest is purely dicta; and "[t]he quotation from the *Martigney Creek* case, while probably a fair

overall statement of the law, does not indicate that the Missouri Supreme Court has expressed any support for the recovery acquisition premium from ratepayers."

The quotation from Priest, Principles of Public Utility Regulation, Vol. 1, ch. 4, pp. 188-190, noted by the Missouri Supreme Court in its *AG Processing* decision, relates that the elements of the onerous burden of proof for the recovery in rates of an acquisition premium are that the transaction: (1) was at arm's-length, (2) received regulatory approval as being in the public interest, (3) resulted in operating efficiencies, and (4) made a desirable integration of facilities. 537 S.W.2d at 399.

At page 12 of AmerenUE's Reply To Staff List Of Conditions, AmerenUE asserts: "there is no quantified, or quantifiable, central and essential issue before this Commission for determination. In short, *AG Processing* does not apply to speculative, future and unquantified issues, as this Commission has recognized in *Missouri-American, supra*, decided just a few months ago." AmerenUE ignores the very language of the *AG Processing* decision, which states, in part:

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.

120 S.W.3d at 736; Footnotes omitted.

In an attempt to argue the inapplicability of the Missouri Supreme Court's AG Processing decision, AmerenUE seeks, at pages 12 and 14 of AmerenUE's Reply To Staff's List Of

Conditions, to make light of the significance of the dollar value and impact of the proposed Metro East transfer compared to the significance of the dollar value of the merger premium in the UtiliCorp-SJLP merger. AmerenUE seeks to equate the significance of the dollar value of the proposed Metro East transfer with the dollar value of the assets and merger premium in the *Missouri-American* case. AmerenUE ignores the direct testimony of one of its own witnesses, Mr. Richard A. Voytas, Manager of the Corporate Analysis section in the Corporate Planning Department of Ameren Services Company whose Schedule 2 to his direct testimony shows that the total rate base and revenue requirement associated with the proposed Metro East transfer is $195.5 million and $114.8 million, respectively. (Ex. 9, Voytas Dir., Sched. 2). Mr. Craig D. Nelson, Vice President - Corporate Planning of Ameren Services Company states in his direct testimony that AmerenUE provides service to approximately 62,000 electric and 18,000 gas customers in Illinois. (Ex. 5, Nelson Dir., p. 3, ls. 18-19). (Although Mr. Nelson's direct testimony in this proceeding reflects that he is an officer of Ameren Services, his direct testimony does not reflect that he is Vice President of Central Illinois Public Service Company, d/b/a AmerenCIPS (AmerenCIPS), the utility receiving the Metro East transfer from AmerenUE.)

Mr. Nelson in his surrebuttal testimony states that AmerenUE's position respecting the proposed Metro East transfer is consistent with the transfer of customers and facilities between AmerenUE and electric cooperatives, citing *Re Union Electric Co. and Gascosage Electric Cooperative*, Case No. EO-2002-178, Report And Order (2002), as an example. (Ex. 6, Nelson Sur., p. 9, ls. 7-11). The Staff would note that size of these transfers of customers and facilities between AmerenUE and the electric cooperatives is not comparable. For example, Case No. EO-2002-178 involved the transfer of 1200 electric customers and certain substations, electric

distribution facilities, easements and other assets of AmerenUE to Gascosage Electric Cooperative. (Ex. 38, pp. 2, 7).

At page 13 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE further attempts to distance the significance of the proposed Metro East transfer from the significance of the merger premium in the UtiliCorp-SJLP merger case by twice referring to the "financial condition" of Aquila and asserting that "it is reasonable to conclude that there could have been an effect on service to be provided by Aquila to its newly acquired customers, given Aquila's financial condition, if recovery of the merger premium was not allowed in rates." Nowhere in the Missouri Supreme Court's *AG Processing* decision is there any reference to Aquila's financial condition. Furthermore, at the time of the UtiliCorp-SJLP merger case and the merger itself, UtiliCorp/Aquila was not, to use the term at page 14 of AmerenUE's Reply To Staff's List Of Conditions, "financially troubled." Next, since the Commission authorized the merger, but did not decide the UtiliCorp-SJLP merger premium issue and rejected UtiliCorp's proposed Regulatory Plan, recovery of the SJLP merger premium was not allowed in the SJLP rates. Finally, AmerenUE's Reply To Staff's List Of Conditions argues at pages 12 and 14 that the fact that AmerenUE is in a rate moratorium until July 1, 2006 is another major distinction between the proposed Metro East transfer and the UtiliCorp-SJLP merger. Although the Commission rejected the UtiliCorp Regulatory Plan, which included a five-year SJLP rate moratorium, among other things, Aquila did not seek a rate increase for its Aquila Networks - Light & Power division, the former SJLP, until it filed Case No. ER-2004-0034 on July 3, 2004, approximately 42 months after the UtiliCorp-SJLP merger was consummated. *Re UtiliCorp United, Inc*., Case No. EM-2000-292, Report And Order, 9 Mo.P.S.C.3d 454, 473-75 (2000).

3. AmerenUE Filed Its Metro East Transfer Case After AG Processing Decision Handed Down By Western District Court of Appeals

The Missouri Western District Court of Appeals handed down its initial opinion in AG Processing, Inc.'s appeal of the Commission's authorization of the merger of UtiliCorp and SJLP on April 22, 2003 four months before AmerenUE filed its Application on August 25, 2004 for the Metro East transfer. The Western District Court of Appeals modified its opinion on May 27, 2003, but still reversed the Commission and remanded. The Missouri Supreme Court granted transfer on July 1, 2003 and handed down its opinion on October 28, 2003 reversing the Commission and remanding. Among other things, the Missouri Supreme Court held in *AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003) that "[t]he PSC erred when determining whether to approve the merger because it failed to consider and decide all necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium." AmerenUE filed the instant case, Case No. EO-2004-0108, on August 25, 2003; filed its direct testimony and schedules on September 17, 2003; and filed its surrebuttal testimony and schedules on March 1, 2004. In its rebuttal testimony and schedules filed on January 30, 2004, the Staff identified, among other things, that Ameren UE had failed to include in its direct case any economic, least cost analysis of the transfer of certain transmission facilities and natural gas facilities and agreements to AmerenCIPS. (Ex. 14, Proctor Reb., p. 19, l. 21 – 20, l. 7; Ex. 18, Sommerer, p. 3, ls. 16-19 and p. 8, ls. 11-22).

Even though Mr. Nelson's surrebuttal testimony was filed on March 1, 2004, it reads very much like the arguments made by: (1) UtiliCorp United, Inc. (UtiliCorp) regarding its Regulatory Plan for its proposed merger with St. Joseph Light & Power Company (SJLP), which Regulatory Plan included a five year rate case moratorium for SJLP; and (2) the Commission in its Report And Order authorizing the UtiliCorp-SJLP merger, rejecting the Regulatory Plan and

not addressing the issue of the recoupment of the acquisition premium. Mr. Nelson states at page 3 of his surrebuttal testimony, in part, as follows:

> Staff should wait until the next rate proceeding when all of the Company's costs can be examined in a comprehensive and thorough manner, as was the case in the Settlement of EC-2002-1. If ratemaking impacts do occur, or are alleged to occur, then the Commission and any other proper party will, at the appropriate future point in time in a ratemaking proceeding, have an opportunity to address those ratemaking impacts. Any such ratemaking proceeding would not, however, occur until at least 2006 due to the current rate moratorium in effect as a result of the Commission's order in the EC-2002-1 case. In the meantime, Missouri customers are not harmed.

4. Authority of the Commission Not Limited As Contended by AmerenUE

At page 5 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE cites *State ex rel. General Tel. Co. v. Public Serv. Comm'n*, 537 S.W.2d 655 (Mo. App. 1976) (*General Telephone*) as a limitation of on the Commission's power. *General Telephone* is significant because the Western District Court of Appeals recognized that the Commission had authority to examine and make adjustments respecting affiliate transactions implied from the powers otherwise expressly granted the Commission. *Id.* at 659. The Court cited as the basis for the Commission's jurisdiction Sections 392.240.1 and 392.270.1 and *State ex rel. City of West Plains v. Public Serv. Comm'n*, 310 S.W.2d 925, 228-29 (Mo. 1958). The counterparts to this authority of the Commission respecting electrical corporations are Sections 393.230, 393.260 and 393.270, and *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 80 (Mo. 1960).

In a case contemporaneous with *General Telephone*, *Re United Telephone Co.*, Case No. 18,264, 20 Mo.P.S.C. (N.S.) 209, 214 (1975), the Commission clearly indicated its intention to closely scrutinize utilities operating in Missouri that are part of a holding company:

> The policy which this commission enunciates in this case is that it will not shut its eyes to the facts of such pyramiding and simply look at the legal entity, the Missouri Operating company, in determining the level of expense, rate base, revenues, and tax consequences when it is setting the *level of rates* for the

> Missouri intrastate operating company. This commission recognizes a clear and present danger that affiliated interests can be used to defeat regulation, that to ignore the impact of these affiliated interests is to shirk the commission's duty and responsibility to examine and consider all facets of a regulated utility's operations when the commission engages in the ratemaking process.

The Commission reaffirmed this position in its Report And Order in *Re United Telephone Co.*, Case No. TR-80-235, et al., 24 Mo.P.S.C. (N.S.) 152, 167-68 (1981).

Regardless of how limited Ameren seeks to characterize the Commission's power, there is case law to the contrary. In a decision issued soon after the Public Service Commission Act became law in 1913, the Missouri Supreme Court, in *State on inf. Barker ex rel. Kansas City v. Kansas City Gas Co.*[11] commented on the scope of the Public Service Commission Act as follows:

> That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to wit: That a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that state regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and, to be effective, must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock, or bond, or note issued as surely is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust willy nilly.

In *State ex rel. Electric Co. of Mo. v. Atkinson*[12] the Missouri Supreme Court noted that "protection of the public" is the "spirit " of the Public Service Commission Act:

> . . . Let it be conceded that the act establishing the Public Service Commission, defining its powers and prescribing its duties, is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition.

[11] 254 Mo. 515, 163 S.W. 854, 857-58 (Mo. 1913).

[12] 275 Mo. 325, 204 S.W. 897, 899 (Mo. banc 1918).

> The spirit of this policy is the protection of the public. The protection given the utility is incidental. . . .

The United States Supreme Court has noted in recent years that "[t]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric Coop. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 377, 103 S.Ct. 1905, 1908, 76 L.Ed.2d 1 (1983).

The Missouri Supreme Court in *State ex rel. Chicago, Rock Island & Pacific R.R. Co. v. Public Service Commission*[13] stated that the Commission's supervision of public utilities in Missouri is referable to the police power of the state, is continuing, reaches every phase of the operation of any utility and is subject to change in the public interest as the Commission determines in its discretion:

> . . . The public service commission is essentially an agency of the Legislature and its powers are referable to the police power of the state. It is a fact-finding body, exclusively entrusted and charged by the Legislature to deal with and determine the specialized problems arising out of the operation of public utilities. It has a staff of technical and professional experts to aid it in the accomplishment of its statutory powers. Its supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest. . . [14]

Finally, there is no statutory or case law prohibition of the Commission authorizing a transaction pursuant to Section 393.190.1 subject to conditions. *See State ex rel. Laclede Gas Co. v. Public Serv. Comm'n,* 535 S.W.2d 561, 566, 567 n.1 (Mo.App. 1976); Sections 386.040 and 386.250(7) RSMo. 2000. The utility can accept the conditions and engage in the transaction or reject the conditions and not engage in the transaction.

[13] 312 S.W.2d 791 (Mo. banc 1958).

[14] 312 S.W.2d at 796.

II. LEAST COST ANALYSIS

1. History of the Metro East Transfer

At page 4 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE states that "the Commission approved the first effort to transfer these Illinois assets in the course of approving the UE-CIPSCO merger in Case No. EM-96-149." AmerenUE also indicates that the transaction proposed in the UE-CIPSCO merger case is not the same transaction for which AmerenUE is seeking the Commission's authorization in this case. UE's Application in Case No. EM-96-149 requested that the Commission issue its Order authorizing UE to transfer to CIPS generally constitute UE's Illinois-based franchise, works or system necessary or useful in the performance of UE's duties to the public with respect to the provision of retail electric and gas service in Illinois, "excluding any of UE's transmission or generating assets located in the State of Illinois." (Tr. 368, ls. 8-22, Vol. 6).

Both Mr. Nelson and Mr. Voytas identified that Ameren made its second filing with the Missouri Commission for authorization for a form of the proposed Metro East transfer now before this Commission in October 2000 and withdrew the filing in May 2001. (Tr. 371, ls. 13-21, Vol. 6; Ex. 10, Voytas Dir., p. 20, ls. 5-7). The filing was assigned Case No. EM-2001-233. On February 6, 2001, AmerenUE filed a Request To Hold Procedural Schedule In Abeyance which stated, in part, that the supplemental direct testimony to be filed by AmerenUE required significant effort by AmerenUE witnesses once various forecasts were developed, the forecasts had not been finalized, AmerenUE could provide no assurance of an exact date when the work would be completed and testimony could be filed, so AmerenUE requested that the procedural schedule be held in abeyance. (Tr. 1635, l. 9 – 1637, l. 6, Vol. 17).

AmerenUE filed on March 29, 2001 in Case No. EM-2001-233, a Request For Leave To Withdraw Application For Transfer Of Assets which stated that "the Company and AmerenCIPS have decided not to proceed with the proposed transfer. . . . Alternative plans for meeting AmerenUE's capacity energy needs for the summer of 2001 have already been commenced. Additional plans for later years are being developed and will be shared with the Staff and the Public Counsel in future meetings." (Tr. 1639, ls. 2-24, Vol. 17).

Mr. Nelson testified that "[s]ometime during the first part of 2003, the company decided to take the third run at the Metro East transfer." (Tr. 386, ls. 11-13, Vol. 6). Mr. Nelson further said that although Mr. Voytas' testimony addresses the least cost alternative for AmerenUE's electric operations (except for a least cost analysis of the transfer of transmission facilities to AmerenCIPS, which Ameren has performed, only at the prompting of the Chair to the Commission), it does not address the least cost alternative for AmerenUE's natural gas operations proposed to be transferred to AmerenCIPS. In fact, he states that there is no formal least cost analysis performed by Ameren on the gas side because "we think this transfer is so obviously in favor of Missouri retail that we didn't think it was necessary." (Tr. 389, ls. 11-13; Tr. 388, l. 24 – 389, l. 8, Vol. 6; Tr. 534, l. 11 – 535, l. 1; Ex. 18, Sommerer, p. 3, ls. 16-19 and p. 8, ls. 11-22).).

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The date June 13, 2003 is significant because the Ameren Corporation Board of Directors approved proceeding forward with the proposed Metro East transfer before the least cost analysis had been completed. Mr. Voytas testified that the least cost "analysis was ongoing and it was completed by -- by the end of July, early August of 2003." (Tr. 1603, ls. 18-20, Vol. 17). Also,

it should be noted that although the Ameren Corporation Board of Directors authorized the proposed transfer both in 2000 and 2003, the only AmerenUE and AmerenCIPS Board actions occurred in 2000.

2. Purpose of the Least Cost Analysis

Dr. Michael S. Proctor filed rebuttal testimony regarding the least cost analysis performed by AmerenUE. The least cost analysis is separate and apart from other issues in this case, in particular the allocation of liabilities issue, which have caused the Staff to recommend conditions to the Commission should the Commission venture into authorizing the transfer. AmerenUE is not proposing to transfer any of its electric generating assets or purchased power contracts. (Ex. 14, Proctor Reb., p. 2, l. 22 – p. 3, l. 8). AmerenUE's least cost analysis compares the costs of meeting its long-term capacity and energy needs by (1) AmerenUE retaining all of its existing generating capacity, but transferring its Metro East electric customers and transmission and distribution facilities to AmerenCIPS to (2) AmerenUE keeping its Metro East electric customers and transmission and distribution facilities but adding combustion turbine generator capacity. (*Id.* at 3, ls. 9-18). The purpose of the comparison is to determine which of the two options is the least cost, resulting in the other alternative being a detriment to AmerenUE's Missouri retail ratepayers. It should be noted that AmerenUE is seeking authorization to transfer not just electric transmission and distribution facilities in Illinois and the obligation to provide service to its Illinois retail electric customers, it is also seeking to transfer its natural gas distribution facilities in Illinois and the obligation to provide service to its Illinois retail natural gas customers.

a. Correctness of Comparing Metro East Transfer Proposal to Adding Combustion Turbine Generator Capacity Alternative

Regarding Dr. Proctor's rebuttal testimony, Mr. Voytas noted in his surrebuttal testimony that "[t]here are more aspects of AmerenUE's least cost analysis on which we agree than disagree. More importantly, we tend to agree on issues of substance." (Ex.10, Voytas Sur., p. 3, ls. 1-2). Dr. Proctor noted that through previous resource planning studies, AmerenUE determined that without the proposed Metro East transfer, the least cost method for AmerenUE meeting the reliability requirements for serving its electric load is to add combustion turbine generator capacity. (Ex. 14, Proctor Reb., p. 3, ls. 18-21). In his surrebuttal testimony, Mr. Voytas identified as one of the issues of substance where he and Dr. Proctor agreed was that "[a]bsent the Metro East transfer, AmerenUE's least cost planning analyses indicate that AmerenUE's least-cost technology for meeting the reliability requirements for serving its existing load is simple cycle combustion turbine generators ('CTGs')." (Ex.10, Voytas Sur., p. 3, ls. 6-9).

b. Closeness or Thinness of Ameren's Least Cost Analysis Results

Dr. Proctor related in his rebuttal testimony that the results of the analysis performed by Mr. Voytas of Ameren Services was that on a present value basis, the estimated cost of the Metro East transfer is $418.4 million in present value ($43.1 million per year on a levelized annual cost basis) compared to an estimated cost of $429.4 million in present value ($45.5 million per year on a levelized annual cost basis) for adding 597 MWs of combustion turbine capacity necessary without the Metro East transfer. (Ex. 14, Proctor Reb., p. 4, ls. 3-5 and p. 10, l. 22 - p. 11, l. 13). Dr. Proctor stated that the difference of $11 million in present value over a 25-year period is "extremely small," further stating that "[w]hen expected costs are this close, it is very important to take a critical look at the 'depth' of the analysis, including the assumptions that went into the calculations." (*Id.* at 4, ls. 6-10). In fact, in his surrebuttal testimony, Mr. Voytas identified as

one of the issues of substance where he and Dr. Proctor agreed was that "[t]he present value of the economic benefit of the Metro East transfer as compared to simple cycle CTGs, under the assumption that the JDA is not revised, is relatively small." (Ex.10, Voytas Sur., p. 3, ls. 10-12). This statement contradicts AmerenUE's Reply To Staff's List Of Conditions at page 27 where AmerenUE asserts, in response to the Staff's recommendation that additional least cost analyses are warranted, that "[t]he record in this case is filled with evidence showing significant benefits."

Chair Gaw asked Dr. Proctor whether, bottom line, Missouri's AmerenUE's retail electric customers would save money because of the proposed transaction. Dr. Proctor responded that the study that Ameren had produced, not including a transmission revenue requirement study: "shows a very, what I would call slight savings, 2.4 million per year under their initial proposal from the transfer" (Tr. 1219, ls. 1-3, Vol. 13); "2.4 million is a -- is minute. It's thin. Whatever word you want to use to describe it, you know, it's -- they're very close to being equal" (Tr. 1219, ls. 18-20, Vol. 13); "I think what happens is other elements start taking on -- for instance, the JDA or the other issue that we have about liabilities, those start taking on a bigger -- they take on a bigger role because -- you're about dead even between the various alternatives. So that these other things start then taking on a larger and larger role" (Tr. 1220, ls. 6-12, Vol. 13). In addition to the issue on liabilities mentioned by Dr. Proctor, no AmerenUE retail natural gas revenue requirement study was performed by Ameren to determine the effect of the proposed Metro East transfer on AmerenUE's retail natural gas revenue requirement. (Ex. 18, Sommerer, p. 3, ls. 16-19 and p. 8, ls. 11-22). Mr. Nelson testified that Ameren did not believe that such a study was necessary or relevant. (Tr. 388, l. 24 - 389, l. 13, Vol. 6; Tr. 419, ls. 7-14; Tr. 534, l. 11- 535, l. 1, Vol. 7).

3. Ameren's Least Cost Analysis Is Flawed

Dr. Proctor, as he had in his prepared rebuttal testimony, related, when on the witness stand, that AmerenUE's least cost study was flawed:

> **Gaw:** Dr. Proctor, would you assume that the company's argument would give you a reasonable best-case scenario for their position?
>
> **Proctor:** No, I think - - and we'll get into this in least cost.
>
> **Gaw:** All right.
>
> **Proctor:** But -- in that part of the hearing, but my position is that they've mixed apples and oranges in their analysis.
>
> **Gaw:** So you think their analysis is flawed?
>
> **Proctor:** Yes.
>
> **Gaw:** Are you concerned that the best-case scenario for an outcome here may be the company's figures, but that a worst-case scenario might be far worse than an even split?
>
> **Proctor:** I haven't done that kind of sensitivity analysis, but I would have hoped that the company would have done that kind of sensitivity analysis in what they presented, and they did not.

(Tr. 1220, l. 13 – Tr. 1221, l. 6, Vol. 13).

Even with the amendment of the JDA that AmerenUE stated that it would agree to attempt to effectuate if forced to and the revenue requirement analysis respecting the transmission facilities transfer, which was belatedly performed by AmerenUE at the prompting of Chair Gaw, Dr. Proctor's recommendations did not change. (Affidavit of Michael S. Proctor, filed on April 27, 2004, p. 6, ¶ 10). The reasons why Dr. Proctor's recommendation has not changed follow below.

a. Inappropriate Use of a Test Year Analysis by Ameren

Dr. Proctor stated that Ameren Services used a test year of the 12 months ending December 31, 2002 for its calculation of the costs of the Metro East transfer. The fixed

component of the costs associated with the AmerenUE generating assets that would otherwise have been paid in rates by the Metro East service area customers (both the direct costs as well as the indirect costs) remains with AmerenUE even after the Metro East transfer, but the variable component of the costs was adjusted by Ameren to reflect the savings AmerenUE expects to receive from the transfer of the former AmerenUE Illinois retail load to AmerenCIPS. (Ex 14, Proctor Reb., p. 6., ls. 15-21 and p. 8, ls. 1-5).

With the Metro East transfer, AmerenUE serves less native load, i.e., less AmerenUE load, each hour, which results in lower cost generation being available to serve the AmerenUE native load, which after the proposed transfer is the AmerenUE load in Missouri. Thus, the incremental savings in variable production costs was calculated by Ameren as the average cost of serving the load transferred to AmerenCIPS, plus the savings from lowering the cost of generation to serve the AmerenUE load in Missouri. (Ex 14, Proctor Reb., p. 7., ls. 1-9).

Based on test year December 31, 2002 data, Ameren Services extrapolated over a 25-year period the savings in variable production costs that it expects to receive from the transfer in the first year after the transfer. (Ex 14, Proctor Reb., p. 4, ls. 13 - 16). Ameren Services did not use budget forecasts for any of the direct or indirect costs associated with the transfer. Thus, the analysis performed by Ameren Services is a one-time snapshot of the expected savings from the first year after the transfer extrapolated over a 25-year period. (*Id.* at 7, ls. 17-20 and at 8, ls. 18-19). Dr. Proctor testified that "[t]he one-time snapshot approach is not the preferred approach to evaluate the economics of this aspect of the Metro East transfer." (*Id.* at 7, ls. 20-21). Dr. Proctor further testified that Ameren Services factored into its test year estimate, but did not determine whether load growth over time would change its estimate of variable cost savings from the test year of the Metro East transfer, due to greater levels of base load capacity being

available to either serve the remaining AmerenUE customers or be sold in the wholesale spot market when it is not needed to serve that load. (*Id.* at 9, ls. 5-10).

At page 28 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE states that "[i]t is quite obvious that if the Company's load grows, the incremental load will be served by low cost existing base load generating units under the transfer scenario rather than by high cost gas fired peakers under the CTG scenario. That fact itself confirms that the level of fuel saving projected in the Company's existing least-cost analysis will be maintained at the expected level, and would likely increase. Additional formal analyses are not needed to 'prove' this rather straightforward point." The Staff disputes that the argument presented by AmerenUE in its response proves anything. AmerenUE's response offers a poor excuse, if an excuse at all, for not performing additional analysis and itself is not "proof" that such analysis is not needed.

b. Inconsistencies in Ameren's Calculation of Variable Cost Savings

Dr. Proctor identified an additional concern relating to using the one-year snapshot approach calculation of savings in variable production expense, when looking at the alternative of the proposed Metro East transfer not occurring and instead AmerenUE adding combustion turbine generators, against which Ameren Services made its calculation of savings in variable production costs. Since the combustion turbine generators were not needed for the 12-months ending December 31, 2002 test year, Ameren Services did not include them in its calculation of generating costs for the no transfer case. Based on Ameren Services responses, it was Dr. Proctor's understanding that had Ameren Services included combustion turbine generators in its test year calculations, the results would be virtually the same because, not being needed to serve load, the combustion turbine generators would not run any appreciable amount during the calendar year 2002 test year. (Ex 14, Proctor Reb., p. 9, ls. 13 - 22). Nonetheless, Dr. Proctor

testified that "[h]ad Ameren Services made its calculations for multiple years that included load growth, then the combustion turbines would have been needed, and in later years, would have had some effect on the calculation of generating costs and generating cost savings." (*Id.* at 9, l. 22 – p. 10, l. 2).

c. Arbitrary Assumptions in Ameren's Calculation of Costs for Combustion Turbine Generator Alternative

Dr. Proctor further related his concerns with the cost analysis that Ameren Services had performed respecting the combustion turbine generators alternative to the Metro East transfer. His concerns may be summarized as follows regarding Ameren Services analysis of the combustion turbine generators alternative for AmerenUE meeting its long-term capacity and energy needs: (1) the Ameren Services analysis assumed that without the Metro East transfer, the full 597 MWs of combustion turbine generator capacity would be needed from the very first year, when AmerenUE forecasts show that the combustion turbine generator capacity could be phased-in over a three-year period; and (2) the Ameren Services "mark to market" analysis assumed that AmerenUE would run its combustion turbine generators any time the spot market price of electricity was greater than the incremental cost of running the combustion turbine generators, but only included 50% of the profit from doing so as an offset to the capacity and other fixed costs of the combustion turbines. Specifically, the mark to market analysis is not consistent with AmerenUE's calculation of costs savings for the Metro East transfer (as indicated above, Ameren Services did not include in its analysis the costs of running the combustion turbine generators to meet load in the non-Metro East transfer scenario when making its calculation of savings in variable production costs), and arbitrary in its profit calculations when it assumed that the combustion turbine generators would only sell 50% of the power into the spot-

market when the spot market price of electricity was greater than the incremental cost of running the combustion turbine generators. (Ex 14, Proctor Reb., p. 9, l. 16 - p. 13, l. 12).

At page 28 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE states that "Dr. Proctor's second suggestion is that the Company analyze for the next five years potential profits from off-system sales generated by running the gas peakers that would have to be built if the transfer did not occur. Presumably, Dr. Proctor's theory is that the analysis could show large profits from gas peakers which in theory might make them a more attractive option relative to completing the Metro East transfer. This analysis is also unnecessary and counterintuitive." What AmerenUE's response fails to take into account is the Staff's concern with consistency in comparisons of costs between the Metro East transfer and the combustion turbine generators alternatives. When asked whether it would be appropriate to compare additional interchange sales profits in both the combustion turbine generators and the Metro East transfer alternatives, AmerenUE witness Mr. Voytas testified that "[i]t would be appropriate." (Tr. 1619, l. 15 – 1620, l. 11, Vol. 17)

At page 29 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE further argues that "there would likely be few times when electricity prices are high enough to justify running the gas peakers for the purpose of producing power for resale. In other words, the relatively high cost of natural gas will keep the peakers from being 'in the money' most of the time. In short, neither the Company nor the Commission needs further analysis or information to reach this reasonable conclusion." Not only is this argument incorrect because it does not take into account the relationship between natural gas prices and electricity prices, it is exactly the opposite of the results that AmerenUE entered into evidence in the direct testimony of its witness Mr. Voytas. On Schedule 4 attached to Mr. Voytas' direct testimony, the line labled "Margin on

Energy" shows increasing profits to AmerenUE from sales of electricity from the combustion turbine generators over the five years for which Mr. Voytas performed a mark-to-market analysis. Over this period, both natural gas prices and electricity prices were assumed to be increasing. AmerenUE's argument is simply incorrect.

d. In Its Comparisons of the Two Alternatives AmerenUE Inappropriately Mixed Test Year and Multi-Year Analyses

Dr. Proctor testified that Ameren in its least cost analysis inappropriately mixed apples and oranges when looking at the Metro East transfer option versus the combustion turbine generators option. By this statement he meant that regarding the Metro East transfer, Ameren looked at a one-year test year analysis but on the combustion turbine generator side Ameren looked at a multi-year analysis. (Tr. 1271, ls.7-14, Vol. 13).

AmerenUE witness Mr. Voytas agreed with Dr. Proctor that his least cost analysis included a mix of single test year and multi-year analysis. (Tr. 1625, ls.19-22, Vol. 17). Mr. Voytas further testified that Ameren's least cost analysis for the proposed Metro East transfer did not include a factor for cost escalation for fixed operations and maintenance (O&M) costs for the 25-year study period. Mr. Voytas could not remember whether the least cost analysis for fixed O&M costs for the combustion turbine generators alternative included a 2% escalation rate. (Tr. 1621, l.21 – 1623, l. 25, Vol. 17). Mr. Kind testified that he verified that Ameren had escalated the level of O&M costs for the combustion turbine generators option by a 2% factor over the 25-year study period. Mr. Kind stated that this was another example of the lack of good correspondence of the analytical methods that were used by Ameren for examining the Metro East transfer option and the combustion turbine generators option. (Tr. 1819, ls. 8-25, HC Vol. 18).

e. Effect of Choice of Reserve Margins in Least Cost Analysis

The reserve margin that Ameren used in its least cost analysis in the instant proceeding should be noted because of the effect on the analysis performed. Reserve margin is the amount of unused available generating capability that can be applied to the system at peakload, expressed as a percentage of total capability. Mr. Nelson relates in his direct testimony at pages 5, line 21 to page 6, line 1 that Ameren made a filing with the Illinois Corporation Commission in Docket Nos. 00-0650 and 00-0655 (Consolidated) for authorization to transfer AmerenUE's retail electric business from AmerenUE to AmerenCIPS. In an Order issued on December 20, 2000 the ICC authorized the transfer and stated at pages 9-10 that AmerenUE, AmerenCIPS and AEM each maintain a minimum planning reserve margin of ** ____ ** Ameren treats its use of a ** _____ ** as Highly Confidential at page 2, line 10 of Mr. Voytas' direct testimony. (Ex. 9). ** _____

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** He also stated that he did not believe that MAIN imposed any financial penalties if a utility did not meet the reserve margin set by MAIN. (Tr. 1642, ls. 13-21, HC Vol. 18). Dr. Proctor indicated that reserve margin from a reliability and MAIN's perspective is a function of the Ameren system as a single control area meeting the MAIN suggested planning reserve margin, not a function of AmerenUE and AEG separately meeting the MAIN suggested planning reserve margin. He related that MAIN has a suggested planning reserve margin, but there are no penalties associated with the MAIN suggested planning reserve margin not being met. (Tr. 1808, l. 10 – 1809, l. 8; Tr. 1788, l. 25, - 1790, l. 9, Vol.17).

Specifically regarding what concerns are there respecting Ameren, AmerenUE, AmerenCIPS, AEG or AEM meeting load, if the Metro East transfer is not approved, Mr. Nelson testified that there are no concerns:

> **Micheel:** If the transfer's not approved, would AEM and AEG have concerns about the ability to -- ability of Joint Dispatch resources of UE and AEG to meet the load served by AEM and AmerenUE?
>
> **Nelson:** No.
>
> **Micheel:** And why wouldn't they?
>
> **Nelson:** On an overall basis, Ameren has enough capacity to meet the overall Ameren load and a 15 percent reserve margin.
>
> **Micheel:** Wouldn't –
>
> **Nelson:** It's just a transfer from one bucket to another, one company to another. Overall, we're fine.

(Tr. 856, ls. 7-18, Vol. 9).

AmerenUE states in paragraph 2, pages 1-2, of its October 27, 2003 filing that if no Commission order is issued authorizing the transfer in the first quarter of 2004, "it *might be required to consider* other alternatives for the acquisition of capacity and energy for the summer of 2004. This would impose an increased administrative cost on AmerenUE and *may possibly result* in the acquisition of unnecessary resources." (Emphasis supplied.) On October 28, 2003 at an Edison Electric Institute Financial Conference, Mr. Gary L. Rainwater, President and Chief Operating Officer – Ameren Corporation, President and Chief Executive Officer – AmerenCIPS, President and Chief Executive Officer – AmerenCILCO, and Mr. Warner Baxter, Executive Vice President – Chief Financial Officer – Ameren Corporation, made a presentation. Mr. Baxter stated, in part, as follows regarding the financial and operational effect of AmerenUE's proposed Metro East transfer to AmerenCIPS:

> . . . Another piece of transfer business that we're in the process of doing is transferring our service territory from AmerenUE, which is principally our Missouri operating affiliate, all into Illinois. That's really done for two reasons one is to simplify our jurisdictional matters trying to keep UE very simply a Missouri utility . . . At the same time, it also will facilitate the generation transfer [of Pinckneyville and Kinmundy plants from AEG to AmerenUE] that we just talked about. Illinois will no longer have approval authority associated with that transaction. Again what we hope to do is to have both the service territory transfer as well as the generation transfer sometime in place by the summer, by next summer. *Key point associated with all this however is that from the financial standpoint it really doesn't matter when those transfers are done because we are in a rate moratorium through the middle at least 2006 if not through the end of 2006. So we have some time, we operate our plants on some sort of a joint dispatch basis so it is not going to have any financial impact or operating impact. But ultimately when want to get these things done before our next rate case is in the state of Missouri as well as in Illinois. . . .*

(Emphasis supplied; Ex. 12, Kind Reb., p. 4, l. 12 – p. 5, l. 5; Staff's Response To AmerenUE's Proposed Procedural Schedule, ¶ 3, pp. 3-4, filed November 6, 2004).

4. Ameren's Surrebuttal to Staff's Contention of Flawed Analysis and Staff's Response

Mr. Voytas relates in his surrebuttal testimony that in January 2002 AmerenUE met with the Staff and OPC to present its evaluation of supply options for the period 2002-2011 and the "Staff Division Directors indicated a preference for the Metro East transfer to meet a large portion of AmerenUE-Missouri's supply requirements." (Ex. 10, Voytas Sur., p. 20, ls. 9-11). Mr. Voytas further commented that "AmerenUE met with Staff and OPC extensively in January and February 2002 to analyze the economics of the Metro East transfer." (*Id.* at 20, ls. 11-12).

Mr. Voytas also refers in his surrebuttal testimony to these January and February 2002 meetings when he responds to Dr. Proctor's criticism of the one-time snapshot approach that he used in his analysis:

> **Q.** Have you used what Dr. Proctor refers to as the "one-time snapshot" approach in prior discussions with Staff on the Metro East transfer proposal?
>
> **A.** Yes. In January and February 2002, AmerenUE, Staff and OPC collaboratively worked together to formulate an accounting based approach, which Dr. Proctor now refers to as the one-time snapshot approach, to analyze the economics of the Metro East transfer relative to the option of installing CTGs. Dr. Proctor was an active participant in that collaborative effort. At the time there was consensus that this approach was acceptable.
>
> **Q.** What did you do differently for the least cost analysis of the Metro East transfer in this proceeding as compared to the 2002 Metro East transfer analysis with Staff and OPC?
>
> **A.** Nothing. We copied the same spreadsheet models, updated the data, and made a correction for the allocation of interchange sales margins after the Metro East load was transferred.
>
> **Q.** Does it appear that Dr. Proctor is holding AmerenUE to a higher standard now?
>
> **A.** Definitely, or at least to a standard different from what he had accepted earlier.

(Ex. 10, Voytas Sur., p. 10, l. 21 – p. 11, l. 15).

Dr. Proctor has a very different recollection of what occurred during January, February and March 2002. (Tr. 1806, ls. 4-19 and 1806, l. 25 – 1807, l. 23, Vol. 17). He stated that he did not recall any discussions regarding the type of analysis that AmerenUE should perform for a future filing respecting a Metro East transfer proposal. He related that what was being focused on was responses to RFPs for power and AmerenUE's analysis of the responses. Since the responses did not necessarily meet all of AmerenUE's needs, AmerenUE was looking at combining purchased power with a tolling operation or a Metro East transfer. The Staff was told that if AmerenUE was to enter into a contract with an outside party for purchased power, the Staff's response, as to which of the options it preferred, was needed as quickly as possible. (*Id.*). Dr. Proctor said that he did not remember a discussion about the content of the analysis of a Metro East transfer:

> . . . I do not remember a discussion about the content of the analysis of the Metro East transfer. What I remember the focus being on was whether or not they should go forward with this -- this contract for power. And that's what we were responding to.
>
> I don't recall at any time that we sat down and said, Is this the best and right kind of analysis, but – but basically we came back and said, Well, out of those options, the Metro East transfer option looks the best. But I don't remember any focus on or discussion of the details and the structure of the analysis that was presented at that time for the Metro East transfer.

(*Id.* at 1807, ls. 12-23).

In addition, it is clear that in AmerenUE's second filing with the Commission concerning the proposed Metro East transfer, Case No. EM-2001-233, the Staff requested that AmerenUE include load forecasts as a key component of the analysis. Moreover, in its request to Hold Procedural Schedule In Abeyance, AmerenUE stated the following:

> 1. The current schedule calls for UE to file Supplemental Direct Testimony on February 8, 2001. This filing requested by the Staff requires significant effort by

> our witnesses once various forecasts are developed. Those forecasts have not been finalized and, thus, the testimony cannot be completed.
>
> 2. Although it is anticipated that this work will be completed in approximately two weeks, it is not possible to give the Commission and other parties any assurance of an exact date when that work will, in fact, be completed. Accordingly, the Company hereby informs the Commission and all parties that the February 8, 2001 filing date cannot be met.

(Tr. 1636, ls. 10-22, Vol. 17). From AmerenUE's own documents, it is clear that AmerenUE knew that the analysis requested by the Staff would require forecasts. AmerenUE should not have thought that the Staff's expectations regarding a complete least cost analysis would have changed unless AmerenUE had directly asked the Staff prior to submitting its analysis in direct testimony, which it did not do.

4. Staff's Recommendation Concerning Correcting Flaw's in Ameren's Least Cost Analysis

Dr. Proctor said that the Staff did not believe that Ameren's least cost analysis was consistent respecting the proposed Metro East transfer and the combustion turbine generators alternative. He stated that the Staff was not confident respecting the result of Ameren's least cost analysis and further analysis by Ameren might provide the Staff a level of confidence that the Staff does not have presently. (Tr. 1781, l. 1 – 1782, l. 17, HC Vol. 18).

In response to a question from Judge Thompson, Dr. Proctor testified that the Staff had not performed any additional independent analysis from what Ameren performed. Judge Thompson stated that this places the Commission in a difficult position and asked Dr. Proctor what he would recommend that the Commission do. Dr. Proctor responded that the Commission could issue an Order directing Ameren to perform the analysis that is necessary for the Staff to determine that the proposed Metro East transfer is the least cost alternative for AmerenUE to meet its long-term capacity and energy needs. (Tr. 1782, l. 18 – 1783, l. 7, HC Vol. 18).

When Judge Thompson requested the details of the additional analysis that the Commission should order AmerenUE to perform, with respect to AmerenUE's calculation of variable cost savings from the proposed Metro East transfer, Dr. Proctor stated:

> **Proctor:** Well, I would recommend that the company do the analysis that I had set out in my Rebuttal Testimony; that is, to take the load forecast out, analyze the fuel savings out several years. I mean, whatever -- you know, if I'm looking at 5 years of analysis, that's going to give me some additional confidence. If it's out 25 years, maybe I'm more confident about that.

(Tr. 1784, ls. 11-17, Vol. 17).

> **Proctor:** . . . So I think if I saw something in the range of 5 years of analyses out that – that were indicating either that the 25 million in savings was staying relatively constant or that it was actually increasing, which I believe was Mr. Voytas's testimony, then – then that would give me a level of – give me a greater level of confidence about that.
>
> **Thompson:** Now, that's fuel savings?
>
> **Proctor:** That's fuel savings. And then the other aspect of this, I think they ran the market-to -- mark-to-market analysis I think was about a five-year analysis as well.
>
> If they would do that for both scenarios, for the transfer scenario and the CT scenario to see how those would compare in terms of off-system sales. And, again, going out five years, I think that would be a more comparable analysis to do but for both sides.

(*Id.* at 1785, ls. 8-24).

Judge Thompson then asked Dr. Proctor questions concerning how long such a study would take, and Dr. Proctor stated that from prior experience with AmerenUE, the Staff "would typically get a pretty good turnaround in a couple of weeks," and estimated that the study being recommended would take from two to four weeks. (Tr. 1786, l. 8 -11, Vol. 17). Dr. Proctor's response on the turnaround time was similar to that of AmerenUE's witness Mr. Voytas, who testified that such a study would take "four to six weeks." (Tr. 1632, ls. 18-24, Vol. 17).

The issue of additional time needed to provide a consistent least cost analysis was a concern about having the Metro East transfer approved prior to the upcoming summer peak period and whether or not AmerenUE would have sufficient reserves for this summer. This matter of timing is addressed above.

Before making a final decision regarding AmerenUE's request to transfer the AmerenUE service territory and facilities in Illinois to AmerenCIPS, the Commission should have confidence that the least cost analysis regarding that proposed transfer is a consistent analysis and represents a reasonable picture of the economic comparison of the alternatives. From a timing perspective, it might be perceived by AmerenUE to be "optimal" to approve the Metro East transfer prior to the summer of 2004, this is clearly not a necessary condition. Thus, the Commission should require AmerenUE to provide a consistent least cost analysis as set out in the testimony of Dr. Proctor.

III. JOINT DISPATCH AGREEMENT (JDA)

1. Background of the JDA

Union Electric Company and Central Illinois Public Service Company entered into a Joint Dispatch Agreement (JDA) dated December 18, 1995 as part of the UE – CIPSCO, Inc. merger. Under the JDA, the generating resources of AmerenUE and AmerenCIPS were committed and dispatched to jointly serve the native loads of both AmerenUE and AmerenCIPS. (Ex. 52, JDA, p. 1; Ex. 14, Proctor Reb., p. 14, ls. 9-15; *Re Union Electric Co.*, Case No. EA-2000-37, Order Approving Unanimous Stipulation And Agreement, Making Findings Under The Public Utilities Holding Company Act, And Closing Case, 8 Mo.P.S.C.3d 503 (2000)).

a. Subsequent Amendment of the JDA

On July 21, 1999, AmerenUE filed an Application with the Commission, establishing Case No. EA-2000-37 for findings under the Public Utilities Holding Company Act of 1935, Section 32 (c) relating to a proposed restructuring of its Illinois-based affiliate AmerenCIPS. 8 Mo.P.S.C.3d at 503-04. Under the Illinois restructuring, all generating assets owned by AmerenCIPS were to be transferred to a new affiliate known as Genco (Ameren Generating Company (AEG)), which was to be an exempt wholesale generator (EWG), and the bundled retail load of AmerenCIPS was to be served by AEG through Ameren Energy Marketing (AEM), the marketing representative for AEG including off-system sales. The bundled retail load of AmerenCIPS is a major portion of the load for AEM. (Ex. 14, Proctor Reb., p. 14, ls. 7-15; Ex. 6, Nelson Sur., Sched. 1). The JDA was amended to reflect this restructuring. 8 Mo.P.S.C.3d 503. The JDA which is presently in effect states that it is made and entered into "this first day of May, 2000" by and between Union Electric Company, Central Illinois Public Service Company and "AMEREN ENERGY GENERATING COMPANY ('GENCO')." (Ex. 52, JDA, p. 1).

The parties to Case No. EA-2000-37 entered into a Unanimous Stipulation And Agreement which was approved by the Commission on January 13, 2000. The Commission's Order approving the AmerenUE Application stated that "nothing in this order should be considered a finding by the Commission of the value for ratemaking purposes of the properties and transactions herein involved" and "the Commission reserves the right to consider any ratemaking treatment to be afforded the properties and transactions herein involved in a later proceeding." 8 Mo.P.S.C.3d at 503, 509. At the evidentiary hearing, Mr. Nelson agreed that the JDA has not been approved for ratemaking purposes by this Commission. (Tr. 846, l. 20 – 847, l. 2, HC Vol. 10).

b. Relevant Terms of Amended JDA

Under the amended JDA, which entailed nothing more than merely altering the JDA to reflect the Illinois restructuring of AmerenCIPS, the generating resources of AmerenUE and AEG are committed and dispatched to jointly serve the native load of AmerenUE and the native load of AmerenCIPS through AEM. Since each hour the actual generation of each entity, AmerenUE and AEG, will only match its own load by chance, it is most likely that AmerenUE or AEM for AEG will transfer energy to meet the load of the other entity. The JDA sets the price for the transferred energy as the generating entity's incremental cost of generating the energy. For each hour in which an off-system purchase is less than the cost of generation for both AmerenUE and AEM, the off-system purchase is made and the cost of the purchase is shared by AmerenUE and AEM on a per megawatt-hour (MWh) basis. Otherwise, the costs of the off-system purchase are assigned to the entity for which the purchase is cheaper than its own generation. Ex. 14, Proctor Reb., pp. 14, l. 12 – p. 15, l. 1).

Also under the JDA, profits from off-system sales are distributed between AmerenUE and AEM in proportion to the MWhs of native load of each entity, not on the basis of the level of generation provided by each entity in making the off-system energy sales. (Ex. 14, Proctor Reb., p. 15, ls. 1-2). (An off-system sale is a sale, at wholesale, of energy to a non-Ameren entity.) Thus, profits on off-system energy sales are calculated each month and divided between AmerenUE and AEM on the basis of their respective shares of native load, not on the basis of whether the energy for the sales was supplied from AmerenUE generating resources or AEG generating resources.

2. Relevance of JDA to Proposed Metro East Transfer

Dr. Proctor states in his rebuttal testimony that based on the inappropriate snapshot analysis of Ameren Services and excluding the nuclear decommissioning cost proposal of the

Staff or any changes in the JDA, the economics of AmerenUE's Metro East transfer proposal and the combustion turbine generators alternative are a "toss up." (Ex. 14, Proctor Reb., p. 13, ls. 15 - 19). He notes that "the economics can dramatically change in favor of the transfer if the JDA is modified to reflect spot-market prices for energy transfers and an equitable sharing of profits from off-system sales is used instead of the current sharing based on system energy." (*Id.* at 13, l. 21 – 14, l. 2).

By its own terms, the operation of the Joint Dispatch Agreement (JDA) is very much a factor in the analysis of the proposed Metro East transfer even when calculating the AmerenUE costs under the scenario that the Metro East transfer occurs. Presently under the terms of the JDA, assuming the Metro East transfer occurs, AmerenUE's generation will be utilized to serve the AmerenCIPS load in the Metro East service area and the JDA determines the pricing of the AmerenUE generation serving the AmerenCIPS load in the Metro East service area. Thus, Dr. Proctor addresses in his rebuttal testimony these two components to the JDA that are both very relevant to the Commission's consideration of AmerenUE's Application. Dr. Proctor also noted that as of December of this year, the JDA can be terminated:

> 2.01 This Agreement shall take effect upon approval by the FERC, and shall continue in full force and effect until terminated by one or more of the Parties, Party(ies) having given at least one year's written notice, but in no event shall this Agreement be terminated prior to December 31, 2004.

(Ex. 52, JDA, p. 5). There is also provision in the JDA for changes to that agreement by the parties to it:

> 13.02 It is contemplated by the Parties that it may be appropriate from time to time to change amend, modify or supplement this Agreement or the Schedules which are attached to this Agreement to reflect changes in operating practices or costs of operations or for other reasons. This Agreement may be changed, amended, modified or supplemented by an instrument in writing executed by the Parties.

(*Id.* at 20).

Under the proposed Metro East transfer, the transfer of energy from AmerenUE's generating resources to serve AEM's load will increase and the amount of energy from AEG's resources to serve AmerenUE's load will decrease. (Ex. 14, Proctor Reb., p. 15, ls. 10-12). This transferring load from AmerenUE to AEM results in AmerenUE supplying the same amount of energy to the spot market from its generating resources, but receiving a significantly reduced share of the profits from those sales because of the change in native loads. (*Id.* at 15, ls. 13-15 and at 16, ls. 16-23).

3. Staff's Recommended Conditions Necessary for Commission Approval of Metro East Transfer

Dr. Proctor in his rebuttal testimony recommended as conditions to Commission approval of the proposed Metro East transfer, two amendments to the JDA, in addition to other conditions proposed by himself, conditions proposed by other Staff witness and the Staff's April 6, 2004 filing with the Commission of Staff's List Of Conditions. Regarding the JDA, Dr. Proctor recommended that (1) energy transfers between AmerenUE and AEG be made at market price and (2) profits from off-system sales be distributed to the entity (AmerenUE or AEG) whose generation supplied the energy for the off-system sale. (Ex. 14, Proctor Reb., p. 5, ls. 12-22; p. 17, ls. 6-9).

Dr. Proctor testified at hearing that between now and start of the Day 2 market, allocation of profits based on generation rather than on load would be an appropriate resolution of one of the inequities of the JDA, but that this formula would not be needed to be used after the start of the Day 2 market because subsequent to Day 2, it will be possible to identify whether it was AmerenUE's or AmerenCIPS's generation that was sold into the market. Dr. Proctor recommended that once it is possible to know whether it is AmerenUE's or AmerenCIPS's

generation that is sold into the market, then the revenues from off-systems sales by AmerenUE or AmerenCIPS should be assigned to AmerenUE or AmerenCIPS based on whether it was AmerenUE's generation that was sold or whether it was AmerenCIPS's generation that was sold into the market. (Tr. 1204, l. 10 – 1208, l. 15).

Without the changes to the two facets of the JDA which Dr. Proctor recommends as conditions to Commission approval of the proposed Metro East transfer, the JDA affects the economics of the proposed Metro East transfer in a detrimental manner. If the proposed Metro East transfer is approved by the Commission, the Metro East native load of AmerenUE, approximately 4 million MWHs per year, will be transferred to AEM. Under the JDA, the transfer of energy from AmerenUE's generating resources to serve AEM's load will increase and the transfer of energy from AEG's resources to serve AmerenUE's native load will decrease. Thus, the AmerenUE generation that is currently serving Ameren UE Metro East load at average cost, as AmerenUE native load, would be sold under the terms of the JDA to AEM at incremental cost to serve what had become AmerenCIPS native load, as a result of the Metro East transfer. (Ex. 14, Proctor Reb., p. 15, ls. 5-16; p. 16, ls. 7-8).

Under the JDA, the AmerenUE generation that is released by the proposed Metro East transfer would not be sold into the spot market at competitive prices, but instead would be sold to AEM at below market price, i.e., at incremental cost. If the proposed Metro East transfer is approved by the Commission, and the difference between market price and incremental cost is assumed to be only $2.50 per MWH, the difference between what AmerenUE could sell the approximately 4 million MWHs of Metro East load on the open market and incremental cost is $10 million per year. (Ex. 14, Proctor Reb., p.16, ls. 2-12). In addition, the amount of profits from off-system sales going to AmerenUE will decrease and the amount of profits from off-

system sales going to AEM will increase, and it is likely that a smaller portion of off-system purchases will be allocated to AmerenUE and a larger portion to AEM. (*Id.* at 15, ls. 5-16). Dr. Proctor summarized the two detriments in the JDA related to the Metro East transfer as follows:

> **Proctor:** . . . The one that was discussed yesterday is a detriment that when -- because the current profits from off-system sales are allocated based on load, when you -- when you move the load over to CIPS, the profits go with it and yet the generation does not change. There's no change in generation and there's a loss of profits, and so we believe that is a detriment.
>
> The other detriment is that AmerenUE will now have to potentially and will serve the Ameren Illinois customers from its generation, and will have to serve those customers at just incremental cost and will not be able to take that power and sell it into the market.
>
> (Tr. 1196, ls. 1-12, Vol. 13).

5. AmerenUE's Objections to Staff's Recommendations to Amend JDA as a Condition for Commission Approval of Metro East Transfer

Both Mr. Nelson and Mr. Voytas indicated AmerenUE's opposition to Dr. Proctor's recommendation that as a condition of approving AmerenUE's proposed Metro East transfer, the Commission should require that the JDA be amended to effectuate a change in transfer pricing, i.e., rather than energy being transferred from AmerenUE to AEM to serve AmerenCIPS at market price rather than at incremental cost. AmerenUE's objections to Dr. Proctor's proposed amendments to the JDA as a condition for approval of the Metro East transfer are: 1) amending the JDA in this non-rate case format constitutes single issue ratemaking (Ex. 6, Nelson Sur., p. 6, l. 19 – p. 7, l. 4); and the amendments to the JDA proposed by Dr. Proctor are already included in AmerenUE's rates (Ex. 6, p. 6, ls. 7-18 and Schedule 1). The Staff's testimony shows that both of these objections are not valid.

a. Modifying the JDA as a Condition for Approval of the Metro-East Transfer Does Not Constitute Single Issue Ratemaking

Mr. Nelson asserts in his surrebuttal testimony that Dr. Proctor's JDA proposals constitute "single issue ratemaking" and are not appropriate. (Ex. 6, Nelson Sur., p. 6, l. 19 – p. 7, l. 4). At the same time, Ameren recognizes that given the moratorium on rate increase cases and excess earning/revenues complaint cases, "AmerenUE's rates are fixed until at least July 1, 2006." (*Id.* at 6, ls. 4-6). Thus, there is no present rates or charges consequence to the Staff's proposed JDA conditions.

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b. Adjustments to JDA Recommended in Metro East Transfer Case Were Not Incorporated into Settlement of Case No. EC-2002-1

Ameren, in Mr. Nelson's surrebuttal testimony (Ex. 6, p. 6, lines 7-18 and Schedule 1) and in its section on the JDA in AmerenUE's Reply To Staff's List Of Conditions, pages 15-18, argues that "Staff in fact has previously adjusted, in the Staff's complaint case, the Company's revenue requirement to take into account these JDA issues" and "[t]he Company's base rates already reflect at least one of the JDA amendments Staff again seeks in this case, as evidenced by Staff's filings in the EC-2002-1 case." (AmerenUE's Reply To Staff's List Of Conditions, p. 15; footnote omitted). Mr. Nelson said that he based his testimony on reading (a) Dr. Proctor's

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testimony in Case No. EC-2002-1, (b) the signed Stipulation And Agreement in Case No. EC-2002-1 and (c) the Commission's Order in Case No. EC-2002-1. (Tr. 402, ls. 2-25, Vol. 6).

On July 25, 2002, the Commission issued a Report And Order Approving Stipulation And Agreement in Case No. EC-2002-1, which reflects that on July 2, 2001 the Staff filed an excess earnings/revenues complaint case against AmerenUE stating that AmernUE's earnings/revenues were excessive in the range of approximately $213 million to $250 million per year. The Commission's Report And Order Approving Stipulation And Agreement states that the settlement reached by the parties requires AmerenUE to reduce rates by $110 million over three years and provides for a one-time credit of $40 million to its Missouri retail electric customers.

Dr. Proctor testified in the instant proceeding that the JDA problems were not addressed by the settlement in Case No. EC-2002-1:

> **Thompson:** Okay. Did this issue [i.e., the JDA] come up as part of the overearnings complaint case?
>
> **Proctor:** Yes, it did.
>
> **Thompson:** And was it resolved as part of this case?
>
> **Proctor:** There was a black box settlement, so everything was resolved.
>
> **Thompson:** So it was settled but not fixed?
>
> **Proctor:** That's correct.

(Tr. 1199, l. 20 – 1200, l. 2, Vol. 13).

On July 25, 2002, the Commission issued a Report And Order Approving Stipulation And Agreement, wherein it stated: "IT IS THEREFORE ORDERED: 1. That the Stipulation And Agreement filed on July 16, 2002, is approved, and all parties shall be bound by its terms."

Unless otherwise specified by the terms of the Stipulation And Agreement in Case No. EC-2002-1, the settlement of the Staff's 2001-2002 excess earnings/revenues complaint case against AmerenUE is not based on any ratemaking determinations, principles or methodologies. AmerenUE's contentions as to what comprises or are the bases of the Staff's settlement of that case violate, in particular, Sections 14.a. and 14.b. of the Stipulation And Agreement in Case No. EO-2002-1:

> **14. EFFECT OF THIS NEGOTIATED SETTLEMENT**
>
> **a.** None of the signatories shall be deemed to have approved or acquiesced in any question of Commission authority, accounting authority order principle, cost of capital methodology, capital structure, decommissioning methodology, ratemaking or procedural principle, valuation methodology, cost of service methodology or determination, depreciation principle or method, rate design methodology, jurisdictional allocation methodology, cost allocation, cost recovery, or question of prudence, that may underlie this Agreement, or for which provision is made in this Agreement.
>
> **b.** This Agreement represents a negotiated settlement. Except as specified herein, the signatories to this Agreement shall not be prejudiced, bound by, or in any way affected by the terms of this Agreement: (a) in any future proceeding; (b) in any proceeding currently pending under a separate docket; and/or (c) in this proceeding should the Commission decide not to approve this Agreement, or in any way condition its approval of same.
>
> . . . .
>
> **e.** This Agreement does not constitute a contract with the Commission. Acceptance of this Agreement by the Commission shall not be deemed as constituting an agreement on the part of the Commission to forego, during the term of this Agreement, the use of any discovery, investigative or other power which the Commission presently has. Thus, nothing in this Agreement is intended to impinge or restrict in any manner the exercise by the Commission of any statutory right, including the right to access information, or any statutory obligation.

Curiously, while AmerenUE argues that its rates already reflect at least one of the JDA amendments, i.e., the amendment allocating profits on the basis of generation rather than load, this is the amendment that Mr. Nelson relates in his surrebuttal testimony that (1) AmerenUE

offered to the Staff and OPC in January 2004 and (2) AmerenUE now expresses a willingness to use its best efforts to effectuate, if that is what it is compelled to do in order for the Commission to reject the Staff's other proposed conditions and authorize the Metro East transfer.

Dr. Proctor testified that only one of the amendments to the JDA that he is recommending in the Metro East transfer case, i.e., the allocation of profits from off-system sales on the basis of generation rather than load, is reflected in the Staff's accounting schedules and his direct testimony in the Staff's 2001-2002 excess earnings/revenues complaint case against AmerenUE, Case No. EC-2002-1. His recommendation in the Metro East transfer case that the JDA be amended to change the pricing of transfers of energy between AmerenUE and AEM to market price rather than incremental cost was not part of the Staff's revenue requirement determination in Case No. EC-2002-1. (Tr. 1284, l. 2 to 1286, l. 20, Vol. 13; Tr. 922, l. 24 – 923, l. 19; Tr. 937, l. 17 – 938, l. 15, Vol. 11). In Case No. EC-2002-1, Dr. Proctor quantified the effect of changing the JDA so that transfers of energy between AmerenUE and AEM would occur at market price rather than incremental cost would result in AmerenUE's revenue requirement decreasing an additional $100 million. (Tr. 1236, ls. 4-7, 18-24; Tr. 1288, ls. 8-23, Vol. 13).

Dr. Proctor's direct testimony in Case No. EC-2002-1 does address transfer pricing. He indicated then at the time the first JDA was entered into it was inappropriate for transfer pricing to occur at incremental cost rather than market price, but it was understandable because there was no transparent market for electricity at the time. He also indicated in his direct testimony in Case No. EC-2002-1 that such a market did not exist then. By a transparent market, he meant a market where the price at which electricity sells is determined by an independent market facilitator and there is a published index for market prices. Dr. Proctor testified that the need for a transparent market was applicable today, but that a transparent market would occur when the

Midwest ISO Day 2 markets begin on December 1, 2004, i.e., when the Midwest ISO day ahead and real-time markets begin on December 1, 2004. Dr. Proctor stated that he did not consider it highly likely that the Day 2 market commencement dates will slip by any significant amount of time. (Tr. 927, l. 25 – 932, l. 5, Vol. 11).

At page 16 of AmerenUE's Reply To Staff's List Of Conditions, Ameren excerpts from Dr. Proctor's surrebuttal testimony in Case No. EC-2002-1, which is not part of the record in this case, and fashions, out of context, an incorrect interpretation of Dr. Proctor's testimony. AmerenUE asserts that "[i]n other words, based upon Dr. Proctor's testimony, it is Staff's legal position that no adjustment to the JDA is possible in this asset transfer proceeding!" At pages 23-24 of his surrebuttal testimony in Case No. EC-2002-1, Dr. Proctor is addressing why the Staff in the context of a merger or asset transfer case may not catch all of the imprudent and unjust, unreasonable and/or inequitable facets of a proposed transaction, and, as a consequence, why it is best to leave any ratemaking determinations respecting the transaction until a subsequent rate proceeding when the Staff will hopefully have had the time to more thoroughly review the transaction and the transaction's aftermath. Dr. Proctor is not saying that matters such as the Ameren JDA can only be reviewed in the context of a rate proceeding. Thus, his testimony in Case No. EC-2002-1, a ratemaking proceeding five years subsequent to the UE-CIPSCO merger case, was addressing why the Staff had not identified the inappropriate aspects of the JDA in the proceeding where UE first put the JDA before the Commission for review. Ameren in this proceeding is asking the Commission to create a "Catch 22" situation: find that it is not appropriate for a party to raise the inequity of the JDA for AmerenUE's customers in either an asset transfer proceeding or a ratemaking proceeding.

5. AmerenUE's "Offer" to Modify the JDA

Mr. Nelson in his surrebuttal testimony states that "because the future, possible ratemaking impacts of the JDA after the Metro East Transfer would occur are so speculative, I do not believe that it is necessary for the Commission to impose as a condition for approving the Transfer any amendment of the JDA." (Ex. 6, Nelson Sur., p. 9, ls. 3-6). Nonetheless, he states that AmerenUE met with the Staff and the OPC in January 2004 and "in order to settle the case, the Company offered to agree, as a condition of the Commission's approval of the Metro East Transfer, to amend the JDA concurrently with the closing of the Metro East Transfer to provide that profits from off-system sales would be allocated based upon generating output, and not based on load requirements as is currently the case." (*Id.* at 8, l. 19 - p. 9, l. 2). He goes on in his surrebuttal testimony to offer to the Commissioners that "if the Commission believes that it is imperative to accept the Company's offer as a condition to approving the Transfer, then the Company is willing to agree to this condition" and "is prepared to use its best efforts to amend the JDA" to address one of the two changes to the JDA recommended by the Staff. (*Id.* at 9, ls. 14-17). Mr. Nelson explained that AmerenUE could go only so far as to offer to use its best efforts to change the JDA because amendment of the JDA is subject to FERC approval and "possibly" approval by the Illinois Corporation Commission. (*Id.* at 9, ls. 19-23). He stated: "I'm highly confident it would be approved by the various regulatory agencies . . . . we're simply shifting more of the profit from off-system sales from Genco to UE. So again, I'm highly confident that it would be approved by the various regulatory agencies." (Tr. 541, l. 20 – 542, l. 10, Vol. 7).

a. Impact of AmerenUE's "Offer" to Amend JDA on Economics of Metro East Transfer

Mr. Nelson and Mr. Voytas quantified the value of this amendment as a decrease in annual revenue requirement of approximately $7 million per year, which when added to the $2.4

million per year lower revenue requirement of the proposed Metro East transfer scenario over the combustion turbine generators scenario, amounts to an annual lower revenue requirement of approximately $9.5 million. Mr. Nelson and Mr. Voytas state that this amendment causes the $11 million net present value advantage of the Metro East transfer over the combustion turbine generators over a 25-year period to increase to $79 million. Mr. Voytas further testified that "[t]he $7 million per year projection is based on 2002 actual market prices which were very low," and that if a $24 million per year value is used, then, based on Ameren's projection of market prices, the $79 million net present value advantage of the Metro East transfer over the combustion turbine generators over a 25 year period increases to $240 million. (Ex. 6, Nelson Sur., p. 10, ls. 4-12; Tr. 360, Vol. 6; Ex. 10, Voytas Sur., p. 4, ls. 5-7 and ls. 11-21; Ex. 34, 2. Benefits To Missouri Ratepayers, B. Joint Dispatch Agreement; Ex. 72, 2. Benefits To Missouri Ratepayers, B. Joint Dispatch Agreement).

b. Staff's Response to AmerenUE's "Offer" to Amend JDA and Allocate Profits from Off-System Sales Based on Generation Rather than Load

Dr. Proctor testified that he disagreed Ameren to ascribing the $7 million per year amount solely to the one change to the JDA that Ameren said it would use its best efforts to amend, if compelled to by the Commission. Dr. Proctor indicated that $3.67 million of the $7 million amount was due to the proposed Metro East transfer and that the other $3.23 of the $7 million amount was due to the Staff's proposed change in the JDA's allocation of profits, which is not due to the proposed Metro East transfer. (Tr. 1272, l. 8 – 1273, l. 20, Vol. 13). He testified that one of the Ameren workpapers comprising part of Exhibit 51, the page entitled "Allocating Of Interchange Sales" containing a yellow colored box on that page, confirmed these matters. (Tr. 1278, l. 20 – 1279, l. 14). Mr. Nelson at the evidentiary hearing identified Exhibit

51 as containing the workpapers to the numbers on page 10 of Exhibit 6, his surrebuttal testimony. (Tr. 826, l. 23 – 828, l.23, Vol. 9).

Ameren, at the evidentiary hearing, sought to engage Dr. Proctor in a comparison of the $9.5 million per year amount that appears at page 10, lines 6-10 of Mr. Nelson's surrebuttal testimony with the $10 million amount that appears at 16, lines 7-12 of Dr. Proctor's rebuttal testimony, which was discussed above. (Tr. 940, l. 20 – 946, l. 11). Dr. Proctor made clear that these two amounts apply to different calculations, not the same matter as Ameren implied. The $10 million on page 16 of his rebuttal testimony addresses the difference in cost in (1) pricing, at market price, the energy to serve the load of the former AmerenUE Illinois retail electric customers that would be transferred to AmerenCIPS, if there were not the transfer price provision of the JDA, which causes the energy to be transferred at incremental cost, and (2) pricing, at incremental cost, the energy to serve this load, due to the transfer price provision of the JDA, which requires the use of incremental cost. The $9.5 million on page 10 of Mr. Nelson's surrebuttal testimony addresses the difference in cost between the proposed Metro East transfer and the alternative of meeting long-term energy and capacity needs by combustion turbine generators and the change in the methodology of allocation of profits under the JDA from load to generation. (Tr. 1279, l. 18 –1280, l. 9; Tr. 1282, l. 23 – 1283, l. 2, Vol. 13).

6. Staff's JDA Recommendations

Subsequent to the offer made by AmerenUE in its surrebuttal testimony, the Staff's initial recommendation in the rebuttal testimony of Dr. Proctor was modified somewhat in the Staff's List Of Conditions, which the Staff submitted to the Commission on April 6, 2004 and was received into evidence as Exhibit 68. The Staff's recommendations regarding the JDA include two basic conditions: (1) the Commission accept the offer made by AmerenUE to be ordered to

modify/amend the JDA and allocate profits based on generation rather than load; and (2) AmerenUE agrees to commit to a process that would eliminate the detriment to AmerenUE's Missouri retail ratepayers from having to serve the transferred Illinois load from its generation units at below market prices. (Ex. 68, pp. 3-5). Moreover, while the Company's offer to amend the JDA does improve the economics of the proposed Metro East transfer, the Staff also recommends, as a condition to the Metro East transfer, a process that ensures that the changes necessary to eliminate all detriments related to the Metro East transfer will be implemented in a timely fashion:

> The parties to this case shall use their best efforts for a ninety-day period following the close of the Metro East transfer to develop a further modified JDA that eliminates the other current economic detriments of the JDA to AmerenUE and provides for a fair sharing of any remaining economic benefits arising from the joint dispatch of the AmerenUE and AEG generating units. In the event that the parties cannot reach agreement on a further modified JDA, then AmerenUE will give notice necessary to terminate its participation in the JDA and the unresolved matters will be brought to the Commission for resolution. The JDA will be modified as decided by the Commission if Ameren can accept and effectuate such modifications. If Ameren cannot accept or effectuate such modifications, then AmerenUE will terminate its participation in the JDA. . . .

(Ex. 68, pp. 4-5).

IV. Reduction for Decommissioning of Callaway Plant

In addition to requesting authorization to encumber its Missouri retail jurisdiction with an additional liability, AmerenUE seeks Commission approval of its proposal that current contributions to the Callaway decommissioning fund be cut. The Company's proposal harms Missouri consumers in two ways. First, Missouri would be entitled to a majority of any funding reduction determined from the funding level established in prior cases. The Company proposes to pass 100% of the benefits of the funding reduction to Illinois consumers. (Tr., 231, ls. 15-24, vol. 6). Second, the proposed funding reduction is an independent action that does not require

Missouri to absorb an approximate $22 million[15] of decommissioning liability in excess of funding assets. Such an action can only be supported in this case if Commission can find definite benefits from the transfer that could offset this known detriment. Staff does not believe that the evidence in this case provides the Commission with a reasonable assurance that there are benefits that would offset this $22 million detriment, as further explained in the Least Cost section of this brief.

Specifically, AmerenUE proposes that, upon a transfer of its Illinois load to AmerenCIPS, the current $272,554 annual contribution of its present Illinois customers (Ex. 2, Redhage Surr., p. 10, ls. 3-10) to the Callaway plant decommissioning trust fund be discontinued, pending this Commission's review of the status of the trust fund in connection with AmerenUE's next mandatory triennial filing, which is to occur by September 1, 2005. (Ex. 1, Redhage Dir., p. 9, l. 8). As support for its proposal, AmerenUE asserts that, upon the elimination of the current Illinois contribution to the trust fund, the remaining contributions would be sufficient to keep the fund within what AmerenUE calls the "zone of reasonableness."

Commission approval of such a proposal would allow AmerenUE to abandon the settlement of its last triennial review case. AmerenUE has made no showing that the situation regarding the Callaway Decommissioning Fund has changed in a manner to support a reduction in the funding of Callaway's decommissioning liability. The funding is being reduced to facilitate an Ameren corporate restructuring, not to address the needs to fund the ultimate

[15] According to Mr. Redhage, $536,000,000 represents the most recent triennial estimated decommissioning cost of $515,339,000 (2002 dollars) inflated to 2003 dollars. (Tr. 242, ls. 2-21, Vol. 6). Currently, AmerenUE's Missouri retail jurisdiction is allocated 91.27% of the responsibility for that cost; however, if the transfer is effectuated, Missouri retail would be allocated 98.01% of that cost. (Ex. 1, Redhage Dir., p. 3, l. 16 and p. 4, l. 9). The liability of AmerenUE's Missouri retail jurisdiction would therefore increase by approximately $36,126,000 (0.9801 x $536,000,000 minus 0.9127 x $536,000,000). The market value (as of June 30, 2003) of AmerenUE's Illinois sub-account to be transferred is about $13,526,000. (Ex. 1, Redhage Dir., Sch. 2). Therefore, the total value of the unfunded liability to be transferred to Missouri retail is approximately $22,600,000 ($36,126,000 minus $13,526,000).

decommissioning of the Callaway Nuclear Plant. It is detrimental to the public interest for Ameren to reduce the funding for the decommissioning of a nuclear power plant located in Missouri for the sole purpose of effectuating a corporate restructuring.

AmerenUE has offered no evidence that a decrease in the total contribution to the trust fund from the level that was agreed to in connection with the last triennial review is warranted. In fact, the trend of past estimates of plant decommissioning costs suggests that an increase in the annual contribution may eventually be necessary. The estimated cost to decommission Callaway has increased in each of the triennial reviews conducted to date.[16] (Tr. 273, lines 4-10, Vol. 6). Moreover, Ameren Corporation, in its Form 10-K report to the Securities and Exchange Commission, updated total decommissioning cost to $536,000,000 (2003 dollars) and stated its expectation that the costs to decommission will increase by approximately 3.5% annually through the year 2033. (Tr., 240, ls. 15-19, Vol. 6).

AmerenUE's assertion that the overall residual contribution level would still fall within the "zone of reasonableness" does not justify the course of action proposed in this case. If there was a decision to cut the funding to the Callaway Decommissioning Fund, then Missouri consumers would receive the benefit of over 90% of the reduction. (Ex. 1, Redhage Dir., p. 3, l. 16), with no increased assumption of decommissioning liability as a proposed by the Company. Illinois customers are receiving a rate reduction in this case that would not be achievable if the funding issue was addressed in a triennial review case.

[16] Following are the consecutive Callaway plant decommissioning cost estimates: $120,000,000 ($1983 dollars---Case No. ER-85-160) (Ex. 28, p. 3 of the Order); $347,000,000 (1990 dollars---Case No. EO-91-300) (Ex. 28, p. 3 of the Order); $371,511,680 (1993 dollars---Case No. EO-94-81) (Ex. 27, p. 71); $419,975,000 (1996 dollars---Case No. EO-97-86) (Ex. 26, p. 9 of the Order); $509,451,856 (1999 dollars---Case No. EO-2000-205) (Ex. 25, p. 3 of the Order); and $515,339,000 (2002 dollars---Case No. EO-2003-0083 (Ex. 28, p. 2 of the attached Unanimous Stipulation And Agreement).

Furthermore, AmerenUE's assertion that the overall residual contribution level would still fall within the "zone of reasonableness" is unpersuasive. It should be noted that an annual funding requirement was established for ratemaking purposes in 1991, before AmerenUE introduced its zone of reasonableness analysis, and that funding level continues to be used in the ratemaking process today. Moreover, the zone of reasonableness ranges from a minimum of approximately $3 million to a maximum of some $10 million. As Staff witness Ronald Bible pointed out, this is a "pretty big zone." (Tr. 264, ls. 16-24, Vol. 6). Indeed, at approximately $7 million, the zone of reasonableness is roughly the same as the total annual contribution to the Callaway nuclear decommissioning trust fund.

Even if AmerenUE's zone of reasonableness argument had some merit, the manner in which the analysis was performed is inadequate. AmerenUE witness Redhage focused on the inflation rate to be applied to the cost of decommissioning. He did not also update the other economic and financial assumptions and input parameters associated with projected earnings of the fund. Mr. Redhage explained that this had been done "slightly more than a year ago" in connection with the 2002 triennial filing and that "[n]ot enough would change to totally reproject every thing." (Tr. 234, ls. 13-19, Vol. 6). In response, the Staff would note that, likewise, it was only "slightly more than a year ago" when, on the basis of a thorough analysis, all parties to the 2002 triennial review case (Case No. EO-2003-0083) agreed, and the Commission decided, that the appropriate overall annual contribution to the fund should include the $272,554 that AmerenUE now seeks to eliminate. By cutting that funding in connection with the proposed Metro East transfer, Ameren Corporation would be creating a deficit from a level that was previously determined to be reasonable by all parties involved. (Ex. 4, Meyer Reb., p. 7, ls. 5-8).

As noted in the rebuttal testimony of Staff witness Greg Meyer, the Staff is indifferent as to whether the post-transfer deficiency is cured, for example, by contributions from AmerenUE, from AmerenCIPS, or from Ameren Corporation. (Ex. 4, Meyer Reb., p. 6).

AmerenUE also argues that if the Commission insists, as a condition of its approval of the Metro East transfer, that overall contributions to the Callaway decommissioning trust fund continue at the same level until the conclusion of the 2005 triennial review, AmerenUE will be required to make a filing with the Internal Revenue Service. According to the surrebuttal testimony of AmerenUE witness Kevin Redhage, if the amount of decommissioning costs that are included in AmerenUE's cost of service for ratemaking purposes are increased, AmerenUE would increase its tax-deductible contribution to the higher level, and it would be required to obtain from the Internal Revenue Service a schedule of ruling amounts authorizing the higher amount before it could make the higher contribution. (Ex. 2, Redhage Surr., p. 11, 12-25). At the hearing, Mr. Redhage estimated that it would probably take some two months to get a decision from the IRS. (Tr. 231, ls. 7-10, Vol. 6). Mr. Redhage also indicated that if the IRS declined to grant such authorization, AmerenUE would retain the original ruling amount of $6.2 million. (Tr. 230, ls. 1-11, Vol. 6).

If the total contribution to the trust fund remains the same, as advocated by the Staff, it is not clear why AmerenUE would need to indicate to the IRS that it is now making a higher contribution to the trust fund. From the standpoint of Ameren Corporation and the decommissioning trust fund, the contribution would remain the same. Under such a circumstance, the Staff is not convinced that a filing with the IRS would be required. (Tr. 348, ls. 3-11, Vol. 6). It seems quite possible that the reverse is true; *i.e.*, that it is AmerenUE's proposed treatment of decommissioning trust fund contributions that would constitute a change

triggering a requirement to file for authorization from the IRS. The Staff would note that Ameren Corporation files a single consolidated tax return with the IRS (Tr. 349, ls. 10-15, Vol. 6), and that the only tax-qualified nuclear decommissioning trust fund in existence is the Callaway plant decommissioning trust fund. There is no tax-qualified decommissioning trust fund for either Missouri or Illinois. These are simply sub-accounts to which monies are allocated out of the trust fund account based on allocation factors. (Tr. 265, ls. 3-8, and 348, l. 11, Vol. 6). Indeed, the record in the instant case contains the following quote from the testimony of Union Electric Company witness Mr. Birdsong in the case involving the proposed merger between Union Electric Company and Central Illinois Public Service Company (Case NO. EM-96-149): "UE maintains a single tax qualified decommissioning trust with [three] subaccounts." (Tr. 349, ls. 2-3, Vol. 6).

Even assuming, though not conceding, that AmerenUE will need to file a request with the IRS in order to increase its level of decommissioning funding, since total contributions to the Callaway plant trust fund will remain exactly the same, to the IRS the change should amount to nothing more than a notification of a jurisdictional shift of the total cost to decommission. Therefore, AmerenUE's request would almost certainly receive routine IRS approval. Further, the Staff does not regard the estimated two-month delay associated with a need to obtain IRS approval this as unduly burdensome, and AmerenUE presented no evidence to the contrary. Certainly, AmerenUE has ample time to prepare its filing with the IRS prior to a Commission-approved transfer of assets so as to ensure that the time to obtain IRS authorization is cut to a bare minimum. Essentially, the Staff regards AmerenUE's concerns related to a potential IRS filing as much ado about nothing. In any event, the Commission should ignore these matters, as

they clearly do not outweigh the need, as discussed above, to maintain funding in accordance with the level agreed to by all parties in the last triennial review.

In addition to Commission approval of AmerenUE's proposals regarding transfer of the unfunded nuclear decommissioning liability and reduction of the overall contribution to the fund, AmerenUE seeks Commission confirmation that the economic and financial input parameters used in AmerenUE's zone of reasonableness analysis, allegedly identical to those presented in the most recent decommissioning trust fund triennial review proceeding (Case No. EO-2003-0083), "continue to be valid and acceptable to the Commission." (Ex. 1, Redhage Dir., ls. 5-7). The Commission should decline to provide such confirmation.

In approving the stipulation and agreements ("Stipulations") reached in settlement of past decommissioning trust fund review cases, the Commission has never specifically made a finding as to whether the economic and financial input parameters used in AmerenUE's zone of reasonableness analyses were valid and acceptable. The Commission simply approved the particular stipulation and agreement, including the agreed-to annual contributions to the fund, and found the contributions to be included in AmerenUE's then-current cost of service and reflected in its then-current rates for ratemaking purposes.

AmerenUE first introduced the analysis in connection with its 1993 triennial update filing (Case No. EO-94-81). Exhibits 24, 25, 26 and 27 are copies of the Commission's Orders and attached Stipulations in Cases No. EO-2003-0083, EO-2000-205, EO-97-86 and EO-94-81, respectively. In addition to the Commission's silence on the matter, nothing in those documents indicates that the Staff or the Office of the Public Counsel agreed that the economic and financial input parameters used in AmerenUE's zone of reasonableness analysis were appropriate. Indeed, in his testimony filed in support of the Unanimous Stipulation And Agreement in Case No. EO-

2000-205, David P. Broadwater, of the Staff's Financial Analysis Department, discussing the zone of reasonableness model and efforts to modify it, stated as follows: "Financial [A]nalysis discussed the model with UE on several occasions, but the collaboration on the project did not go beyond the development of the model. UE used the model for purposes of its September 1, 1999 filing. The Staff and UE have not agreed to any of the assumptions or economic and financial parameters that are to be used within the model." (Tr. 249, ls. 13-19, Vol. 6).

Despite the fact that the Commission has not specifically approved the financial input parameters used in AmerenUE's zone of reasonableness analyses, AmerenUE has obviously been successful in gaining the necessary IRS authorization to make tax-deductible contributions to the decommissioning trust fund. The Staff recommends, therefore, that the Commission deny AmerenUE's request, and instead adhere to its established and historically acceptable practice of not sanctioning the financial input parameters used in AmerenUE's zone of reasonableness analyses.

AmerenUE is using the proposed Metro East transfer to gain from the Commission concessions that circumvent the agreements it made in the prior triennial reviews. This is an example of the difficulty in placing a great deal of faith in any AmerenUE settlement, as it continually seeks to change the agreement whenever it is in its best interests. If the Commission grants these concessions in this case, this can be used as precedent in future cases for a party seeking an outcome inconsistent with the agreements previously reached among the parties to the latest triennial review proceeding. Any Commission approval of the transfer sought in the instant proceeding should be conditioned on maintaining the existing total funding of the Callaway plant decommissioning trust fund, as agreed to by the parties in Case No. EO-2003-0083, the 2002 triennial update proceeding.

IV. Sulfur Dioxide (SO_2) Emission Allowances

Like most other electric utilities, AmerenUE receives from the Environmental Protection Agency an allocation of sulfur dioxide ("SO_2") emission allowances for each year (referred to as the "vintage year"), based on emission caps set by the Environmental Protection Agency at each of its coal-fired generating units. One SO_2 allowance is equal to one ton of SO_2 emissions. The Environmental Protection Agency began issuing SO_2 allowances for the 1995 vintage year. Under existing law, utilities may use allowances for a particular vintage year in that year, or in any year thereafter. Utilities are afforded some latitude in the manner in which they choose to control their emissions. For example, if a utility finds that it does not have sufficient allowances to cover its emissions for a particular year, it may seek to forestall the installation of emission control equipment by going to the market and purchasing additional allowances, or perhaps obtaining additional allowances by trading some of its allowances for another vintage year. (Tr. 589, l. 16 – 592, l. 4, Vol. 7).

Ameren routinely engages in such transactions. In recent years, Ameren has pursued an aggressive strategy of marketing SO_2 emission allowances. (Ex. 11, Campbell Reb., p. 3, ls. 19-20). AmerenUE's revenues were increased by ** _____** in 2001 (Ex. 41), ** _____** in 2002, and ** _____** in 2003 (Ex. 47, pp. 1-2), through Ameren's marketing of AmerenUE's SO_2 allowances. Total year-to-date 2004 revenues from SO_2 marketing, as of the time of the hearing, were **** _____**** (Tr, 762, ls. 7-14, Vol. 10). Furthermore, the trend is upward. As acknowledged by AmerenUE witness Moore, Ameren has budgeted ** _____** in anticipated revenues for each of the years 2004, 2005, and 2006. (Tr., 777, ls. 7-11, Vol. 10). At the time of the hearing, those targets were still valid. (Tr., 891, ls. 3-9, Vol. 9).

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The Staff is concerned that Ameren's aggressive pursuit of emission allowance marketing may deplete AmerenUE's emissions bank to a point where AmerenUE would be required to install expensive emission control equipment sooner than would be necessary had the bank been maintained. ** _____ _____** (Tr., 799, ls. 20-23, Vol. 10) ** _____ _____. ** (Tr., 801, ls. 11-14, Vol. 10) In the event that Ameren has depleted AmerenUE's SO2 allowances and the Commission approves the proposed Metro East transfer, AmerenUE's current Illinois customers will not bear a portion of the cost of compliance, with the result being that Missouri ratepayers will end up shouldering almost all of that cost. (Ex. 11, Campbell Reb., p. 5, ls. 4-7).

Furthermore, such costs are not reflected in the least cost study submitted with the Direct testimony of AmerenUE witness Richard A. Voytas. Mr. Voytas explains that his study did not include SO_2 emission compliance costs because "[t]here is no way to determine what future regulations will be in place and what requirements for technology installations will be required at AmerenUE power plants over the next twenty years." (Ex. 10NP, Voytas Surr., p. 45, ls. 9-11). Yet Ameren Corporaton found that it was able include estimates of such compliance costs in its Form 10-K report for the fiscal year ended December 31, 2003, filed with the Securities and Exchange Commission and available to Ameren shareholders. The report contains a projection of SO_2- and NOx-related expenditures for AmerenUE of $250-$350 million by 2010 and $300-$500 million by 2015. (Ex. 59, p. 152).

Not only does the least cost study fail to recognize any capital cost effect of Ameren's aggressive emission allowance marketing program, but also it includes annual revenues from the sale of allowances that are unsustainable. Mr. Voytas testified that he included $17,850,000 of

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revenues from the sale of emission allowance in 2001 for the full 25 years of his study.[17] (Tr. 569, ls. 4-10, Vol. 7). The record evidence indicates, however, that this level of AmerenUE's emission allowance revenues cannot be sustained for anywhere near the 25-year time frame of the analysis. On cross-examination, AmerenUE witness James C. Moore, II estimated that, ** _____ _____**. (Tr., 783, 2-6, Vol. 10).

Thus, AmerenUE's least cost analysis is doubly flawed with respect to SO_2 allowances. First, according to the testimony of AmerenUE's own witness, the analysis includes grossly overstated emission allowance sales assumptions. As a result, the least cost advantage to the Metro East transfer option, already razor thin at best (Ex. 14, Proctor Reb., p. 13, ls. 15-17), is further diminished. Second, the analysis fails to include any cost for emission control equipment; yet Ameren's 2003 Form 10-K filing with the Securities and Exchange Commission includes estimates of substantial capital expenditures for AmerenUE over the next ten years, thereby signaling that AmerenUE expects to incur such costs during the time frame of the least cost study. If the Commission approves the transfer of AmerenUE's Illinois load, as requested in this proceeding, AmerenUE's Missouri ratepayers would bear almost the entire burden of those expenditures. For these reasons, and considering the other omissions pointed out elsewhere in the Staff's brief, the Commission should regard the least cost analysis as inadequate to support AmerenUE's application in this proceeding.

[17] Almost two weeks later, Mr. Voytas attempted to qualify that statement. (Tr. 1682, l. 1 – 1685, l. 8, Vol. 17). The Staff finds the attempt to be contradictory and misleading, and therefore unpersuasive.

[18] ** _____ _____**

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In addition to the concerns raised above, the Staff (along with Public Counsel) is of the opinion that Ameren may be in violation of the Commission's Order Approving Stipulation And Agreement in Case No. EO-98-401. (Ex. 11, Campbell Cross-Surr., p. 5, ls. 10-17; Ex. 12, Kind Reb., p. 41, ls. 5-13). Paragraph 2 of the Stipulation And Agreement (attached to said Order) states in pertinent part as follows:

> The Company is authorized to manage the entire allowance inventory, but may sell only up to one-half of all Phase I allowances without seeking specific Commission approval. This includes sales to AmerenCIPS and other utilities. AmerenUE may request authorization to sell additional allowances, above this level, through a filing with the Commission. (Ex. 50, p. 2 of Stipulation And Agreement).

The Order itself states:

> AmerenUE will be allowed to manage the entire allowance inventory, but may sell only up to one-half of all Phase I allowances without seeking specific Commission approval, including sales to AmerenCIPS and other utilities. AmerenUE may request authorization to sell additional allowances, above this level, through a filing with the Commission.

Phase I allowances are those with a vintage year from 1995 through 1999. Phase II allowances have a vintage year of 2000 or beyond. Ameren's annual reports to the Staff indicate that it has been engaged in the sale of Phase II allowances. (Ex. 11, Campbell Reb., p. 6, ls. 1-2). Indeed, AmerenUE witness Moore testified that AmerenUE had sold about ** _____** Phase II allowances in one form or another. (Tr. 793, 1. 15 – 794, l. 12, Vol.10). Mr. Moore later stated that the Phase II allowances sold were allowances "earned" through trading transactions (Tr. 887, 11-13, Vol. 9), but acknowledged that such sales constitute Phase II sales, when defined in terms of vintage. (Tr. 888, ls. 2-9, Vol. 9).

AmerenUE contends that it is in full compliance with the requirements of this provision. In particular, AmerenUE believes that it is not precluded by the Commission's order in Case No. EO-98-401 from selling its Phase II allowances without Commission approval. (Tr.

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898, ls. 12–17, Vol. 9). Further, as to Phase I sales, AmerenUE believes that it is well within the sales limits set by the Commission. (Ex. 21, Moore, Surr., p. 4, ls. 11-12).

The Staff believes that the sale of AmerenUE's SO2 allowances warrants the establishment by the Commission of a formal investigation docket to determine if these sales are in compliance with Commission orders. Mr. Kind pointed out that if the Commission voids any emission allowance sales transactions, AmerenUE may be subject to liability as a result of legal action taken by the allowance purchasers in such transactions. (Tr., 688, ls. 4-18, Vol. 9). At present, the Staff is still endeavoring to determine the precise status of AmerenUE's emission allowance bank. (Tr., 606, ls. 19-21, Vol. 7). In the Staff's view, a separate docket to investigate these matters is the appropriate way to proceed, and the Commission should order that a docket be opened for that purpose.

VI. LIABILITIES

Ameren advocates that the Commission just ignore the liabilities in this case because they are "unknown, contingent and unquantifiable." (AmerenUE's Reply To Staff List Of Conditions, p. 8). The Staff has a better solution: insure against these known or unknown and unquantifiable liabilities.

As Staff witness Dr. Proctor explained, "its a question of having some insurance, having some confidence about the economics and having insurance against some of the potential bad things that could go wrong." (Tr 1791, ls. 5-8, Vol. 17). In response to Staff's List of Conditions, Ameren is unwilling to provide any assurances, any hold-harmless commitments, or any safe harbors for Missouri ratepayers in support of its sworn testimony. (AmerenUE's Reply To Staff's List of Conditions, p. 29-30).

The Commission should reject this proposed transfer. It is bad for Missouri. Ameren proposes that Missouri pay for liabilities that arose prior to the transfer that would be the responsibility of Illinois absent the transfer. (Tr. 1501, ls. 4-13, Vol 15). The thin benefits cannot overcome this vast exposure to economic risk. That is the reason that insuring against the detriments is the only solution.

If the Commission decides to approve a transfer the Commission can address the issue of liabilities and assure that there is no detriment by taking Dr. Proctor's suggestion of insuring against the detriments created by the liabilities. This logical approach: (1) permits the Commission to reasonably determine and ensure that there is no detriment to the public interest as a result of the transfer; (2) allows the Commission to comply with the standards established in *AG Processing* and (3) requires Ameren to stand behind its sworn testimony that there is no detriment to the public interest.

This approach is necessary because the proposed transfer is fraught with negative consequences for Missouri ratepayers and for this Commission. The negative consequences result from likelihood that the potentially huge, personal injury, property damage or environmental cleanup liabilities that fall to Missouri would overwhelmingly outweigh any possible benefit. Adding to the significance of these negative consequences is the fact that, once the transfer occurs, this transaction cannot be undone.

A careful evaluation by this Commission is essential to avoiding this potentially significant detriment from liabilities injuries, damages or other claims that have occurred during the time that Illinois has benefited from the generaltion. As Dr. Proctor explains, the lack of analysis from Ameren creates hurdles to a reasoned decision. If Ameren had performed an analysis of all possible outcomes, weighing the best against the worst outcome, the Commission

would have had a better basis for a good decision. (Tr. 1792, ls. 4-17, Vol. 17). But the Commission received no such analysis from Ameren. (Tr. 1784, ls. 3- 25, Vol. 17).

This approach, to insure against any grave consequences from the environmental and other remaining risks, would allow the Commission to be comfortable that, if it chooses to authorize a transfer, there will be no detriment to the public interest.

The second reason that this approach is sound is that it permits the Commission to consider and deal with all of the necessary and relevant issues. Ameren battles to direct the Commission's attention away from *AG Processing*, in which the Supreme Court set the standard for Section 393.190.1 cases. The Court concluded that "[t]he PSC erred when determining whether to approve the merger because it failed to consider and decide all necessary and essential issues." This case threw out the idea that the Commission only need consider immediate and specifically defined detriments. The Court instructed that in order for a Section 393.190.1 Commission decision to be reasonable, the Commission must address the essential issues including those issues that "could be addressed in a subsequent ratemaking case." 120 S.W.2d 732 at 736. The essential issue of whether Ameren should be allowed to burden Missouri customers with the Illinois proportion of the liabilities inherent in this proposed transaction is an integral part of this case.

AmerenUE has not been straightforward with this Commission about the liabilities involved in this transfer case and Ameren's lack of both candor and analysis creates a challenge for the Commission in considering the necessary issue of distribution of liabilities.

Staff has determined that the potential liability issues that are critical to the issue of detriment in this transfer case. (Tr. 1488, ln. 24 – 149024). These liabilities include: debt on property transferred to Illinois, workers' compensation claims, personal injury claims, products

liabilities, common general liabilities, under-reserved claims, accrued environmental liabilities such as mercury contamination and asbestos claims, which are discussed below. All of these must be considered in this case.

AmerenUE urges the Commission to go ahead and authorize the transfer and wait for a rate case to analyze the costs to Missouri. (AmerenUE's Reply To Staff's List Of Conditions, p. 12-13; Ex. 6, Nelson Surr. p. 3, ls.24-25). There are several reasons why this approach is faulty. First, this transaction, unlike the JDA cannot be redone. Second, if the Commission approves the transfer, it must necessarily determine that the transfer is not detrimental to the public interest, so the Commission has already determined that any negative outcomes are not detrimental, limiting its ability to deny costs in future rate or complaint cases. Third, Ameren asks the Commission to "approve as reasonable and prudent the consideration" received, (Application For Transfer Of Assets, p. 10 (c)) so that the Commission, in authorizing the transfer, has precluded a prudence challenge to increased costs in the next rate case because it has already determined that the consideration received is reasonable and prudent. Fourth, as noted above concerning compliance with *AG Processing* : "[t]he fact that the [detriment] could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed [transfer]. 120 S.W.2d 732 at 736. While the PSC may be unable to speculate about future merger-related rate increases, it can determine whether [AmerenUE's proposal to transfer all environmental liabilities is] reasonable, and it should [consider] it as a part of the [least cost analysis] when evaluating whether the proposed [transfer] would be detrimental to the public. 120 S.W.3d 732, 736.

The third benefit of the "insurance" approach is that if AmerenUE is wrong in its assertions to the Commission, Missourians will not suffer. If AmerenUE had done its best to

analyze this transfer, the Commission could have confidence that Ameren's assurances were reliable. AmerenUE did not, however, do its best, and its analysis is flawed. (Tr. 1220, ls. 13-25, Vol. 13). The Company is willing to provide all kinds of assurances that the liabilities are unlikely to manifest as Staff suggests or that the consequences would be small, but the Company is completely unwilling to stand behind these assurances. (AmerenUE's Reply To Staff's List of Conditions, p. 29-30). Again, AmerenUE is unwilling to provide any guarantees, any hold-harmless commitments, and safe harbors for Missouri ratepayers. *Id*. The Company's reluctance to stand behind its sworn testimony should alert the Commission that the assurances are not reliable.

In contrast, Staff has provided compelling evidence showing that a public detriment is likely to occur. *State v. City of St. Louis*, 73 S.W.2d 393, 400 (Mo. Banc 1934). Just one of many examples is the 10-K, Ex. 59 at p.154-155 of 184, in which Ameren lists all of the asbestos claims pending against UE. Ameren witness Nelson cannot tell this Commission what amount of reserves have been established, but all of the pre-transfer liabilities remain exclusively with AmerenUE. (Tr. 1404, ls. 8-15, Vol. 15). Any event occurring prior to the closing date related to product liabilities, hazardous materials, employee safety and health remains with AmerenUE. (Tr. 1408, ls. 2-6, Vol. 15).

When the full weight of the asbestos, mercury and SO_2 liabilities fall on Missouri consumers, AmerenUE's words and sworn assurances are worthless. Words won't provide that insurance. Insuring against the liabilities UE is retaining is especially important because we know these liabilities will happen. Speaking theoretically in a discussion with Judge Thompson, Dr. Proctor discusses what to do with the things that "may even seem to have a very small

probability of happening" and that can't be quantified "and those are the ones that we'd like to get some insurance against. (Tr. 1792, l. 19 - 1793, l. 7, Vol. 17).

The liabilities identified by Staff, and listed in the 10-K, (Ex. 59, p. 150-154 of 184) however, have every probability of occurring, it is just that the full costs of some of the liabilities are unknown. Even though Ameren may have set some reserves, since the outcome of these liabilities is unknown, the reserves do not constitute the required "insurance" (Tr.1404. ls. 8-9 Vol. 15),** ** (Tr. 1421, ls. 8-9, Vol. 16HC). Insurance against these "really bad" outcomes is the obvious and prudent solution. (Tr. 1792, l. 25 - -1793, l. 19, Vol. 17). Staff has proposed methods of insuring against the unknown in its list of conditions.

This proposed transaction is detrimental because "any event occurring prior to the closing date related to product liabilities, hazardous materials, employee safety and health remains with AmerenUE" (Tr. 1408, ls. 2-4, Vol. 15) and thus with the Missouri ratepayers. The various liabilities that Staff was able to identify that remain with Missouri ratepayers are listed below:

1. General corporate liabilities Staff has been unable to determine whether there has been proper apportionment of the general corporate liabilities. (Tr. 1497, ls. 1-6, Vol. 15). Only a small portion of common AmerenUE general corporate liabilities related generally to employee compensation that apply to both operations in Missouri and Illinois are proposed to be transferred to AmerenCIPS as a condition of the Metro East transfer. AmerenUE customers will be retaining all the remaining common general corporate liabilities. (Ex. 20, Fischer Reb. p. 12, ls 6-10). **

** (Ex. 20, Fischer Reb. p. 12, ls 6-14).**

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_____ ** (Tr. 1418, ls. 17-21, Vol 16HC). It is detrimental to the public interest for Missouri customers to pay the cost of these common liabilities with no corresponding compensation. The Commission, therefore, cannot find, as Ameren requests, (Application p. 10 (c) that the consideration received is prudent or reasonable.

2. O&M "Production related fixed operations and maintenance ("O&M") expenses as well as administrative and general (A&G) expenses that currently are allocated to AmerenUE's Illinois customers will be allocated to AmerenUE's Missouri customers after transfer. (Ex. 9NP, Voytas Dir. P.. 3, ls. 6-8). This corresponds to the 6% of additional capacity that will be available to Missouri. AmerenUE performed no analysis of the impact of the transfer on AmerenUE gas operations O&M Costs. Mr Voytas speculates, nonetheless, that the transfer may still be the least cost alternative. (Ex. 9NP, Voytas Dir. p. 3, ls. 9-11).

3. Debt Missouri is retaining the debt on the assets that are being transferred. So Missouri will be paying off the debt on assets that are transferred. This is a detriment to which Mr. Nelson readily admits. (Tr. 1392, ls. 9-11; Vol. 15).

4. Environmental All environmental liabilities remain with UE. Even though Illinois customers benefited, from the generation, the expense of clean-up, remediation, and legal costs, among others, will remain with Missouri customers. (Tr. GREG redirect). ** _____

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_____ ** (Tr. 1422, ls. 7-25 – 1423, ls 1-20Vol. 16HC). This reinforces the need for the Commission to insure against the detrimental impacts of this transfer on Missouri.

Ameren claims that future speculative detriments have no place in this case. (Ameren Reply at 8), and the detriment must be a direct and present detriment. Staff disagrees based on its reading of *AG Processing*, but certainly the asbestos liability meets even Ameren's standards of a direct and present detriment.

5. Asbestos The asbestos hazard has been known for years. It is certainly a present detriment because "UE . . .[has] been named in a number of lawsuits which have been filed by certain plaintiffs claiming varying degrees of injury from asbestos exposure." (Ex. 59 p. 154 of 184) Most have been filed in Madison County Illinois" "The number of total defendants named in each case is significant . . the average number of parties is 60." These claims "allege injury from asbestos exposure during plaintiff's activities at our electric generating plants." But Ameren is proposing for Missouri to retain all of this liability. It is not clear what amount , if any, of reserves set aside for these claims has been included in Missouri or Ilinois cost of service. The only thing we are sure of, is that the transfer will obligate Missouri for these liabilities in the future when the final outcome of these lawsuits is known.

Ameren implies that only quantified, known and central issues need be determined at this time (AmerenUE's Reply To Staff's List Of Conditions, p. 12). Staff disagrees with this assertion, but even if this misleading assertion were true, asbestos is quantified, known and central. There are 49 claims pending (Ex. 59, p. 155 of 184). "Each lawsuit seeks unspecified damages in excess of $50,000." (Ex. 59, p. 154 of 184). That is $2,450,000 and this does not include litigation costs or other legal costs. It is apparent that this liability is known, is not contingent, and occurred when Illinois customers were benefiting from service.

6. Clean Air Act Ameren knows that "[b]oth federal and state laws require significant reductions in SO2 and NOx emissions that result from burning fossil fuels. Ameren has also

been able to "quantify" $160 million to $180 million as the future estimated capital expenditures for AmerenUE. Ameren has estimated capital expenditures of $250 million to $350 million by 2010 and $300 million to $500 million to 2015. (Ex. 59, p. 150-155). The combined total for future estimated capital expenses is over $1 billion. (Ex. 59, p. 150-155). Ameren claims that these are capital expenditures, or assets, but these are not *revenue producing* or *generation producing* capital projects. These capital projects will not generate a single watt of electricity. Mr. Nelson goes on to say that "Liabilities are not booked in advance for capital expenditures." (Tr. 1398, ls. 17-20, Vol. 15). The reality is that the costs of these future capital expenditures will be passed on to Missouri ratepayers through returns on ratebase and depreciation expenses that will not be shared with Illinois.

The EPA has published revisions to the Clean Air Act that may require additional expenditures for "major modifications" to existing plants. While these rules have been challenged, the rules could result in "major" costs. (Ex. 59, p. 151 of 184)

7. Mercury While the actual cost of cleanup of mercury is unknown, "in mid-December the EPA issued proposed regulations with respect to SO2 and NOX emissions (the 'Interstate Air Quality Rule') and mercury emissions from coal-fired power plants. These new rules, if adopted, will require significant additional reductions in these emissions from our power plants . . . ." (Ex. 59, p. 151 of 184) Ameren tells its shareholders that the final mercury requirements are highly uncertain, but estimates that capital costs could be up to $100 million by 2010, and AmerenUE would be responsible for two-thirds of the cost. (Ex. 59 T

8. Remediation "We are involved in a number of remediation actions to clean up hazardous waste sites as required by federal and state law. Such statutes require that responsible parties fund remediation actions regardless of fault . . . . UE and CIPS have been identified by

the federal or state governments as a potentially responsible party at several contaminated sites. AmerenUE assesses its potential costs of remediation each year. (Ex. 76). Estimated costs are included in a reserve.

9. Sauget is known because it is on the Environmental Protection Agency's CIRCLA clean up list. Reaching back to hold all potentially responsible parties polluters responsible is certainly known to be the method employed by the EPA when determining the responsible parties for sharing costs of cleanup.

In this case Ameren has reserved, but there is no contingency if they have underreserved and Solutia has gone bankrupt. ** _____ _____ ** (Ex. 76). This does not take into account the increased potential costs if AmerenUE must pay a portion of Solutia's share. (Ex. 59, p. 153 of 184).

The challenge to doing what is fair for Missouri is that the future liabilities are not completely known. "We need to make a distinction between a current liability and a long-term liability. In the area of environmental liabilities, we don't know what the cost of . . . a clean up at a generation site that benefited both Illinois and Missouri customers will be Staff does not want to preclude Illinois from paying its fair share of future liabilities associated with cleaning up a site that they benefited from." "[T]hese environmental liabilities it's a ticking bomb. It may turn into something [and] Illinois ratepayers should be on the hook to clean up their proportionate share" (Tr. p. 1079, ls. 16-21). Rather than put **all** of the risk on Missouri, the Commission can reasonably give Ameren an incentive to assure that what it has represented to the Commission will be the result by requiring Ameren to prove that the benefits that it touts do actually outweigh the detriments that it dismisses. The Commission can put some of the risk on Ameren by requiring Ameren to either transfer Illinois liabilities to Illinois, requiring Ameren to

demonstrate through empirical data in a true up that the benefits outweigh the detriments or by holding Ameren responsible for Illinois' 6% until all claims that are the result of pre-transfer activities and operations are resolved.

VII. Natural Gas Issues

It is the Staff's position that the Commission should not approve this transfer. If the Commission does approves a Metro East transfer, it should require Ameren and AFS to stand behind their sworn assurances of no detriment to Missouri consumers for loss of the Alton LDC resources. These resources are used to supply the peak summer needs of the Venice and Meramec generation plants. Ameren's and AFS should also be expected to back up their assurances of no detriment to the gas customers in the Fisk/Lutesville area. (Tr. p. 1094, ln. 24 to p. 1095 ln. 8).

In its pursuit of the right solution for Missouri ratepayers, the Commission is required to consider both present detriments and risks of future detriments. *AG Processing*. 120 S.W.2d 732. The Commission can only do this if it has adequate information on which to base its decision. Assurances from Ameren witness Mr. Massman that this transfer has no possible detriment related to either the power plant issue or Fisk/Lutesville (Tr. 1094, ln. 24 – Tr. 1095 ln. 8) and hopeful acceptance will not protect Missouri ratepayers from certain harm. Mr. Massman can only speculate. (Tr. 1003, ls. 12-20, Vol. 11). Staff explains the problem: "[t]here are almost no descriptions whatsoever in either AmerenUE's application or its direct testimony of any safeguard to prevent detriment of the public interest." (Ex. 18, Sommerer Reb. p. 8, ls 15-22). This is true even after discovery. "Even in response to Staff's discovery requests, critical details of how current beneficial transactions and relationships will be recreated once the Alton

gas system is transferred from AmerenUE to AmerenCIPS are absent." (Ex. 18, Sommerer Reb. p. 8, ls 15-22).

Ameren made misleading statements in its sworn application. (Application For Transfer of Assets, p. 6). "The transfer of assets and related transactions will benefit the Missouri retail electric customers of AmerenUE, and will not harm them in any way. . . Further, AmerenUE's Missouri gas utility business is completely separate from its Illinois gas utility business in Alton, Illinois. AmerenUE's Missouri gas utility business is served from different pipelines than the one which serves its Illinois gas utility business. Further AmerenUE's Missouri gas utility business has supply and transportation contracts which are separate and distinct from those contracts entered into for the benefit of its Illinois gas utility business." (Application For Transfer of Assets, Change in Decommissioning Trust Fund, Waiver of Affiliate Rules, p. 6, emphasis added).

An examination of the last three sentences reveals how these statements are misleading. "Further, AmerenUE's Missouri gas utility business is completely separate from its Illinois gas utility business in Alton, Illinois." This is not true. "There is an upstream pipe contract that was omitted." (Tr. 984, ls. 7-8). AmerenUE has a ** _____ _____ ** (Ex.18, Sommerer Reb. p. 5, ls 1-3).

"AmerenUE's Missouri gas utility business is served from different pipelines than the one which serves its Illinois gas utility business." This statement is also incorrect. "The Alton area is served directly by MRT. The Fisk-Lutesville area is served directly by NGPL. . . . There's a common contract at NGPL that serves both utilities." (Tr. pp. 985-986, emphasis added).

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"Further, AmerenUE's Missouri gas utility business has supply and transportation contracts which are separate and distinct from those contracts entered into for the benefit of its Illinois gas utility business." This is also untrue. "Although NGPL is not directly connected to the Alton Illinois gas utility, it should have been identified in the application as the pipeline that indirectly serves the utility. The Alton, Illinois gas utility and the Fisk-Lutesville, Missouri gas utility share one common firm transportation contract." (Ex. 17, Massmann Sur. p. 4, l. 10; Tr. p. 986, ls. 11-17). The application itself has never been corrected by Ameren. (Trans. p. 985, ls. 6-7).

Staff has identified two detriments that should be addressed by conditions placed on the Company. One detriment is the impact of the transaction on the Fisk/Lutesville area gas customers, addressed later in this section, and the other is that Ameren has used its Alton natural gas LDC's gas supply during the summer when demand for natural gas is low for the LDC to provide safe and reliable gas supply for the Venice and Meramec generation plants that are use to meet Missouri customers' summer electricity needs. (Ex. 18, Sommerer Reb. p. 6, ls. 19-23; p. 7, ls. 26-30, p. 8 ls. 1-3). Ameren has sworn that this transfer would not be a detriment for its Missouri consumers despite the trading of this reliable no-notice source of natural gas for the unknown volatility of the spot market. (Tr. 1094 l.24 to p. 1095 l. 8). Staff has determined that it indeed is a detriment. (Ex. 18, Sommerer Reb. p. 3, ls. 16-21). For this reason, Staff recommends that, if the Commission authorizes the proposed transfer, the Commission condition its authorization on Ameren obtaining new gas supply, transportation, and storage agreements that leave AmerenUE's Missouri electric and gas utility operations in no worse position or situation in terms of both cost and reliable operations than would have existed absent the transfer. (Ex. 18, Sommerer Reb. p. 3, ls. 8-14). If the Commission does order this provision in

order for the approval of the transfer, AmerenUE would, in future rate cases, bear the burden of proof that this condition has been met. If the Commission does not order this provision, the burden of proof would be shifted to Staff.

In its application and in direct testimony, Ameren failed to fully describe or analyze the impact of the transfer of the Alton system on AmerenUE's Missouri customers and it did not perform any study of the economic impacts of the Metro East transfer on its Missouri customers. (Ex. 18 Sommerer Reb. p. 3, ls. 16-21). It is impossible for Ameren to prove that this transfer is not detrimental to its for Missouri customers because there is no least cost study evaluating the loss of Alton gas resources on both its Missouri natural gas and electric customers resulting from Ameren's proposal to discontinue the current valuable relationship between its Alton Illinois LDC and the Meramec and Venice power plants. Ameren does not even suggest that this relationship can be replicated. (Tr. p. 1107, ls. 8-23). It is only after Staff raised the detriments related to the natural gas aspects of the transfer that Ameren filed the surrebuttal testimony of Mr. James Massmann attempting to address this issue. (Ex. 17, Massmann Surr.)

Staff did not overlook AmerenUE's customers and in terms of natural gas supply, Staff identified two distinct areas of detriment for Ameren customers. One of which is the end of the beneficial relationship for both Alton gas supply and transportation, and the Meramec and Venice power plants. "When the Alton gas distribution system resources were generally idle (during the summer months), the Venice and Meramec power plants could utilize those resources to meet summer demand and loss of this resource is a significant detriment. ((Ex. 18, Sommerer Reb. p. 8, ls. 20-22). The testimony in this case demonstrates that Ameren urges this Commission to trade the known of a exceptionally beneficial relationship for the Venice and Meramec power plants for the unknown volatility of the spot market while, remarkably, also

finding that there is no detriment to Missouri ratepayers. (Ex. 18, Sommerer Reb. p. 3, ls 16-21). Ameren itself aptly described this relationship as a part of a data request answer to Staff:

> The Alton service territory requires firm gas service, but requires reserved capacity on MRT only during the winter season. The power plants have alternate fuels and need interruptible gas service but on a no-notice basis, and tend to use more gas in the summers. The gas needs of the Alton service territory and the power plants are therefore complementary, and **in order to save costs for both gas and electric customers**, it was decided to utilize the MRT gas transportation and storage contracts for both distribution and electrical generation. Joint usage allows the power plants to continue to have no-notice service (the interruptible MRT gas sales contract which provided no-notice service in the past was cancelled when Order 636 services commenced on MRT), and the sharing of expenses lowers the cost of maintaining the capacity for the Alton distribution customers.

(Ex. 18, Sommerer Reb. p. 7, ls. 11-23).

Elimination of this resource for Missouri customers results not only in the likelihood of higher natural gas prices, but also in a considerably less reliable supply situation. As Mr. Sommerer testified, it will be difficult to replicate this situation and costly as well. (Tr. 1107, ls. 8-13. Vol. 11). "The two systems operate together relying on each others usage to reduce costs for each system. (Ex. Sommerer Reb. p.7, ls. 26-27). The transfer would eliminate this reliable, no-notice natural gas supply for an uncertain stand-alone gas supply and transportation agreement, exposing the power plants to the vagaries of the natural gas spot market. (Ex. 18, Sommerer Reb., p. 8, ls. 11-13).

Ameren proposes to now go to the spot market to supply the power plants. Ameren witness Mr. Massman described the spot market as a clearinghouse for various prices of gas and the buyer goes to the market and bids for a particular day. (Tr. 971, ls. 18-25 Vol. 11). Ameren has had a long term stable arrangement with Alton. But if this transfer is approved as proposed, AFS will have to go to the spot market for unstructured deals that are made for only short

periods. (Tr. 971, ls.18-25, Vol. 11). This is an obviously less reliable situation and, thus, a detriment to UE customers.

Not only is the spot market riskier, it is possible that the power plants would have to pay the market price. Ameren's claims that Missouri ratepayers would not be harmed because the Venice plants paid the market price for gas were shown to be incorrect. Reference to Ex. 55 demonstrates that many times the power plants were not charged the daily spot market price. If the Commission approves this transaction without conditions, it will be quite costly for Missouri ratepayers because UE will supply Venice's peak summer cooling needs by relying on the "spot market [an] extremely volatile market" (Tr.1108, ls.13-23, Vol.11) instead of the current exceptionally reliable situation that is used to supply those power plants.

Additionally, although the Company argued that the Alton LDC's capacity that was used by the power plants was priced at a capacity release market rate, that is not always true. Mr. Massman changed his testimony to indicate it is "typically" true. (Tr. 949, ls 1-2, Vol. 11). In addition, the availability of such discounted capacity release is questionable given that the power plants never relied on actual capacity releases but used the idle firm capacity of the Alton LDC. (Tr. 1014, ls. 10-23, Vol. 11).

As testified by Staff witness Sommerer, the Alton system had a diversified portfolio of gas supply, storage, and transportation resources. (Ex. Sommerer Reb. p.6 ls. 19- p. 7 ls. 23). This resource base was used to supply the Venice and Meramec power plants. (Tr. 1014, ls. 10-13, Vol. 11). To state it another way, in order to supply low cost gas service for the electric generation, Ameren currently uses the MRT gas transportation contracts for both its LDC and for the electric plants. (Tr. 958, ls. 18-25, p. 959, ln. 1, Vol. 11). As admitted by Ameren witness Massmann under cross-examination (Tr. pp. 958, l-22; p. 967 ls. 3-6), the power plants did not

rely on spot market purchases for its gas supply in peak summer months, but instead relied on the Alton LDC's natural gas contracts. (Tr. 1014, ls. 10-13, Vol. 11).

The ability of AmerenUE to access the Alton system's no-notice supply is of great economic value to Missouri customers. (Tr. 955, l. 24 to p. 956 l. 16, Vol. 11). That distinct advantage will be lost if this transfer takes place. (Tr. 1015, ls. 23-25, Vol. 11). "Ameren has never supplied the power plants that way" (Tr. 955, l. 24 - 956, l.16, Vol. 11). This transaction will result in Ameren NOT purchasing gas in the most economic way for the power plants. The power plants will face higher gas prices (Tr. 1014, ls. 19-23, Vol. 11) and less reliable supply. (Tr. 1015, ln. 23 to 1016, ln. 1, Vol. 11).

AFS now proposes to rely on interruptible service. Mr. Mass man described what may happen to an interruptible transporter. (Tr. p. 979, ls 5-12, Vol. 11). Ameren proposes to rely on interruptible service or, if possible, proposes to try to negotiate a discount (Tr. p. 967, ls. 21-23, Vol. 11) But instead of the ready access to the Alton resources that the Meremac and Venice plant enjoy, AFS will have to bid on this capacity, there may be other bidders for this capacity, and one of them could bid the price up to Federal Energy Regulatory Commission (FERC) maximum rates. (Tr. 968, ls. 3-6, Vol. 11). AFS does not know what will happen with this capacity because it has not been posted for bid (Tr. 968, ls. 11-16, Vol. 11) AFS does know that the power plants have never had to pay FERC maximum rates. (Tr. 968, ls. 17-21, Vol. 11)

There is also a reliability risk that does not exist under the present situation. The lack of the current mutually advantageous service would mean that less reliable alternatives would have to be used to supply power to Missouri. (Tr. 967, ls. 16-23, Vol. 11). While the current generation plants have multiple sources of fuel, future units at these sites may not, making resort to the extremely volatile spot market much more uncertain. The existing practice of relying on

the Alton LDC's firm gas supply and firm transportation contracts created a situation where the power plants had access to what was in essence equivalent to a firm natural gas resource. (Tr. 1014, ln. 14 – 1016, ln. 1). The Company's post-transfer proposal for supplying the power plants existing requirements is to replace the firm, no-notice Alton natural gas resources with the volatility of spot market interruptible gas supply. (Tr. 971-972, Vol 11).

The evidence in this case demonstrated that in proposing this transaction, Ameren forgot about its natural gas customers. AmerenUE is a large electric company but it does have some natural gas customers in Missouri. In proposing this transaction to the Commission, Ameren forgot about these customers even to the extent that it made misleading statements in its application, as noted above.

While there are not a lot of customers in this the Fisk/Lutesville area, these customers rely on AmerenUE to supply natural gas. (Tr. 1009, ln. 13- 1010, ln. 20, Vol. 11). These customers have been served under a combined contract that gave this small area certain advantages in terms of natural gas transportation prices. (Tr. 1009, ln. 13- 1010, ln. 20, Vol. 11). If the Commission were to approve this proposal without the conditions proposed by Staff, these customers would also be subject to the vagaries of the market when the underlying transportation contract expires. (Tr. 1011, ls. 4-8, Vol 11). This discounted rate currently enjoyed by this area is below the FERC maximum tariff rate. If the transfer is approved the Company's proposal is to release part of the capacity to AmerenCIPS in a "pre-arranged" capacity release deal. (Tr. 1000, ls. 17-23). Then, after the contract expires, AmerenUE offers no assurances that the contract will continue to be combined with AmerenCIPS to insure that the smaller Missouri LDC would still have access to rates at least as favorable as the Alton LDC (the system which Fisk/Lutesville currently shares this discounted capacity). (Tr. 1012, ls, 13-20; Tr. 1003, ls. 6-24, Vol. 11)

Ameren is willing to testify that this contract will be negotiated with all the other Ameren contracts and that Ameren will bring to bear all of its might. (Tr. 1003, ls. 1-5, Vol. 11). But, as Mr. Sommerer points out, until Ameren performs this negotiation, it is just Mr. Massmann's "hope" that he can obtain as favorable a rate so that Ameren's assurances of the lack of detriment is pure speculation. (Tr. 1003, ls. 12-24, Vol. 11). Staff has suggested conditions to take this benefit from mere speculation to certainty, but Ameren is completely unwilling to stand behind Mr. Massmann's assurances to this Commission.

AmerenUE's assurances that these items may be addressed in a rate case also miss the point. The fact that the least cost analysis presented to the Commission by AmerenUE fails to include these costs in its analysis results in detriment to both the electric and natural gas ratepayers. There is simply no replacement for this present beneficial relationship between Alton LDC and the Venice and Meramec generation plants. If the transfer is approved, AmerenUE must bear the risk that it is wrong, not AmerenUE's customers. Staff agrees that when the Company does its best to fully disclose, evaluate, and address the critical issues at stake in the application, and the Commission is fully informed as to the issues and is able to consider all the advantages, detriments and risks of detriment, if the Commission errs by approving the application, the consumers at least have had a reasonable assurance that potential detriments have been considered, and perhaps the consumers should bear the risk. That is not the situation in this case. The Company has failed to fully evaluate and quantify detriments. Based on the testimony, the Commission cannot determine that there is no detriment for Missouri consumers because elimination of the current relationship between the Alton, Illinois LDC and the Venice and Meramec power plants results in irreparable harm. UE has not done its best for its natural gas or electric customers.

Ameren urges the Commission just to trust that it will do its best for these overlooked customers. (Tr. 1003,1s. 12-24, Vol. II) (Ameren Response To Staff's List of Conditions). The Commission should, however, act to protect the customers that Ameren ignored in this case. The Commission may do so by holding Ameren accountable to its sworn testimony that it will use its negotiation strength to obtain the best possible supply for these forgotten consumers. It would seem that Ameren would be most motivated to remember these customers if it were responsible for the possible negative outcome of its negotiations, and not permitted to merely make some effort to negotiate the new contracts. If Ameren carries through on what it claims in sworn testimony that it can do, the risk of any detriment to Ameren is small. Why then does Ameren refuse to accept the risk? It has forgotten these customers once, the Commission should assure that it does not happen again and, if Ameren is required to bear the risk of its failure, Ameren is unlikely to overlook them again. Staff's conditions merely hold Ameren to its sworn assertions to this Commission and protect both the Fisk/Lutesville natural gas customers and AmerenUE's electric customers from detriment.

VIII. Transmission Service and Costs

1. Metro East Transfer Includes Transfer of AmerenUE Transmission Facilities to AmerenCIPS

Mr. Nelson testified that the reason that the pending application includes the proposed transfer of transmission facilities is to effectuate that AmerenUE would no longer be regulated in Illinois. (Tr. 379, ls. 1-14, Vol. 6).

a. AmerenUE's Request to Transfer Transmission Assets in Instant Case Should Not Be Equated with Metro East Transfer Request in 1996-1997 UE-CIPSCO Merger Case

As previously noted herein, at page 4 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE states that "the Commission approved the first effort to transfer these

Illinois assets in the course of approving the UE-CIPSCO merger in Case No. EM-96-149." AmerenUE also indicates that the transaction proposed in the UE-CIPSCO merger case is not the same transaction for which AmerenUE is seeking the Commission's authorization in this case. If the Staff did not look at the proposed transfer of UE's Illinois retail customers close enough in Case No. EM-96-149, that is no reason for the Staff and the Commission to not give the proposed Metro East transfer an appropriate level of scrutiny in the instant proceeding. Besides, the transfer did not occur and regardless, there is no *stare decisis* respecting Commission decisions.[19]

UE's Application in Case No. EM-96-149 requested that the Commission issue its Order authorizing UE to transfer to CIPS assets which generally constituted UE's Illinois-based franchise, works or system necessary or useful in the performance of UE's duties to the public with respect to the provision of retail electric and gas service in Illinois, "excluding any of UE's transmission or generating assets located in the State of Illinois." (Tr. 368, ls. 8-22, Vol. 6).

b. Some Transmission Assets in Illinois Are Necessary to Electrically Connect AmerenUE Generating Facilities to Ameren Transmission Grid.

Mr. Nelson's direct testimony in the instant proceeding relates that some of the electric assets to be transferred to AmerenCIPS are electric transmission assets used to serve the entire Ameren control area, including AmerenUE's Missouri retail customers. (Ex. 5, Nelson Dir., p. 7, ls. 5-19 and p. 9, ls. 1-3). Mr. Edward C. Pfeiffer, Director of the Transmission Planning and Services Department of Ameren Services, testified that AmerenUE transmission assets connecting AmerenUE generating facilities located in Venice, Il., Pinckneyville, Il., Electric

[19] 120 S.W.3d at 736; *See also State ex rel Chicago, Rock Island, & Pacific Railroad Co. v. Public Serv. Comm'n*, 312 S.W.2d 791, 796 (Mo. banc 1958); *State ex rel. General Tel. Co. v. Public Serv. Comm'n*, 537 S.W.2d 655, 661-62 (MoApp.1976); *State ex rel. Arkansas Power & Light Co. v. Public Serv. Comm'n*, 736 S.W.2d 457, 462 (Mo.App. 1987); *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 706 S.W.2d 870, 880 (Mo.App. 1985); *State ex rel. St. Louis v. Public Serv. Comm'n*, 47 S.W.2d 102, 105 (Mo.banc 1931); and *Marty v. Kansas City Light & Power Co*., 259 S.W. 793, 796 (Mo. 1923).

Energy, Inc./Joppa, Il. and Keokuk, Ia. to the Ameren transmission grid would be transferred to AmerenCIPS as part of the proposed Metro East transfer. (Tr. 1119, l. 24 – 1120, l. 21, Vol. 11; *See also* Tr. 1185, l. 14 – 1189, l. 16, Vol. 13 (Colloquy between Judge Thompson and Dr. Proctor)).

c. Relationship of Single Ameren Control Area for Transmission Service from AmerenUE's Network Resources to AmerenUE's Native Load

Dr. Proctor explained that due to the JDA, as part of the merger of Union Electric Company and Central Illinois Public Service Company, the two separate control areas of these two companies were combined into a single control area. Otherwise a single dispatch of UE's and CIPS' generation to meet the load of both companies would be extremely complicated to perform over two separate control areas. A primary function of the control area is to dispatch and regulate generation in such a manner as to meet its net scheduled interchange, which is either net imports or exports scheduled into or out of the control area. A single control area increases the efficiency of the joint dispatch process and there are no transmission charges for the energy transferred between the two companies. (Ex. 14, Proctor Reb., pp. 17, l. 19 – 18, l. 20).

2. Staff's Recommendation for Hold Harmless Condition Related to Transmission Service from AmerenUE Generation Sources that Subsequent to Proposed Metro East Transfer Would No Longer Be Directly Connected to AmerenUE Transmission System

Dr. Proctor testified that although it is his understanding that if the proposed Metro East transfer occurs, AmerenUE and AmerenCIPS will continue to be operated as a single control area and there will be no changes in transmission service or charges, there is nothing in writing that provides such assurance. It is the Staff's position that AmerenUE should have obtained such written assurance and as a condition for Commission approval of the pending AmerenUE Application, the Commission should require written assurance from Ameren that AmerenUE will

be held harmless with respect to transmission service and transmission charges respecting Venice, Pinckneyville, EEInc/Joppa and Keokuk. (Ex. 14, Proctor Reb., p. 19, ls. 1–16). "[N]o transmission facilities should be transferred until such agreements are finalized and filed with the Commission." (*Id.* at 19, ls. 16-18).

a. Ameren's Response to Staff's Hold Harmless Condition

Dr. Proctor testified that if the Metro East transfer does not occur, the AmerenUE generating plants in Illinois and Iowa would continue to be connected to the AmerenUE transmission system and be designated as network resources, i.e., generating plants that AmerenUE is assured of having firm transmission from to meet its native load. (Tr. 1190, ls. 2-11, Vol. 13). He related the Staff has concerns regarding potential financial consequences of AmerenCIPS owning the transmission facilities after the proposed Metro East transfer rather than AmerenUE continuing to own the transmission facilities. (*Id.* at 1192, ls. 7-14). Dr. Proctor calculated the potential detriment resulting from AmerenUE customers having to pay a transmission rate in order to have the Illinois and Iowa generating plants be network resources if the transmission facilities in question are transferred to AmerenCIPS. (*Id.* at 1192, ls. 15-20). He calculated as the worst-case scenario respecting AmerenUE retail electric customers having to pay a transmission rate totaling $13.8 million, annually. (*Id.* at 1192, l. 15 – 1193, l. 16 and 1242, l. 17 – 1243, l. 14).

Dr. Proctor related that, presently, there is no transmission rate because there is a single control area for AmerenUE and AmerenCIPS, and the JDA does not currently incorporate any rate for transmission service. (*Id.* at 1250, ls. 2-6). However, Dr. Proctor stated that his concern respecting a possible transmission rate being sought from Missouri retail electric ratepayers through a renegotiation of the JDA is related to a possible attempt by AmerenCIPS and AEG to

recover lost revenues resulting from changes that might be made in the JDA that the Staff is recommending, one of which Mr. Nelson said in his surrebuttal testimony, and at the evidentiary hearing, that AmerenUE would accept if required by the Commission. (Tr. 1242, l. 8 – 1243, l. 6, Vol. 13).

AmerenUE's position reflected in the testimony given by Mr. Nelson in response to questions from Judge Thompson respecting AmerenUE's unwillingness to agree to a hold harmless condition is that AmerenUE has no intention of splitting the control area or to depart from its participation in MISO, and even if it did, it does not think that the Federal Energy Regulatory Commission (FERC) would allow it to charge a pancaked transmission rate. Thus, in AmerenUE's opinion, such a hold harmless condition is unnecessary. (Tr. 1729, ls. 10-23 and 1730, ls. 17-21, Vol. 17).

The key words used by Mr. Nelson in his testimony are "intention," and "think." Irrespective of Ameren's intentions or what Ameren thinks the FERC may or may not do, the possibilities still exist, and are very dependent on actions that Ameren may decide to take at a later date. The Staff is requesting protection for Missouri retail ratepayers from the consequences of those actions should Ameren reverse its current intentions or the FERC take a different approach.

b. Examples of Prior Hold Harmless Conditions Agreed To by Ameren

There is an example within the recent past of Ameren Services agreeing to a hold harmless condition respecting transmission congestion. The example is in FERC Docket No. EC02-96-000 wherein Ameren Services, Central Illinois Light Company (CILCO) and AES Medina Valley Cogen, LLC filed a joint application for approval of a merger and related waivers and authorizations pursuant to Section 203 of the Federal Power Act whereby Ameren would

acquire CILCO and Medina. The FERC issued on November 21, 2002 an Order Conditionally Authorizing Merger And Granting Waivers And Authorizations (FERC Conditional Merger Order), 101 FERC ¶61,202. The hold harmless transmission congestion condition involves City Water Light & Power of the City of Springfield, Illinois (Springfield) and is identified as follows in the FERC Conditional Merger Order:

> 32. Applicants recognize the need for interim market power mitigation measures during the period from the date the acquisition is consummated to the date the upgrades are completed and in service. They propose two interim measures. First, for the Springfield market, Applicants agree to pay Springfield the difference between Springfield's incremental cost to generate and the Into Cinergy price (adjusted to account for transmission costs, losses and ancillary service charges) for each hour when constraints on the Ameren or CILCO transmission systems prevent Springfield from importing the energy that it wishes to import to serve its native load. This "hold harmless" transmission congestion condition would be in effect until the identified transmission system upgrades for the Springfield area are completed, or if other upgrades are agreed to by Applicants and Springfield, until Applicants have discharged their portion of the responsibility for constructing those other upgrades. Second, for wholesale customers purchasing in the Ameren and CILCO markets, Applicants agree to extend any existing fixed contract which is due to expire before the upgrades proposed for those markets are completed through the month in which construction is actually completed.

101 FERC¶61,202 at 61,840.

There is another example of Ameren willing to provide hold harmless assurances or enter into mitigation measures. The March 2004 prepared direct testimony of Mr. Nelson in FERC Docket No. EC04-81-000, Exhibit 80 in this proceeding, states that its purpose is to describe the "'mitigation measures'" that Ameren Corporation commits to take if its acquisition of Illinois Power Company is consummated. Mr. Nelson states that if the Illinois Power acquisition is consummated, Ameren Corporation commits to (1) sell some of its rights to the output from the 1,014 MW coal fired Joppa plant owned by Electric Energy Inc. (EEInc). and (2) seek to ensure that the only owner of EEInc not affiliated with Ameren Corporation, LG&E Energy's Kentucky

Utilities Company is able to receive output from EEInc attributable to its 20% interest in EEInc if it so wishes. (Ex. 80, p. 4, ls. 12-20).

3. During Hearings in the Instant Case AmerenUE Submitted Analysis Respecting Impact on Revenue Requirement of the Transfer of AmerenUE's Illinois Transmission Assets to AmerenCIPS

Dr. Proctor identified in his rebuttal testimony that Ameren had not filed in its direct case a revenue requirement analysis of the effect of the proposed transfer of the AmerenUE transmission facilities in the Metro East area to AmerenCIPS. (Ex. 14, Proctor Reb., p. 19, ls. 1-21 – 20, l. 7). On April 7, 2004, in response to the request of Chair Gaw, AmerenUE caused to be marked as exhibits documents which showed Ameren's projection of the effect on AmerenUE's Missouri retail electric revenue requirement of (1) AmerenUE's proposed transfer of its Metro East transmission facilities to AmerenCIPS and (2) AmerenUE's participation in the Midwest ISO through a contractual agreement with GridAmerica, in conjunction with the FERC's transmission policy of seeking to eliminate the pancaking of transmission service charges. AmerenUE's Exhibit 71 shows that the proposed Metro East transfer of AmerenUE transmission facilities results is an annual benefit of $0.385 million compared to the nontransfer combustion turbine generators alternative. This $0.385 million would be added to the annual $2.4 million benefit that AmerenUE identified in its prepared direct testimony and surrebuttal testimony as the annual benefit of the proposed Metro East transfer compared to the combustion turbine generators alternative. Ameren identified $1.5 million as being the benefit of the proposed Metro East transfer over the combustion turbine generators alternative when looking at Ameren's projection of the loss of third party revenues to AmerenUE arising from AmerenUE's participation in the Midwest ISO through a contractual agreement with GridAmerica, in

conjunction with the FERC's transmission policy of seeking to eliminate the pancaking of transmission service charges. (Tr. 1387, l. 13 - 1390, 9, Vol. 15).

On April 27, 2004, the Staff filed the affidavit of Dr. Proctor respecting his review of Exhibits 71, 72 and 73 and the workpapers for these exhibits. First, Dr. Proctor qualified his analysis as being for the limited purposes of the pending case and indicated that in the context of a ratemaking proceeding the Staff would want to look closer at various items. Next, he related that he conducted his review on the basis of the 4 coincident peak (CP) allocation factors used by Ameren, the 12 CP allocation factors obtained from AmerenUE witness Gary Weiss and the 12 CP allocation factors used by AmerenUE witness Kevin Redhage for decommissioning costs. Dr. Proctor explained that with respect to annual transmission revenue requirements, assuming the current levels of transmission revenues will continue, the net benefits of the proposed Metro East transfer over the combustion turbine generators alternative ranged from $1.841 million to $2.033 million, where the range depends on which allocation methodology and factors are used for allocating fixed transmission costs. Thus, on the basis of Dr. Proctor's analysis, AmerenUE's Exhibit 71 understated the benefit of the Metro East transfer. He further explained that with a 25% decrease in transmission revenues, which Ameren projected as the result of AmerenUE participating in the Midwest ISO and FERC transmission policy, the net benefits of the proposed Metro East transfer over the combustion turbine generators alternative ranged from $2.813 million to $3.089 million, where the range depends on which allocation methodology and factors are used for allocating fixed transmission costs. (Proctor Affidavit filed April 27, 2004, ¶ 9, pp. 5-6).

> Dr. Proctor concluded that Ameren's transmission revenue requirement analysis resolved only one of the Staff's conditions, in part, i.e., that "AmerenUE perform a study that shows that the proposed Metro East transfer will have no detrimental impact on AmerenUE's revenue requirements." (Proctor Affidavit filed April 27, 2004, ¶ 10, p. 6).

4. Staff's Recommendations Concerning Transmission Conditions Relating to AmerenUE's Proposed Metro East Transfer

During the portion of the evidentiary hearing on the instant issue respecting the proposed transfer of transmission facilities from AmerenUE to AmerenCIPS, Judge Thompson in particular inquired whether the document to be provided by the Staff setting out the Staff's proposed conditions, addressing the elements of the proposed Metro East transfer that the Staff deems to be detrimental to the public, would contain conditions respecting AmerenUE's proposed transfer of transmission facilities. Dr. Proctor indicated that the Staff's list of proposed conditions, which would be submitted to the Commission, would address AmerenUE's proposed transfer of transmission facilities and contain a "hold harmless" condition. (*Id.* at 1248, l. 15 – 1251, l. 5). The following hold harmless provision appears at pages 12 and 13 of Exhibit 68, the Staff's April 6, 2004 List Of Conditions:

> If Ameren elects, or is otherwise required, to split the single control area currently encompassing the transmission assets of AmerenUE and AmerenCIPS or modifies/amends the transmission terms of the JDA, AmerenUE agrees not to seek recovery from its remaining Missouri bundled retail ratepayers of any additional transmission charges due solely to the transfer of ownership of the transmission assets that were owned by AmerenUE in Illinois prior to the Metro East transfer that, as a result of the Metro East transfer, become owned by AmerenCIPS. The agreement provided for in the preceding sentence applies only to transmission charges associated with the current generating capacity at the Keokuk (Iowa), Pinckneyville (Illinois), Venice (Illinois) and Joppa (Illinois) generating plants.
>
> The Keokuk and Venice generating plants are owned by AmerenUE. The Pinckneyville generating plant is currently owned by AEG, but is expected to receive Federal Energy Regulatory Commission (FERC) authorization to be transferred to AmerenUE. The Joppa generating plant currently provides a portion of its capacity and energy to AmerenUE through a purchased power contract that expires, December 31, 2005. The Joppa generating plant is owned by Electric Energy Inc. (EEInc.); and AmerenUE owns 40% of EEInc. The generating capacity that is currently available to AmerenUE at each of these generating plants is 125 MWs at Keokuk, 75 MWs at Venice, 330 MWs at Pinckneyville and 405 MWs at Joppa.

> AmerenUE plans to replace the capacity currently provided from its contract at the Joppa plant with an additional 330 MWs of capacity to be located at Venice, when the AmerenUE contract for a portion of the Joppa purchased power expires on December 31, 2005.[1]
>
> AmerenUE will ensure that Keokuk at 125 MWs, Pinckneyville at 330 MWs, Venice at 75 MWs and Joppa at 405 MWs (until AmerenUE's contract for Joppa purchased power expires on December 31, 2005) shall remain network resources (or such comparable resource as are required by applicable authorities) to serve AmerenUE load so long as these generating plants are owned and operated by AmerenUE and remain in service. If AmerenUE is no longer served pursuant to a contract for purchased power from Joppa, AmerenUE will ensure that up to 480 MWs (75 MWs at Venice and 405 MWs formerly from Joppa) will be available from the Venice plant site as a network resource to serve AmerenUE's native load.
>
> ___
>
> [1] Because Joppa is a base-load, coal-fired facility and the proposed capacity additions at Venice are peaking, gas-fired combustion turbines, the energy from these two facilities are not substitutes. However, for purposes of this proceeding, what the two facilities have in common is generation capacity that would not be directly connected to the AmerenUE transmission system subsequent to the Metro East transfer.

(Ex. 68, pp. 12-13 (the above quote appears as one paragraph in the Staff's List Of Conditions, but, for purposes of ease of reading, has been disaggregated into multiple paragraphs above); Ex. 15, p. 3, l. 14 - p. 5, l. 3; *See also* Ex. 59, pp. 22-23 of 184 for the operating capability of AmerenUE's generating units at the time of Ameren's expected 2004 peak summer electrical demand).

By late filing the comparison of revenue requirements for transmission, the Company has fulfilled the requirement to perform such a study. The Company has not agreed to hold harmless bundled retail customers in Missouri from any detriment arising from such a transfer and from changes in methodology, for determining AmerenUE's revenue requirements, not used in the aforementioned study.

AmerenUE's Reply To Staff's List Of Conditions, filed on April 14, 2004, asserts: (1) at page 25, that Dr. Proctor's concerns are "future, speculative," and (2) in footnote 21 on page 25

that "Staff apparently wants this Commission to believe that FERC might re-institute 'pancaked' transmission rates, a step that would be 180º opposed to FERC's entire RTO initiative, and a step that no one logically believes FERC would take." While the Staff agrees with AmerenUE that a hold harmless condition may not currently be necessary for AmerenUE's Missouri retail ratepayers receiving transmission service from AmerenUE generating plants, which would no longer be directly connected to AmerenUE's transmission, nor is it needed if AmerenUE's Missouri retail ratepayers are only allocated the costs of AmerenUE owned transmission as was assumed by AmerenUE in Exhibit 71, the Staff believes that such a hold harmless condition is needed to protect bundled retail customers in Missouri from changes that AmerenUE may effectuate in the future through: (1) changes to the JDA that would include transmission charges; (2) changes made to the Ameren control-area that would separate out the AmerenUE transmission system; or (3) changes causing the inclusion of additional costs in AmerenUE's transmission cost of service. Moreover, if the situation is as AmerenUE contends and there is virtually no possibility of such changes taking place, then why is AmerenUE so inalterably opposed to providing a hold harmless assurance to the Commission?

IX. Affiliate Transactions Detriments

The Metro East transfer is a transaction between affiliates, AmerenUE, Ameren Corporation (Ameren), AmerenUE's non-regulated parent, and AmerenCIPS, which is regulated by the Illinois Commerce Commission. It is not an arms-length transfer, and is an affiliate transaction. The Metro East transfer is, therefore, subject to the Commission's affiliate transactions rules, 4 CSR 240-20.015 and 4 CSR 240-40.015. The unregulated parent Ameren, designed the transaction between AmerenUE and AmerenCIPS, a non-Missouri regulated affiliate. The fact that AMS employees performed all of the analysis and negotiations on behalf

of AmerenUE and AmerenCIPS makes it evident that the Metro East transfer is not an arms-length transaction. An arms-length transaction is one between parties that are not related.

The Commission promulgated these rules because when a utility does business with an affiliate, "the safeguards provided by arms-length bargaining are absent and ever present is the danger that the utility will be charged exorbitant prices [or left with outrageous detriments] which will by inclusion in its operating costs become the predicate for excessive rates." *Atmos Energy Corp. v. Public Serv. Comm'n,* 103 S.W.3d 753 (Mo. 2003) *citing United States v. Western Elec. Co., Inc.*, 592 F. Supp. 846, 853 (D.D.C. 1984).

If this were an arms-length transaction, in other words, if Ameren were purchasing these power plants or the generation capacity from a third party, would UE take on the obligation to pay pre-purchase environmental liabilities resulting from past power plant generation? The answer is, of course, a resounding "No." UE would only assume these burdens with sufficient compensation or with some kind of insurance to cover future payment obligations for these massive liabilities. (Tr. 1793 ls. 1-13, Vol. 17). The fact that AmerenUE is proposing to transfer assets to a non-Missouri regulated affiliate below the greater of the Fair Market Value (FMV) or Fully Distributed Cost (FDC) is a financial advantage. (Ex. 20, Fischer Reb. p. 9, ls. 15-18). Additionally the fact that Ameren is transferring all of the liabilities that would remain with CIPS absent the transfer is providing a financial advantage to CIPS and also to the parent, Ameren. Cross subsidization occurs when Ameren wrongly shifts the claims for personal injury, property damage, workers' compensation or environmental clean-up on Missouri.

Because the safeguards provided by arms-length bargaining are absent , this transaction must be subject to heightened scrutiny. The principal entity that is performing most of the work to effectuate this transfer is AMS, and AMS represents both AmerenUE and AmerenCIPS. The

best interests of AmerenUE cannot be presumed to be carried out by employees of AMS, who also are acting as agents for the other party of the agreement, AmerenCIPS. (Ex. 20, Fischer Reb., p. 7, ls. 9-14). To be arms-length, the sole interest of one party (UE) cannot be the ultimate goal of an entity (AMS) that is also acting as an agent for the other party (CIPS).

Remarkably, Ameren places the burden of making certain that Missouri is protected squarely on this Commission. Ameren witness Craig Nelson implicitly admits that no one at Ameren was considering AmerenUE' interests when in the hearing room he places **this Commission** in the role of being one of the arm in the transaction. In addition, Ameren puts the Commission squarely in the role of engaging in heightened scrutiny when witness Nelson testifies that the transaction is arms-length because this Commission is at one end of the arm and this Commission will ensure that the transaction is fair. (Tr. p. 1039, ls. 19-22, Vol. 11). "At the other end of the arm [is] the Missouri Public Service Commission ensuring that there [is] no subsidy and [the transaction is] fair and reasonable and no detriment." (Tr. p. 1039, ls. 15-18, Vol. 11). The Commission can be the "arm" and protect Missouri consumers by applying the affiliate rules to this transaction, or, in the alternative by applying all of Staff's conditions to the transfer.

In fact, there is little incentive for Ameren, the parent, to promote AmerenUE's best interests separate from the interests of the holding company. AMS employees performed only a limited review of liabilities and conducted even less review, if any, on the cost of service impacts of the proposed Metro East transfer on AmerenUE's Missouri electric and gas ratepayers. Ameren has not adequately represented or protected AmerenUE's interests in the transaction. The Boards of all of Ameren's affiliated companies are so interrelated that it would be impossible for the interests of any affiliated company but the holding company, Ameren to be considered in

any affiliated transaction. See for example p. 720, ls. 1-25, Vol. 9 of the transcript and Ex. 59, pp. 25-32 of 184 of the United States Securities and Exchange Commission (SEC) Form10-K for the fiscal year ended December 31, 2003.

In addition to AmerenUE not having an independent board, it was employees of Ameren Services Company (AMS), a non-regulated affiliate of Ameren, not employees of AmerenUE or AmerenCIPS who determined the assets and liabilities that would remain with Missouri in the proposed Metro East transfer. The issues that the Staff and the Public Counsel have raised demonstrate that AmerenUE and its Missouri customers were not represented neither when the terms of the transaction were decided nor when the analysis was conducted on the impact of the transaction on Missouri ratepayers. In fact, the Commission has been put in a position of determining what is just for AmerenUE and its customers because no one at Ameren made sure that AmerenUE consumers are protected.

Ameren witness Nelson, asserts that the rules do not apply, or that a variance should be granted, but Mr. Nelson admits under cross-examination that he was not familiar with the provision of the rule when he made that assertion. (Tr. 1048, ls. 3-13, Vol. 11).

The standard for variance is "in the best interest of customers. 4 CSR 240-20.01. Ameren lacked any motivation to protect Missouri consumers, so this standard certainly has not been met. No due diligence was performed by Ameren or AmerenUE to assure that there was no detriment to its Missouri customers as a result of the transfer. The insufficient analysis of the impact of the transaction on electric and gas cost of service and AmerenUE unwillingness to supply support for the transactions until surrebuttal testimony also demonstrates that AmerenUE is not looking out for the interests of its Missouri customers.

AmerenUE emphasizes the principle that a transfer of assets at net book would not allow one party, AmerenCIPS, to benefit over the other party, AmerenUE. The transaction includes the transfer of liabilities also. This is where the Staff has identified many of the detriments of the transaction. The liabilities represent future obligations to pay. By not transferring liabilities to AmerenCIPS in the transaction, AmerenUE will be required in the future to pay more than its equitable share of these costs.

If the transfer does not take place, Illinois ratepayers would contribute to the environmental liabilities for which they are responsible and Missouri would not carry the burden alone. (Tr. 1077, ls. 20-24, and 1078, ls. 6-10, Vol. 11). If the transfer takes place as proposed by Ameren in this case, Illinois ratepayers would not contribute to environmental liabilities that were incurred as a result of providing service to them in the past. AmerenUE would ask for its Missouri customers to carry the burden alone. If this were an arms-length transaction, AmerenUE would never buy power plants and take responsibility for pre-existing environmental liabilities without adequate compensation for this future obligation.

There is no evidence that AmerenUE is receiving reasonable and prudent consideration from AmerenCIPS for the business that AmerenUE is transferring to AmerenCIPS. This inequity goes beyond the assets being transferred at net book to the liabilities not being transferred. AmerenUE is not receiving reasonable and prudent consideration for the additional future obligations it will be required to pay if the transfer is approved in its current form. The Commission should not authorize this proposal. Ameren's disregard to applying the affiliated transactions rules would lead to cross subsidization of Ameren and AmerenCIPS. Granting a waiver would support AmerenUE' deficient application and inadequate analysis of the impact of the transaction on Missouri ratepayers. A waiver would also set a precedent for future waiver of

the affiliated transactions rule requests. This is precisely the reason the affiliate transactions rules must apply. This is precisely the type of situation for which this Commission adopted the affiliate transactions rules. (Tr. 1055, ls. 4-18, Vol. 11). The transaction is not arms length and there are both present and future detriments. (Tr. 1054, ls. 15-25, Vol. 11). This is the Commission's first real opportunity to apply its rules for the purpose for which they were promulgated.

This Commission's affiliate transactions rules apply to this transaction, and the proposed Metro East transfer falls far short of meeting the standard established in the rule for waiver. The Commission must reject Ameren's application for variance from the rules because Ameren ignores the standard for variance. The standard for variance from the Commission's rule is in the best interest of customers.

Staff Recommendations

The Commission should reject AmerenUE's request for waiver or variance because Ameren has not complied with the affiliated transactions rules criteria for waiver. The Commission should apply the affiliated transactions rules to the transfer transactions. When the affiliated transaction rules are applied, the protection that the enforcement of the rules gives to regulated affiliates and their Missouri ratepayers will serve its intended purpose of preventing the type of cross subsidization that is occurring in this transfer. Enforcing the affiliated transactions rules, a surrogate arms-length transaction will require Ameren to compensate Missouri ratepayers for the liabilities of the transaction as it would a third party in a transaction. The way for the Commission to ensure that the transfer is fair and reasonable and complies with the Commission's affiliate transactions rules is to place the full risk of these liabilities on Ameren.

This allows the Commission to fulfill the role Ameren gave it of being the Missouri arm of the transaction.

Commission's Affiliate Transaction Rule Applies to JDA

The Staff believes that the Commission's affiliate transaction rules apply to the JDA, but, of course, Ameren believes otherwise. (Ex. 20, Fischer Reb., pp. 9-11). The Staff inquired whether AmerenUE's request in the alternative for a waiver for the proposed Metro East transfer from the Commission's affiliate transaction rules was intended by AmerenUE to cover the JDA. Ameren responded that since the JDA had already received approval from the Commission, "UE believes that a waiver of the affiliate rules should not be necessary for the JDA." (*Id.* at 9, ls. 21-22). 4 CSR240-20.015 and 4 CSR 240-40.015 show that the original rules were filed April 26, 1999 and were effective February 29, 2000, which is after the Commission authorized the UE-CIPSCO merger on February 21, 1997. The Missouri Supreme Court held in *State ex rel. Atmos Energy Corp. v. Public Serv. Comm'n*, 103 S.W.3d 753 (Mo. banc 2003), which also was handed down after the Commission authorized the UE-CIPSCO merger, that the Commission had the authority to promulgate the affiliate transaction rules, the promulgation of the rules satisfied all relevant rulemaking procedures and the order of rulemaking was lawful and reasonable. The Staff notes that the Staff's proposed condition regarding access to books, records, employees and officers, contained in the Staff's List Of Conditions filed on April 6, 2004, prompted AmerenUE's Reply To Staff's List Of Conditions, which states, in part, at page 27, is an agreement that the Staff's proposed condition is improper because the Commission's affiliate transaction rules apply:

> The Commission has affiliate transaction rules, and those rules provide the mechanism for access to AmerenUE records and affiliate records. . . . A similar condition did exist in the CIPSCO merger Stipulation in 1997, but that was

> because the Commission, at that time, had no affiliate transaction rules. Those rules now exist, and this condition is improper.

The parties to the JDA are AmerenUE, a regulated Missouri utility, AmerenCIPS, an Illinois regulated affiliate and AEG, a nonregulated Illinois affiliate. The affiliate transaction rules are applicable to transactions between Missouri regulated utilities and non-Missouri regulated affiliates and nonregulated, non-Missouri affiliates.

The electric affiliate transaction rule allows for a waiver to be requested pursuant to 4 CSR 240-20.015(10)(A)1 or (10)(A)2. 4 CSR 240-20.015(10)(A)1 requires that a variance be requested by written application. 4 CSR 240-20.015(10)(A)2 permits a utility to engage in an affiliate transaction not in compliance with the rule when to the utility's best knowledge and belief, compliance with the standards of subsection (2)(A) would not be in the best interests of the utility's regulated customers and the utility complies with the procedures set out in subparagraphs (10)(A)2.A and (10)(A)2.B of 4 CSR 240-20.015. The standards in subsection (2)(A) are as follows:

> (2) Standards.
> (A) A regulated electrical corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated electrical corporation shall be deemed to provide a financial advantage to an affiliated entity if-
> 1. It compensates an affiliated entity for goods or services above the lesser of-
> A. The fair market price; or
> B. The fully distributed cost to the regulated electrical corporation to provide the goods or services for itself; or
> 2. It transfers information, assets, goods or services of any kind to an affiliated entity below the greater of-
> A. The fair market price; or
> B. The fully distributed cost to the regulated electrical corporation.

Mr. Nelson acknowledged that the Commission's affiliate transaction rule applies to power transactions between Electric Energy, Inc. and AmerenUE. (Tr. 480, ln. 19 - 481, ln. 4, Vol. 7).

The EEInc transaction is similar to transactions between AmerenUE and Ameren's nonregulated generating affiliate, AEG.

X. Staff's List Of Conditions Necessary For Staff Recommendation That The Commission Approve Ameren's Proposed Metro East Transfer

On April 1, 2004 at the evidentiary hearing in the instant case, Judge Thompson indicated to the parties that the Commission desired a document containing the Staff's list of conditions respecting the proposed Metro East transfer. In response to an inquiry from counsel for the Staff, Judge Thompson indicated that the list to be provided by the Staff should include both those conditions contained in the Staff's rebuttal testimony and any additional conditions that the Staff would recommend to the Commission. (Tr. 1149, ls. 10-20, Vol. 11; Tr. 1378, l. 9, - 1383, l. 3, Vol. 15). The Staff noted in its responsive filing with the Commission on April 6, 2004 that the Staff does not recommend approval of the Metro East transfer without Commission adoption of all of the conditions set out in the Staff's filing. Even then the Staff is wary of recommending approval because of the unlikelihood of the transaction being reversed once effectuated, barring some judicial determination. The Staff's List of Conditions is Exhibit 68 and except in limited instances is not repeated in detail below.

XI. Access to Books, Records, Employees and Officers

In the Staff's List Of Conditions Necessary For Staff Recommendation That The Commission Approve Ameren's Proposed Metro East Transfer filed on April 6, 2004, the Staff proposed the following condition respecting access to books, records, employees and officers:

> AmerenUE shall make arrangements to ensure access at reasonable times and places to all books, records, employees, and officers of AmerenUE, Ameren and any affiliate or subsidiary of Ameren as required to verify compliance with Chapters 386 and 393. In order to ensure compliance with the Commission's Report And Order in the instant case respecting the issues addressed above, AmerenUE, Ameren and any affiliate or subsidiary of Ameren shall maintain books and records, and shall make available books, records, employees and

> officers without claims that the same are unavailable because of the Public Utility Holding Company Act of 1935 (PUHCA) or are records of an affiliate not within the control, custody or possession of AmerenUE. (These conditions do not appear in the rebuttal or cross-surrebuttal testimony of a Staff witness - Janis E. Fischer is the Staff witness on these conditions.)

At the evidentiary hearings Mr. Nelson asserted, among other things, that the Staff is "asking AmerenUE to be subject to a condition, a standard that no other Missouri utility is subject to. And we don't get it. We don't know why." (Tr. 1732, ls. 10-12, Vol. 17). At page 27 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE argues that this condition proposed by the Staff, among other things, "is inappropriate, not only in the context of this asset transfer case, but in any event, to condition an asset transfer on recordkeeping and record access requirements beyond those that apply to other utilities and beyond this required by Commission rules designed to address this very issue." Contrary to AmerenUE's assertion that it is being singled out for treatment different for any other utility, the Staff is seeking only that Ameren be subject to the same access that the only other utility registered under PUHCA, Great Plains Energy, Inc. is subject to. As can be seen below, the language in the First Amended Stipulation And Agreement in the KCPL reorganization proceeding, Case No. EM-2001-464, is different from the language in the Stipulation And Agreement in the UE-CIPSCO, Inc. merger case, and provides the level of access that the condition in question would place Ameren under:

> **Case No. EM-96-149:**
>
> **Access to Books, Records and Personnel**
>
> UE and its prospective holding company, Ameren, agree to make available to the Commission, at reasonable times and places, all books and records and employees and officers of Ameren, UE and any affiliate or subsidiary of Ameren as provided under applicable law and Commission rules; provided, that Ameren, UE and any affiliate or subsidiary of Ameren shall have the right to object to such production of records or personnel or any basis under applicable law and Commission rules, excluding any objection that such records and personnel are not subject to Commission jurisdiction by operation of the Public Utility Holding Company Act

of 1935 ("PUHCA"). In the event that rules imposing any affiliate guidelines regarding access to books, records and personnel applicable to similarly situated electric utilities in Missouri are adopted, then UE, Ameren and each affiliate or subsidiary thereof shall become subject to the same rules as such other similarly situated electric utilities in lieu of this paragraph.

Case No. EM-2001-464:

Access to Books, Records and Personnel

GPE and KCPL agree to make available to the Staff and Public Counsel, at reasonable times and places, all books, records, employees and officers of GPE, KCPL and any affiliate of KCPL as provided under applicable law and Commission rules; provided that KCPL and any affiliate or subsidiary of GPE shall have the right to object to such production of records or personnel on any basis under applicable law and Commission rules, excluding any objection that such records and personnel of affiliates or subsidiaries are not subject to the Commission's jurisdiction and statutory authority or are not in the control, custody or possession of KCPL, including objections based on the operation of PUHCA.

XII. No Ratemaking Determinations

Staff witness Greg R. Meyer addresses in his rebuttal testimony AmerenUE's prayer at page 10 of its Application that the Commission approve as reasonable and prudent the consideration received by AmerenUE from AmerenCIPS for the transferred assets and liabilities. (Ex. 4, Meyer Reb., p. 17, l. 12 – p. 19, l. 18). At page 14 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE asserts that "[t]he Company, on the record in this case, has been clear: The Company is not requesting ratemaking treatment or 'approval' in this case because this is not a rate case." There is a lack of clarity regarding what Ameren means when it asserts that it is not seeking ratemaking determinations in this proceeding. This lack of clarity can be seen by a colloquy between Judge Thompson and Mr. Nelson regarding two of the requests contained in the "WHEREFORE" clause of AmerernUE's August 25, 2003 Application, which appear to be prayers for ratemaking determinations:

(c) Approving as reasonable and prudent the consideration received by AmerenUE from AmerenCIPS for the transferred assets and liabilities;

. . . .

(f) Approving the reallocation of the electric generating capacity and energy associated with the transferred electric assets to AmerenUE's Missouri electric jurisdiction;

Prayers (c) and (f) in AmerenUE's August 25, 2003 Application in Case No. EO-2004-0108.

Thompson: Okay. I'm looking down here through the wherefore clause of the application. And now I have it on paper I can wrestle with it even more successfully. I'm looking at No. C, Ameren requests the Commission to approve as reasonable and prudent the consideration received by AmerenUE from AmerenCIPS for the transfer of the assets and liabilities.

And I think that Staff would probably consider a prudency finding as a rate-making finding. Is a finding that the consideration is prudent, is that essential from the point of view of AmerenUE? Now, I don't want to put you in a position of negotiating the thing. Maybe that's the wrong question.

Nelson: I can respond to that, your Honor.

Thompson: Okay. That would be fine.

Nelson: We're not asking for a rate-making approval, rate-making pre-approvals. I think the intent behind that request was clarity around the affiliate rules transactions.

Thompson: Okay.

Nelson: So if we got - -

Thompson: So it's aimed at the affiliate transaction rules?

Nelson: Primarily, yes.

Thompson: Thank you. Thank you.

Because the assets in the Illinois Metro East area have never been in rate base for Missouri purposes anyway. Right?

Nelson: That's correct.

Thompson: So transferring them or not has no rate-making effect, does it?

Nelson: Minor rate-making effect because of the change in allocations. And as we'll discuss - - Chairman Gaw asked us to look at the result on transmission and I would like to go through that - -

Thompson: Okay.

Nelson: - - later, if I could.

Thompson: Absolutely.

Nelson: But there is a benefit due to those - - how those allocations work. So it has a minor rate-making effect.

Thompson: Okay. What about F, Approving the reallocation of the electric generating capacity of energy associated with the transfer of electric assets? Do you consider that particular request to have rate-making implications?

Nelson: Yes.

Thompson: Okay.

Nelson: I mean, that's the purpose - - the primary purpose of this whole transaction, that this Commission agree that the low-cost cheap generation should be dedicated to Missouri jurisdiction. And, you know, we're not asking for a prudency finding, but we're asking them to agree, yes, we want it dedicated.

(Tr. 1705, l. 9 – 1707, l. 11, Vol. 17).

The above colloquy between Judge Thompson and Mr. Nelson reveals that AmerenUE has its own interpretation of what is meant by the Commission when the Commission states that it is not making a ratemaking determination. Ameren's unique interpretation of terms also can be seen by its assertion that the Staff's JDA issues were resolved by the Stipulation And Agreement that the Staff entered into and the Commission accepted in settlement of the Staff's 2001-2002 excess earnings/revenues complaint case against AmerenUE.

Ameren's unique interpretation of terms is the basis for the Staff's recommendation that the Commission not authorize or grant items (d) and (m) in the "WHEREFORE" clause of AmerenUE's August 25, 2003 Application in the instant proceeding:

(d) Authorizing AmerenUE to enter into, execute and perform in accordance with the terms of all other documents reasonably necessary and incidental to the performance of the transactions which are the subject of the form of the Asset Transfer Agreement and this Application;

. . . .

(m) Granting such other relief as deemed necessary to accomplish the purposes of the Asset Transfer Agreement and this Application and to consummate the sale, transfer and assignment of the assets and related transactions.

(Ex. 4, Meyer Reb., p. 16, l. 3 - p. 17, l. 3).

The Staff did note in Staff's List Of Conditions at page 11 that in the past respecting nuclear decommissioning, the Commission has ruled on the adequacy of the funding level and found that the costs of decommissioning the Callaway nuclear generating station are in AmerenUE's cost of service and are being recovered in current rates. The Staff has no problem with the Commission making similar statements in respect to the presently pending Application. The Staff also has no problem with AmerenUE using a 12 CP methodology to determine the allocation of the Callaway nuclear generating station decommissioning cost. The Staff is opposed to the Commission authorizing or granting item (l) in the "WHEREFORE" clause of AmerenUE's August 25, 2003 Application in the instant proceeding:

(l) Confirming that the economic and financial input parameters used in the Zone of Reasonableness analysis contained in the Direct Testimony of Kevin L. Redhage . . . continue to be valid and acceptable to the Commission

(Ex. 68, pp. 10-11; Ex. 3, Bible Reb., pp. 2-3; Ex. 4, Meyer Reb., p. 5, ls. 7-18; Ex. 16, Bax Reb., p. 6).

Again, in an attempt to be as explicit as possible given Ameren's view of what constitutes a ratemaking determination, the Staff included at pages 13-14 of the Staff's List Of Conditions filed on April 6, 2004 the following no ratemaking determination language regarding AmerenUE's contract for purchased power from the EEInc Joppa plant which expires on December 31, 2005:

> The Staff Commission approval to transfer AmerenUE-owned transmission facilities, currently connected to the Joppa generating plant, to AmerenCIPS does not diminish or otherwise affect whatever arguments any party may raise in a ratemaking proceeding with regard to AmerenUE's/EEInc.'s/Ameren's decisions respecting the discontinuation of Joppa generation to serve AmerenUE's load after December 31, 2005.

Another colloquy in the hearing, between Judge Thompson and Dr. Proctor should, be noted because it explains what has been the Staff's and the Commission's approach in general respecting whether ratemaking determinations should be made in proceedings that are not general rate increase or general rate decrease proceedings, aside from the prohibition against single-issue ratemaking. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41 (Mo. banc 1979). Dr. Proctor stated that the level of Staff analysis, such as in the UE-CIPSCO merger case, Case No. EM-96-149, is not detailed as in a general rate proceeding:

> **Proctor:** Well, here's the difference. When we get into a rate case and there's ratemaking implications, I will tell you that we do a much more thorough review than in a particular merger case where we're trying to assess the overall benefits of something. So Staff doesn't get into -- if we got into that level of detail, it would take forever for us to go through and analyze a merger proposal.
>
> By the way, that's one of the reasons for the separation.
>
> **Thompson:** Meaning the mergers aren't supposed to have ratemaking impact, right?
>
> **Proctor:** They're not supposed to have -- they're not supposed to be preapproving ratemaking conditions.

(Tr. 1199, ls. 6-19, Vol. 13).

XIII. Staff Recommended Conditions Respecting Establishing Collaborative Or Investigation: (1) JDA, (2) SO_2 AND (3) EEInc

At pages 4-5 of the Staff's List Of Conditions filed on April 6, 2004, the Staff recommends a collaborative, to eliminate the remaining economic detriments of the JDA which

Ameren has not offered to eliminate if directed to do so by the Commission, and further action by the Commission if the collaborative does not result in an agreement.

At page 8 of the Staff's List Of Conditions, the Staff recommends that the Commission order an investigation respecting Ameren's sale of SO_2 allowances.

At page 14 of the Staff's List Of Conditions, the Staff recommends that the Commission order an investigation respecting AmerenUE's/ EEInc's/Ameren's decision not to use the 405 MWs of capacity from the Joppa plant to meet AmerenUE's load after December 31, 2005.

XIV. Discovery

At page 3 of AmerenUE's Reply to Staff's List Of Conditions, AmerenUE states that "[m]ost of Staff's data requests that go to the heart of key conditions on its 'list' were not submitted to the Company until on or around January 8, 2004 – more than four months after the case was filed" [Footnote omitted], and castigates the Staff for not taking depositions. Staff witness Greg Meyer explained in his rebuttal testimony that due to the Staff's efforts to process this case expeditiously, conference calls with Ameren personnel and witnesses "were used to gather information, check assumptions and discuss positions" in as short a time frame as possible. (Ex. 4, Meyer Rebuttal, p. 2). The first conference call occurred on October 31, 2003. Mr. Meyer noted in his rebuttal testimony that "[t]he expedited schedule has only allowed time to identify and evaluate the work performed underlying the AmerenUE proposal, identify detrimental impacts of the proposal and, if possible, identify conditions that must be satisfied before the Metro East transfer should ever be approved." (*Id*. at 3).

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 18th day of May 2004.

/s/ Steven Dottheim