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August 7, 1999

Via Overnight Mail

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Re: AmerenUE, Case No. EO-96-14
AmerenUE, Case No. EM-96-149

Dear Mr. Roberts:

Enclosed for filing in the above-referenced cases please find the original and fourteen copies of AmerenUE's post-hearing brief. Please "file" stamp the extra enclosed copy and return it to me.

Thank you for your attention to this matter.

Sincerely,

Craig S. Lerner

MISSOURI PUBLIC SERVICE COMMISSION

Case No. EO-96-14
Case No. EM-96-149

UNION ELECTRIC COMPANY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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ST. LOUIS, MISSOURI
August 1999

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BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Monitoring of the Experimental Alternative Regulation Plan of Union Electric Company	)))	Case No. EO-96-14

UNION ELECTRIC COMPANY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Union Electric Company respectfully proposes that the Commission adopt the following findings of fact and conclusions of law in its Report and Order addressing the issues raised by the proposed adjustments to the earnings calculations of Union Electric for the Third Sharing Period of the first Experimental Alternative Regulation Plan ("EARP"). To assist the Commission, for each finding of fact proposed below we set out the evidence supporting that fact and comment upon the weight of the evidence in the record that bears on that fact. Similarly, for each conclusion of law proposed below we set out the authority for that conclusion.

PROPOSED FINDINGS OF FACT

THE CHARACTER AND SIGNIFICANCE OF THE STIPULATION AND AGREEMENT

1. **The first Experimental Alternative Regulation Plan ("EARP") was adopted by the Commission on July 21, 1995, with an effective date of August 1, 1995.**

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A to Rebuttal Testimony of Donald E. Brandt (Report and Order, Case No. ER-95-411) ("Appendix A (Report and Order)"), at 8.

COMMENT:

No contrary evidence was introduced.

2. **The terms of the EARP were set out in a Stipulation and Agreement ("Agreement") submitted to the Commission on June 12, 1995 by the signatories, who were the Staff of the Commission (the "Staff"), Union Electric Company, the Office of Public Counsel ("OPC"), the Missouri Industrial Energy Consumers, Cominco American, Asarco Inc., the Doe Run Company, and the Missouri Retailers Association.**

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A (Report and Order), at 2; Attachment A to Appendix A to Rebuttal Testimony of Donald E. Brandt (Agreement) ("Attachment A (Agreement)"), at 21.

b) Exh. No. 15: Rebuttal Testimony of Benjamin A. McKnight ("McKnight Rebuttal"), at 6 (lines 3-5) ("The procedures, assumptions and other details required for executing and administering this new alternative form of regulations were clearly defined and documented in the Agreement.").

c) Transcript of Hearing, June 1-3, 1999 (Donald E. Brandt) ("Tr. (Brandt)"), at 168 (lines 15-19) ("[O]utside the terms of any kind of a contract per se, just the Staff standing up in public or here and say they reserve a right to examine the revenue effect, if that's not part of the stipulation, I wouldn't recognize it.").

COMMENT:

No contrary evidence was introduced.

3. **The terms of the Agreement were the result of arm's-length negotiations between the signatories that began in late 1994 and continued through the first half of 1995.**

SUPPORTING EVIDENCE:

a) Exh. No. 21: UE Response to Data Request No. 106 and Letter from Donald E. Brandt to Kenneth J. Rademan (Jan. 27, 1995) ("UE Proposal") (proposing a "UE/Customer Share in Savings Plan" that ultimately became the EARP).

b) Exh. No. 13: Attachment A (Agreement), at 19 ("The provisions of this Stipulation and Agreement have resulted from negotiations among the signatories and are interdependent.").

c) Exh. No. 12: Rebuttal Testimony of Donald E. Brandt ("Brandt Rebuttal"), at 3 (lines 17-18), at 13 (lines 13-14), at 14 (lines 13-21).

d) Exh. No. 40: Deposition Cross Examination of Kenneth J. Rademan ("Rademan Dep."), at 114-15 (Rademan discussed a possible alternative regulation plan with a representative from UE prior to the Brandt Jan. 27, 1995 letter in Exh. No. 21.), at 9-11 (identifying the Staff members who "were responsible for negotiating with Union Electric Company").

e) Exh. No. 41: PSC News, at 2 (July 21, 1995) ("The agreement was reached as a result of extensive negotiations conducted by the . . . parties.").

COMMENT:

No contrary evidence was introduced.

4. The signatories of the Agreement intended that the Agreement create binding obligations on them.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 8 (lines 16-18).

b) Tr. (Brandt), at 220-21 (lines 22-22) (explaining that each party that entered the Agreement gave up something to get something).

c) Tr. (Rackers), at 385 (lines 8-12) (stating, "I think that all the parties that signed [the Agreement] agreed to the terms," while going on to note that the Staff understands the terms differently from UE).

d) Tr. (Schallenberg), at 501 (lines 13-17) (It is his "understanding that the parties to the agreement entered into a binding agreement to abide by the terms of that agreement."), at 504 (lines 4-5) ("I would say the Staff views that it's always bound by any agreement it entered into.").

COMMENT:

No contrary evidence was introduced.

5. The approval of the Agreement and its adoption by the Commission was necessary to bring the EARP into existence.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment A (Agreement), at 19 ("In the event that the Commission does not approve and adopt the terms of this Stipulation and Agreement in total, it shall be void and no party hereto shall be bound, prejudiced, or in any way affected by any of the agreements or provisions hereof.").

COMMENT:

No contrary evidence was introduced.

6. As part of the consideration for the Agreement, and in reliance on its representations, Union Electric agreed to provide a one-time credit of $30 million to its customers at the outset of the EARP.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A (Report and Order), at 2, 3; Attachment A (Agreement), at 1-3.

b) Exh. No. 12: Brandt Rebuttal, at 2 (lines 20-23), at 4 (lines 1-3).

c) Exh. No. 15: McKnight Rebuttal, at 4 (lines 20-22).

d) Tr. (Brandt), at 248 (lines 18-21).

COMMENT:

No contrary evidence was introduced.

7. **As part of the consideration for the Agreement, and in reliance on its representations, Union Electric agreed to a permanent rate reduction of $30 million, that is, rates would be lower each year by $30 million, even after the three-year period of the first EARP.**

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A (Report and Order), at 2, 3; Attachment A (Agreement), at 3, 5-6, 11.

b) Exh. No. 12: Brandt Rebuttal, at 2 (lines 20-23), at 4 (lines 1-4), at 10 (lines 21-22).

c) Exh. No. 15: McKnight Rebuttal, at 4 (lines 20-23).

d) Tr. (Brandt), at 248 (lines 18-21).

COMMENT:

No contrary evidence was introduced.

8. **As part of the consideration for the Agreement, and in reliance on its representations, Union Electric agreed to an alternative regulation plan for a period of three years running from July 1, 1995 through June 30, 1998 under which**

Union Electric shared its earnings each year with its customers according to a three-level sharing grid: (i) up to and including a 12.61% return on equity ("ROE") Union Electric would retain all its earnings; (ii) 50% of any portion of earnings greater than a 12.61% ROE up to and including a 14.00% ROE would be shared with customers; and (iii) 100% of any portion of earnings greater than a 14.00% ROE would be returned to customers.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A (Report and Order), at 3, 5; Attachment A (Agreement), at 4.

b) Exh. No. 12: Brandt Rebuttal, at 2 (lines 20-23), at 10 (lines 1-4).

c) Tr. (Brandt), at 248 (lines 18-21).

COMMENT:

No contrary evidence was introduced.

9. **As a part of the consideration for the Agreement, and in reliance on its representations, Union Electric agreed to a moratorium on rate increases until June 30, 1998, unless Union Electric's ROE fell below 10%.**

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A (Report and Order), at 4; Attachment A (Agreement), at 4-5.

b) Exh. No. 12: Brandt Rebuttal, at 2 (lines 20-23), at 4 (lines 15-19) ("[A]s part of the deal, UE surrendered the right to file a rate case except in the most extreme circumstances, thereby accepting the considerable financial risk of having to absorb increases in such major components of the Company's costs of doing business as labor costs, fuel costs, and interest rates.").

COMMENT:

No contrary evidence was introduced.

10. As part of the consideration for the Agreement, the signatories other than Union Electric agreed not to file a rate reduction case, or encourage or assist others to do so.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment A (Agreement), at 4-5.

b) Tr. (Brandt), at 116 (lines 3-7).

COMMENT:

No contrary evidence was introduced.

11. As part of the consideration for the Agreement, and in reliance on its representations, Union Electric agreed to conduct a class cost of service study and a rate design review.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A (Report and Order), at 5.

b) Exh. No. 12: Brandt Rebuttal, at 2 (lines 20-23).

COMMENT:

No contrary evidence was introduced.

12. As part of the consideration for the Agreement, the Staff agreed to end an earnings monitoring of Union Electric that it had initiated.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment A (Agreement), at 1.

COMMENT:

No contrary evidence was introduced.

13. Union Electric relied on the anticipated faithful performance of the representations in the Agreement for the first EARP in agreeing to enter the second EARP adopted in 1997.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 2 (lines 20-23).

COMMENT:

No contrary evidence was introduced.

14. Union Electric relied on the anticipated faithful performance of the representations in the Agreement for the first EARP in agreeing not to seek to recover in rates the $232 million merger premium from its merger with CIPSCO.

SUPPORTING EVIDENCE:

c) Exh. No. 12: Brandt Rebuttal, at 4 (lines 19-21).

d) Exh. No. 13: Appendix B to Rebuttal Testimony of Donald E. Brandt (Report and Order, Case No. EM-96-149) ("Appendix B (Report and Order)"), at 5 ("UE has agreed that it will not seek to recover the asserted merger premium of $232 million in rates in any Missouri proceeding.").

e) Tr. (Brandt), at 205 (lines 6-22) ("[A]s a result of negotiations we gave up . . . collection of the merger premium."), at 248 (lines 21-22).

COMMENT:

No contrary evidence was introduced.

15. Union Electric relied on the anticipated faithful performance of the representations in the Agreement for the first EARP in agreeing to a rate reduction beginning in the second EARP based on the average annual total revenues of the first EARP, adjusted to reflect normal weather.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix B (Report and Order), at 6; Attachment 1 to Appendix B of Rebuttal Testimony of Donald E. Brandt (Stipulation and Agreement, Case No. EM-96-149) ("Second EARP Agreement"), at 5.

COMMENT:

No contrary evidence was introduced.

16. **Union Electric relied on the anticipated faithful performance of the representations in the Agreement for the first EARP in agreeing to abandon its proposal that its shareholders should realize, over a 10-year period, half of the nearly $760 million in benefits resulting from that merger.**

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 4 (lines 21-23).

b) Tr. (Brandt), at 205 (lines 6-22) (explaining that UE gave up its proposal that the almost $800 million in savings from the merger should be split 50/50 between shareholders and ratepayers over a ten-year period), at 248 (lines 22-24).

COMMENT:

No contrary evidence was introduced.

17. **In reliance on the representations in the Agreement, and in response to the incentives created by the earnings sharing mechanism, Union Electric committed its best people and other resources to its regulated power business to create the efficiencies that would allow it to benefit from the EARP, and correspondingly, the Company did not pursue in a similar fashion other unregulated lines of business that it would have used to generate a level of profits for it shareholders comparable to that offered by the EARP.**

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 5 (lines 1-6).

b) Tr. (Brandt), at 116-117 (lines 12-2), at 117-18 (lines 17-14) (explaining that UE had developed business plans for getting into unregulated lines of business).

COMMENT:

No contrary evidence was introduced.

18. The Union Electric sharing grid alternative regulation plan was the first of its kind for an electric utility in Missouri.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A (Report and Order), at 4.

COMMENT:

No contrary evidence was introduced.

19. The sharing grid mechanism, with settled accounting methodologies determining the earnings to be used in the grid, created incentives for Union Electric to run its business more efficiently.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A (Report and Order), at 5 ("The 12.61 percent trigger for sharing should allow UE sufficient incentive to manage its operations in an efficient manner.").

b) Exh. No. 12: Brandt Rebuttal, at 3 (lines 20-21), at 10 (lines 14-16) ("[T]he EARP supplied Union Electric with an incentive to operate more efficiently, for it now had the prospect of retaining a portion of the profits such efficiencies might generate."), at 12 (lines 15-20) ("With settled accounting methodologies, and not subsequent regulatory proceedings, governing the calculation of

earnings, the Company's employees can be confident that the real efficiencies they achieve will have a direct impact on earnings, and that the fruits of their labors will not be subject to later reduction because a regulatory body, pursuant to some model not truly reflecting the incentives at work here, concluded those earnings were 'too high.'").

c) Exh. No. 15: McKnight Rebuttal, at 7 (lines 1-7) (explaining that "[n]umerous regulatory jurisdictions" have adopted incentive rate regulation, like the Agreement, "in order to encourage the [utility] to run better, to lower its costs, and/or to improve business processes or ways of doing business in response to growing competitive pressures"), at 8 (lines 3-13).

d) Exh. No. 39: Rademan Surrebuttal, at 4 (lines 1-4) (explaining how the sharing grid approach "encourages the productivity of a utility's employees").

e) Tr. (Brandt), at 266-67 (lines 3-22) (describing what employees say in response to encouragement to be more efficient: "[E]very time we reduce costs, the Commission comes and takes it away." Under the EARP, however, "you make a dollar and we get to keep half of it.... [T]hat rings a bell when it comes to employees.").

f) Tr. (Rackers), at 397 (lines 10-12) (acknowledging that the sharing grid could encourage efficiencies), at 398 (lines 8-11) ("It appears the Commission viewed that at least parts of the agreement, the 12.61 percent trigger, would allow UE sufficient incentive to manage its operations in an efficient manner.").

g) Exh. No. 41: PSC News, at 1 (July 21, 1995) (In this press release announcing the EARP, the Commission notes: "Under the experimental alternative regulation plan, customers will benefit from the efficient operations of the

company by sharing in company earnings if those earnings reach a certain level.").

h) Exh. No. 46: Transcript, Case No. ER-95-411 (July 19, 1995), at 65 (lines 5-12)(Staudaus & Rosen commenting on the EARP: "This is a positive

monitoring provisions of the Agreement do not set out any of the terms for calculating Union Electric's earnings.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment A (Agreement), at 6-7.

b) Exh. No. 39: Rademan Surrebuttal, at 8-9 (lines 17-3) (Staff has "full power under Section 3.e . . . to scrutinize all reports and data concerning the earnings calculations, and if necessary submit data requests to UE or ask to interview relevant UE personnel.").

c) Exh. No. 12: Brandt Rebuttal, at 15 (lines 15-20), at 21-23 (lines 19-8).

d) Exh. No. 14: Rebuttal Testimony of Warner L. Baxter ("Baxter Rebuttal"), at 5 (lines 3-5).

e) Tr. (Rackers), at 408-09 (lines 25-5).

COMMENT:

No contrary evidence was introduced.

26. The Agreement provides that the return on common equity by which the sharing of Union Electric's earnings is determined *will be* calculated by using a "methodology" agreed upon by the signatories. This methodology embodies the agreement of the Staff, OPC, and Union Electric concerning "what items, based on prior Commission orders, should be excluded from the calculation of UE's return on equity." This methodology is set out in Attachment C to the Agreement, titled the "Reconciliation Procedure." No other provision of the Agreement sets out a methodology for calculating Union Electric's return on equity, and no other provision of the Agreement expressly authorizes the Commission to add to or otherwise modify the methodology set out in the Reconciliation Procedure --

whether at the request of one of the signatories, or on its own motion, and whether prospectively or retrospectively -- without the agreement of all the signatories.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment A (Agreement), at 8; Attachment C to Appendix A to Rebuttal Testimony of Donald E. Brandt (Reconciliation Procedure) ("Attachment C (Reconciliation Procedure)").

b) Exh. No. 39: Rademan Surrebuttal, at 5 (lines 5-8) ("[A]fter months of detailed negotiations, the parties agreed on a specific 'methodology' to calculate earnings, and further set out the actual terms of that methodology -- that is, the operation of the agreed-upon methodology -- in the Reconciliation Procedure."), 6 (lines 14-16) ("No provision of the Agreement authorizes any party to unilaterally change this methodology of calculating earnings, either by modifying the adjustments that are set out in the Procedure or by adding new adjustments to it."), 7 (lines 11-12) ("[N]o term of the Agreement says a party can change the steps of the agreed-upon accounting methodology.").

c) Exh. No. 12: Brandt Rebuttal, at 13–14 (lines 18-2), at 20-21 (lines 22-9).

d) Exh. No. 15: McKnight Rebuttal, at 9 (lines 18-21) ("The Agreement, including Attachment C, clearly establishes the operating periods and results, accounting principles, regulatory policies and agreed to assumptions that should be consistently applied in the annual Earnings Report to measure UE's refund obligation for each sharing period.").

e) Exh. No. 39: Rademan Surrebuttal, at 2 (lines 17-18) ("No understandings that were not written in the Agreement were part of the UE EARP."), at 4-8 (lines 15-8) (quoting Mark Oligschlaeger that "up-front agreement on how earnings should

be calculated" is essential for sliding scale incentive regulation and explaining how the up-front agreement is memorialized in the EARP).

f) Tr. (Brandt), at 222 (lines 8-13) ("[T]he Stipulation and Agreement constitutes the full terms of the agreement between the parties as written and that anything that is not included in that in writing is not part of the agreement . . . .").

g) Tr. (Baxter), at 318 (lines 3-13) (explaining that the accounting methodologies for the EARP are set out in the Reconciliation Procedure.).

h) Tr. (Rackers), at 413 (lines 10-11) (acknowledging that the parties did not "specifically agree[] to another accounting practice or methodology" outside of the Reconciliation Procedure).

COMMENT:

No contrary evidence was introduced with respect to the fact that no provision explicitly allows a signatory to modify or add to the Reconciliation Procedure. Mr. Rackers and Ms. Westerfield testified that section 3.f.vii of the Agreement and section 2.g of the Reconciliation Procedure (which are nearly identical) in effect allow a signatory to do this by raising "issues . . . which are related to the operation or implementation of the Plan." As we explain in our Brief, this interpretation is not faithful to the text of the Agreement and would render the Agreement illusory, and not binding on any signatory. Mr. Schallenberg took a more radical view contrary to both Union Electric and his Staff colleagues, claiming that there was no agreement over the methodology to calculate the return on equity.

27. No provision from the Southwestern Bell Incentive Regulation Experiment (the "SW Bell Plan") that could allow the Staff to propose adjustments that are not set out in the Reconciliation Procedure of the EARP, or that in any other way diverge

from the methodology agreed to in the Reconciliation Procedure, was ever adopted by the signatories of the EARP or otherwise made a part of the Agreement.

SUPPORTING EVIDENCE:

a) Exh. No. 39: Rademan Surrebuttal, at 2 (lines 15-18) ("It is that sharing grid mechanism, and not other terms of the SW Bell arrangement, that was the model in the minds of the Staff and UE when negotiating the UE EARP.").

b) Tr. (Brandt), at 133-34 (lines 19-1) (explaining that he is only familiar with the sharing grid from the SW Bell Plan), at 138 (lines 22-24) (Brandt had not seen the SW Bell Plan before Mr. Dottheim showed it to him during cross-examination), at 142 (lines 11-12) (same), at 147-48 (lines 14-9) (The UE person who drafted UE's first proposal for the Reconciliation Procedure may have borrowed some boilerplate language from the SW Bell Plan.), at 181-84 (lines 12-2), at 222-23 (lines 14-25) (explaining that anything that was intended to be incorporated in the Agreement was set out there and that it is common for lawyers to borrow language from prior documents: "I don't think there's a lawyer who starts from scratch."), at 307 (lines 16-23) (no language in the SW Bell Plan that allows a party to propose an "adjustment [for the earnings calculation] that was not within the reconciliation procedure").

c) Exh. No. 22: In the matter of an incentive plan for Southwestern Bell Telephone Company, Case No. T0-90-1 (March 15, 1991), at 32-36 (In the SW Bell Plan, a section entitled "Monitoring Procedures" sets out the terms of both calculating SW Bell's earnings and monitoring those calculations, with no provision authorizing one party to compel a different calculation methodology.).

d) Exh. No. 21: UE Proposal, Attachment B, "Reconciliation Procedure" (containing no provision authorizing one party to propose, and the Commission to impose, an adjustment to the earnings calculation that modifies or diverges from the methodology set out in the Reconciliation Procedure).

e) Tr. (Rackers), at 404 (lines 6-11) (during meetings with UE on the EARP that he attended, does not recall anyone representing to UE that the EARP was supposed to work just like the SW Bell Plan), at 407-11 (lines 18-13) (in comparing the EARP and the SW Bell Plan, acknowledges that the earnings calculations and information provision terms are in different sections, while "in the Southwestern plan under monitoring procedures, you both have the earnings calculations and the information provision functions").

f) Tr. (Schallenberg), at 529-30 (lines 16-10) (acknowledging that there is no statement in the Agreement that the EARP was to operate according to the Staff's understanding of its monitoring procedures under the SW Bell plan).

28. **The methodology set out in the Reconciliation Procedure for calculating Union Electric's return on equity is based on its Missouri operating revenues, expenses, and average rate base for each year, or Sharing Period, as recorded in Union Electric's books and records. These books and records conform to relevant precedents of the Commission, the Uniform System of Accounts, and, for matters not addressed by those precedents of the Commission or the Uniform System of Accounts, the established accounting practices of Union Electric consistent with generally accepted accounting principles.**

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment C (Reconciliation Procedure), at section 2.a.

b) Exh. No. 39: Rademan Surrebuttal, at 5 (lines 13-16) ("Thus the parties agreed to start the earnings calculation in the most obvious and practical way, with figures that were produced by the accounting methodologies used by UE in its books and records.").

c) Exh. No. 12: Brandt Rebuttal, at 6 (lines 17-19), at 14 (lines 3-9).

d) Exh. No. 1: Direct Testimony of Stephen M. Rackers ("Rackers Direct"), at 2 (lines 20-22).

e) Exh. No. 15: McKnight Rebuttal, at 3 n. 1 (explaining that "'generally accepted accounting principles' is a technical accounting term that encompasses conventions, rules and procedures necessary to define accepted accounting practice at a particular time"), at 4 (lines 16-17) (UE is required by law to file financial statements with the SEC that are presented in accordance with GAAP."), at 10 (lines 7-10) (pointing out that the Agreement "relies heavily on the Company's historical accounting methods to determine whether UE has a refund obligation").

f) Tr. (Brandt), at 123-24 (lines 2-23), at 125-27 (lines 15-25) (discussing accounting practices in UE's books and records).

g) Tr. (Baxter), at 318-19 (lines 19-15), at 323-24 (lines 6-1).

h) Tr. (McKnight), at 365 (lines 2-13).

COMMENT:

No contrary evidence was introduced.

29. The methodology in the Reconciliation Procedure then sets out the adjustments to be made to discrete items in Union Electric's operating revenues, expenses, and average rate base for the Sharing Period to complete the calculation of Union

Electric's return on equity for purposes of determining the level of earnings sharing for that Period.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment A (Agreement), at 8 (section 3.f.ii: "Staff, OPC and UE have conferred and determined what items, based on prior Commission Orders, should be excluded from the calculation of UE's return on equity. These items are identified in Attachment C [the Reconciliation Procedure]."); Attachment C (Reconciliation Procedure), at section 2.c-f.

b) Exh. No. 39: Rademan Surrebuttal, at 6 (lines 1-13).

c) Exh. No. 12: Brandt Rebuttal, at 6 (lines 20-23), at 14 (lines 5-21).

COMMENT:

No contrary evidence was introduced.

30. **The design and structure of the Reconciliation Procedure as fashioned by the signatories reflects its critical difference from normal ratemaking: its focus on a process to calculate a bottom-line earnings number by which to determine earnings sharing, instead of a focus and regulatory judgment on each of the multitude of costs that affect the earnings of the Company.**

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 15 (lines 4-12).

b) Exh. No. 15: McKnight Rebuttal, at 8 (lines 3-9, 17-22).

COMMENT:

No contrary evidence was introduced.

31. **None of the provisions in the Reconciliation Procedure expressly provide for an adjustment to any expense based on a judgment of a signatory or of the**

Commission that such expense is in some manner "inappropriate." Where the signatories agreed that an expense should be normalized, or excluded entirely, they expressly so provided in the Reconciliation Procedure.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment C (Reconciliation Procedure).

b) Exh. No. 39: Rademan Surrebuttal, at 2 (lines 19-21) ("The sharing grid mechanism by itself illustrates that the UE EARPs did not involve any concept of inappropriate or excessive earnings that is so familiar in the concept of traditional rate regulation."), at 6 (lines 1-7).

c) Exh. No. 12: Brandt Rebuttal, at 5 (lines 9-12), at 6 (lines 17-23), at 7 (lines 9-10) ("This innovative plan was intended to be a machine that would go of itself, without the need for intrusive regulatory oversight and time-consuming regulatory proceedings.").

d) Tr. (Brandt), at 160 (lines 13-17) (Under the EARP, the Staff cannot propose an adjustment to the earnings calculation on the grounds that a cost was imprudently incurred.), 161 (lines 1-2) (same).

COMMENT:

No contrary evidence was introduced.

32. **For each of the three Sharing Periods in the EARP, the Agreement provides that the calculation of Union Electric's return on equity is to be memorialized in several reports. A preliminary earnings report, with a proposed Sharing Report, must be submitted by Union Electric within 90 days after the end of a Sharing Period. A final earnings report and Sharing Report must be submitted within 105 days after the end of a Sharing Period.**

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment A (Agreement), at 8, 10.

COMMENT:

No contrary evidence was introduced.

33. The Reconciliation Procedure as designed in the Agreement established an almost mechanical process by which the Company's earnings each year would be calculated by objective and well-understood accounting methodologies that the signatories had explicitly agreed upon in advance.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 5 (lines 9-12), at 6 (lines 14-15), at 7 (lines 9-10), at 25 (lines 5-9).

b) Exh. No. 15: McKnight Rebuttal, at 8-9 (lines 17-5), at 9-10 (lines 18-4).

c) Exh. No. 39: Rademan Surrebuttal, at 2-3 (lines 21-8) ("Instead of reducing rates to reduce excessive earnings 18 months or more after the fact as would be the case under the traditional approach, the EARP establishes an automatic, mechanical procedure -- not requiring elaborate regulatory proceedings, but based on an up-front policy judgment of appropriate sharing levels -- by which earnings above those levels are shared with customers."), at 4-5 (lines 15-8).

d) Tr. (Baxter), at 347 (lines 8-14) ("[T]his agreement is in many respects almost a mechanical type thing. You start with an appropriate method for your company. You faithfully follow the accounting methodologies under the agreement, and it just sort of flows. And certainly you reflect the adjustments that are set forth in Attachment C.).

e) Exh. No. 40: Rademan Dep. at 75 (lines 7-20) (explaining how the Reconciliation Procedure was to be a "cookbook," a "straight mechanical calculation.").

COMMENT:

No contrary evidence was introduced.

34. **The Agreement provides that the role of the Commission in the determination of sharing credits under the EARP is that of the body that will resolve disputes between the signatories concerning compliance with the terms of the Reconciliation Procedure, whether that dispute arises from an error of one signatory, from a good faith difference of interpretation of those terms, or from the deliberate manipulation of operating results to reduce the amount of any sharing credit.**

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix A (Report and Order), at 7 (noting that the Commission does not have the authority under current statutes to order the adoption of a plan for a utility to share earnings with customers, but that the Commission can accept an agreement by which a utility and interested parties establish such a plan); Attachment A (Agreement), at 9 (section 3.f.vii: "UE, Staff, OPC and other signatories reserve the right to bring issues which cannot be resolved by them, and which are related to the operation or implementation of the Plan, to the Commission for resolution."; section 3.f.vi: The Commission may investigate and hold a hearing concerning a complaint by a signatory that Union Electric's "operating results have been manipulated to reduce amounts to be shared with customers or to misrepresent actual earnings or expenses."); Attachment C (Reconciliation Procedure), at section g ("UE/Staff/OPC reserve the right to

petition the Commission for resolution of disputed issues relating to the operation or implementation of this Plan.").

b) Exh. No. 39: Rademan Surrebuttal, at 6-7 (lines 20-16).

c) Exh. No. 12: Brandt Rebuttal, at 7 (lines 1-5), at 16-18 (lines 7-5), at 18-20 (lines 22-21).

d) Exh. No. 14: Baxter Rebuttal, at 5 (lines 14-21), at 6-7 (lines 3-2) (giving examples of a failure to apply the accounting methodologies under the Agreement and explaining the meaning of "manipulation"), at 23-24 (lines 13-14).

e) Tr. (Brandt), at 155-56 (lines 9-14) (discussing meaning of "manipulation"), at 157-58 (lines 22-14) (same), at 160 (lines 18-21) (explaining that an allegation that UE incurred a cost imprudently is not equivalent to an allegation that UE had manipulated earnings), at 196 (lines 2-24) (describing the types of controversies that can be brought to the Commission), at 196-202 (lines 25-2) (explaining that the Commission makes the determination of whether there is a reasonable business explanation for a variation in costs in evaluating whether the Company manipulated the earnings report), at 202 (lines 16-20) (explaining that the Commission can decide a claim that there is an error in the earnings report), at 259-60 (lines 16-4) (Section 2.g of the Reconciliation Procedure allows parties to submit for Commission resolution issues relating to the operation or implementation of the plan: "[i]n other words, what does the Stipulation and Agreement provide for, not what the parties wish it provided for or with foresight would have put in there or with hindsight wish they had."), at 282-83 (lines 17-1) (agreeing with the observation of Commissioner Murray that "the Commission

has the role ... of deciding those disputes and those disputes being whether the agreement is actually being carried out according to its terms"), at 306-07 (lines 18-10) (explaining that the merger and acquisition cost issue is an example of a dispute based on competing interpretations of the terms of the Agreement, and so properly a dispute concerning "the operation or implementation of the plan.").

f) Tr. (Baxter), at 326-28 (lines 6-4) (noting that "an allegation of manipulation can include significant variations in the level of expenses associated with any category of costs where no reasonable explanation has been provided" and that lack of a reasonable explanation could demonstrate imprudence), at 356-57 (lines 21-14) (With respect to Commissioner Murray's hypothetical of UE purchasing an airplane when it does not own one, a dispute over whether that purchase, which would cause a significant variation in the level of expenses under the category of transportation costs, was a reasonable business expense could be taken to the Commission.).

g) Exh. No. 40: Rademan Dep., at 117-18 (lines 25-15) (explaining that imprudence concerns can be raised in the context of a claim of manipulation).

COMMENT:

As we discuss more fully in our brief, the Staff claims that section 3.f.vii of the Agreement and section 2.g of the Reconciliation Procedure allows them to propose changes to the Agreement, including additional adjustments for the Reconciliation Procedure, and authorizes the Commission to order that change. The Staff witnesses, however, simply make this claim based on section 3.f.vii, and offer no other language in the Agreement, or otherwise evidence or canon of construction, that supports their interpretation.

35. **The Agreement also provides that the Commission may address concerns raised by a signatory based on the accounting for an unprecedented expense, representing a category of costs that Union Electric had not incurred and been included in a ratemaking proceeding as of the time the Agreement was negotiated, and so could not have been considered by the signatories when they were determining what adjustments to include in the Reconciliation Procedure.**

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment A (Agreement), at 10 (section 3.f.viii: The signatories "have the right to present to the Commission concerns over any category of cost that has been included in UE's monitoring results and has not been included previously in any ratemaking proceeding.").

b) Exh. No. 39: Rademan Surrebuttal, at 7-8 (lines 17-16) (explaining that, in the negotiations over the Reconciliation Procedure, all the parties had access to UE financial materials of all kinds, and so knew, or could have known, all the categories of costs affecting UE's earnings, and that section 3.f.viii addresses a new category of costs that had not previously affected those earnings).

c) Exh. No. 12: Brandt Rebuttal, at 7 (lines 5-8), at 18 (lines 6-21).

d) Exh. No. 14: Baxter Rebuttal, at 5-6 (lines 14-2), at 7-8 (lines 6-8).

e) Tr. (Brandt), at 308-09 (lines 3-8) (giving an example of what might be considered to be a new category of cost when it was imposed: the contribution mandated by federal law to the Uranium Enrichment Corporation to help fund the cleanup of nuclear facilities).

f) Tr. (Baxter), at 324-26 (lines 12-5) (explaining that the new category of costs provision was a "fail-safe provision" that allowed the parties to bring such a

category before the Commission, and that the DOE decommissioning assessment might have been an example of such a category).

COMMENT:

Though the Staff denies this conclusion, they offer no evidence that really meets, much less overcomes, the evidence recited above, which includes the testimony of the lead Staff and the lead UE negotiator.

36. Union Electric did not manipulate its operating results in calculating sharing credits for any sharing period of the EARP.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 21 (lines 11-17), at 24-28 (lines 14-2).

b) Tr. (Brandt), at 228-29 (lines 14-4) (explaining that the costs incurred for computer maintenance associated with the Year 2000 problem was a reasonable response to the problem and did not involve a significant expense compared with Union Electric's computer maintenance costs generally), at 229-31 (lines 17-8) (explaining that the costs of the CSS, AMRAPS, and EMPRV systems were reasonably incurred to improve operations and the information they provide, and that these systems needed to be installed promptly).

c) Tr. (Rackers), at 429 (lines 3-9) (None of the Staff's proposed adjustments are based on a claim that "the involved expenses were imprudent" or that "operating results have been manipulated."), at 445 (lines 4-8), at 448 (lines 11-12).

COMMENT:

No contrary evidence was introduced.

37. The adjustments proposed by the Staff and OPC to the calculation of Union Electric's return on equity for the last sharing period of the first EARP are not set out in, or otherwise provided for by, the Agreement.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment A (Agreement).

b) Exh. No. 12: Brandt Rebuttal, at 2 (lines 13-20).

c) Exh. No. 15: McKnight Rebuttal, at 6 (lines 8-13), at 10-11 (lines 18-2).

COMMENT:

There is no dispute that all proposed adjustments, except for that dealing with the merger and acquisition costs, are not set out in the Agreement. The Staff would probably content that section 3.f.vii "otherwise provides for" such adjustments. The evidence with respect to that claim is discussed in PFOF No. 34 above. The facts and evidence with merger and acquisition cost issue is set out below.

COMPUTER MAINTENANCE EXPENSES TO ENSURE YEAR 2000 COMPLIANCE

38. The methodology agreed to in the Reconciliation Agreement does not provide any accounting treatment for computer maintenance expenses generally, or for computer maintenance expenses to ensure Year 2000 compliance specifically, other than that normally used by Union Electric in recording such expenses in its regulatory books and records.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment C (Reconciliation Procedure), at section 2.

COMMENT:

No contrary evidence was introduced.

39. Union Electric has incurred computer maintenance costs for decades before the EARP and has consistently expensed those costs in its regulatory books and records as they have been incurred. Union Electric, accordingly, expensed its computer maintenance costs relating to the Year 2000 as they were incurred.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 33 (lines 13-15).

b) Exh. No. 14: Baxter Rebuttal, at 10-11 (lines 16-2), at 14 (lines 3-8).

c) Exh. No. 15: McKnight Rebuttal, at 11 (lines 5-11).

d) Tr. (Brandt), at 226-27 (lines 19-2), at 272-73 (lines 2-10) (exchange with Commissioner Crumpton concurring additional evidence showing UE expensed computer costs in the past and "Staff did not say they were imprudently incurred or Staff did not say you should not have expensed these items").

e) Exh. No. 47: Computer Software Development Accounting Data, Case Nos. ER-87-114 and ER-87-115 (document requested by Commissioner Crumpton showing expensing of computer software costs during prior rate proceedings with no Staff objection).

f) Tr. (Baxter), at 708 (lines 7-14) (explaining that Union Electric has been dealing with Year 2000 costs for some time, possibly as early as the 1980s).

COMMENT:

No contrary evidence was introduced.

40. During the first EARP, expensing Year 2000 computer maintenance costs, as Union Electric did, was in accordance with generally accepted accounting principles ("GAAP").

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 11 (lines 2-8) (Under the authoritative consensus reached in Emerging Issues Task Force Issue No. 96-14 ("EITF 96-14"), Year 2000 computer maintenance costs should be expensed as incurred.), at 16 (lines 20-23) (Under GAAP, application of an EITF consensus is mandatory.), at 16-17 (lines 23-2) ("[T]he SEC's Chief Accountant has said that he would challenge any accounting that differs from a consensus of the EITF because the consensus position represents the best thinking on areas for which there are no specific standards.").

b) Exh. No. 6HC: Schedules to Surrebuttal Testimony of Arlene S. Westerfield, Schedule 1 (EITF Issue No. 96-14), at 1-2 ("The Task Force reached a consensus that external and internal costs specifically associated with modifying internal-use software for the year 2000 should be charged to expense as incurred.").

c) Exh. No. 15: McKnight Rebuttal, at 4 (lines 1-15) (explaining that the SEC has the responsibility under federal law to establish the accounting principles for companies like Union Electric whose securities are traded in interstate commerce, and that the SEC considers any accounting differing from an EITF consensus as not in accordance with GAAP), at 11-12 (lines 22-7) (According to the EITF, software costs associated with the year 2000 problem "are incurred to keep the software updated and therefore should be classified similar to other computer repair and maintenance expenses."), at 14-15 (lines 14-9).

d) Tr. (Baxter), at 705-06 (lines 13-9) (the EITF's position is to expense computer software costs associated with Year 2000 as they are incurred.).

COMMENT:

No contrary evidence was introduced.

41. During the first EARP, expensing Year 2000 computer maintenance costs, as Union Electric did, was in accordance with the Federal Energy Regulatory Commission's Uniform System of Accounts.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 11 (lines 9-16).

COMMENT:

No contrary evidence was introduced.

42. The expensing of Year 2000 computer maintenance costs, as Union Electric did, was a proper application of the methodology for calculating the Company's return on equity as set out in the Reconciliation Procedure.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 15 (lines 1-6, 15-18).

COMMENT:

No contrary evidence was introduced.

43. The activities undertaken by Union Electric to ensure that its computer systems will be Year 2000 compliant are not different in kind or cost from other computer maintenance activities Union Electric has undertaken over the years. Costs for Year 2000 maintenance are not extraordinary and do not represent a new category of costs.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 33-34 (lines 22-5).

b) Exh. No. 14: Baxter Rebuttal, at 12-14 (lines 1-16), at 17-18 (lines 21-1) ("Computer software maintenance expenses are in fact ongoing, and they are very much recurring.").

c) Exh. No. 15: McKnight Rebuttal, at 11-12 (lines 21-1) ("The Company has routinely incurred computer repair and maintenance costs and it will continue to do so in the future. Year 2000 related activities involve costs that are no different from those resulting from other computer repair and maintenance activities."), at 12 (lines 7-11), at 12-13 (lines 16-7).

d) Tr. (Brandt), at 228-29 (lines 18-22) ("[R]elative to the Y2K costs, the dollars that are at issue in this case are just about a million dollars in that third sharing. So given the millions we spend every year on computer systems, a million dollars is just not that big of a deal.").

e) Exh. No. 30: "Extraordinary Items," Uniform System of Accounts, ¶ 15,017 (providing that an extraordinary item is "abnormal and significantly different from the ordinary and typical activities of the company," and "should be more than approximately 5 percent of income").

f) Tr. (Baxter), at 713 (lines 2-20) (explaining that maintenance activities for the variety of computer systems at UE is fairly significant, citing the example of maintaining the very critical operating systems at the Callaway plant), at 728-30 (lines 21-1) (describing what is done to address the Year 2000 problem, and noting that that is the same kind of work done when implementing changes to a system), at 733 (lines 1-20), at 745-48 (lines 6-2) (for the computer costs that are expensed, that is, software related expenses the Year 2000 work would involve approximately $2¼ to $4¼ million per year for two years, an insignificant

amount compared to the software maintenance costs incurred for the Company's 30 to 50 mission critical systems), at 748-49 (lines 3- to 11) (For the Company's Year 2000 expenses to be extraordinary under the USOA, they would have to exceed 5 percent of income each year, or, on a pre-tax basis, $20 million), at 749-50 (lines 19-20) (describing software maintenance needed when rates are changed), at 751-52 (lines 8-15) (describing the serious consequences of the failure of other computer systems not related to Year 2000 problems).

COMMENT:

No contrary evidence was introduced. Ms. Westerfield testified that the basis for the Staff's proposed deferral of these costs was that they were "extraordinary" and "unusual." Tr. (Westerfield), at 649 (lines 10-14). However, she offered absolutely no evidence to support these characterizations, admitting that she had made no comparisons with the other computer costs to determine a dollar level at which a cost would become extraordinary, id. at 650 (lines 9-17); that she did not examine the Company's computer costs outside of the third sharing period, id. at 653 (lines 16-21), or before the EARP, id. at 654 (lines 4-7); that she does not know if Union Electric had other computer maintenance expenses during the third sharing period that were as significant as the Year 2000 related expenses, id. at 655 (lines 12-17); that she does not know what programmers actually do in fixing Year 2000 associated problems, id. at 656-57 (lines 17-8); and that she does not know what amount of the Company's original estimate for its total Year 2000 costs related to computer hardware (which the Company capitalizes), and what amount related to software. Id. at 662 (lines 20-24). Moreover, though she testified that the basis for the proposed deferral of those costs was also the Uniform System of Accounts ("USOA") provisions dealing with extraordinary expenses, id. at 666 (lines 6-11), at 667-68 (lines 23-2), at 669 (lines 11-13), she admitted that she made none of

the comparisons to the "ordinary and typical activities" of UE that USOA requires, nor did she compare the Company's Year 2000 costs to its income, as also required by the USOA. Id. at 670-76 (lines 17-16). Finally, Ms. Westerfield even got the size of what she considered to be this "extraordinary expense" wrong. Of the $10-15 million Union Electric estimated that it would spend in total for Year 2000 expenses for all its operations, approximately $2¼ to $4¼ million per year was software expense in Missouri. Tr. (Baxter), at 745-46 (lines 6-19).

44. **Union Electric incurred computer software maintenance expenses associated with Year 2000 work before the third sharing period of the EARP, but neither the Staff nor OPC questioned the Company's treatment of such expenses during the first two sharing periods.**

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 18-19 (lines 18-9).

b) Exh. No. 6: Westerfield Surrebuttal Schedules, Sch. 2 -- Ameren Year 2000 Disclosure, at 2-10 ("Callaway's Year 2000 Project began Software Remediation in 1986.").

COMMENT:

No contrary evidence was introduced.

45. **Deferring computer maintenance costs associated with Year 2000 problems to some future period would burden future customers with the costs of other computer maintenance required during that future period plus the costs associated with the Year 2000 problem, that is, costs that would then have been incurred in a previous period.**

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 18 (lines 5-7).

COMMENT:

No contrary evidence was introduced.

46. **The computer software maintenance expenses associated with the Year 2000 problem do not improve software beyond the state in which it was originally intended to be used and do nothing more than restore the software to its normal state.**

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 17 (lines 8-11).

b) Exh. No. 15: McKnight Rebuttal, at 12 (lines 11-14).

c) Tr. (Baxter), at 721-22 (lines 23-11) (The Year 2000 repair does not extend the useful life of a computer system or add functionality to it.).

COMMENT:

No contrary evidence was introduced.

47. **To capitalize and amortize the costs of maintenance associated with the Year 2000 problem, a period representative of the useful or service life of that maintenance, over which such amortization is to be done, must be established. No such period has been established.**

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 17 (lines 11-12).

b) Tr. (Baxter), at 727 (lines 15-22) (explaining that the expenditures for the Year 2000 computer repair do not have a useful life).

COMMENT:

No contrary evidence was introduced.

48. In the third sharing period of the first EARP, Union Electric incurred approximately $672,000 in computer software maintenance expenses associated with the Year 2000 problem.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 9 (lines 16-21).

COMMENT:

No contrary evidence was introduced.

OTHER COMPUTER SOFTWARE DEVELOPMENT EXPENSES

49. Union Electric has incurred computer software development costs for decades, and has consistently expensed those costs as they have been incurred.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 35 (lines 15-21).

b) Exh. No. 15: McKnight Rebuttal, at 15 (lines 23-24), at 17 (lines 20-21).

c) Tr. (Baxter), at 844-45 (lines 15-2).

d) Exh. No. 47: Computer Software Development Accounting Data.

COMMENT:

No contrary evidence was introduced.

50. Consistent with that long standing practice, Union Electric expensed as they were incurred the costs to develop and install the computer programs for its customer information systems ("CSS"), for its human resource and payroll system ("AMRAPS"), and for its power plant maintenance scheduling system ("EMPRV").

SUPPORTING EVIDENCE:

a) Tr. (Baxter), at 845-46 (lines 3-4).

COMMENT:

No contrary evidence was introduced.

51. Though it varies by project, the normal leadtime for Union Electric bringing computer software into service ranges from approximately 12 to 24 months. Among the costs that are incurred before such software is in service are the costs of the software itself, costs associated with consultants, and training costs, all of which would be expensed as incurred.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 21 (lines 13-16), at 22 (lines 14-18).

b) Exh. No. 15: McKnight Rebuttal, at 15 (lines 20-27).

COMMENT:

No contrary evidence was introduced.

52. The activities undertaken by Union Electric to develop and install the CSS, AMRAPS, and EMPRV computer programs were not different in kind from other computer software development and installation activities Union Electric has undertaken over the years. The costs incurred to develop and install CSS, AMRAPS, and EMPRV do not represent a new category of costs.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 35 (lines 15-21).

b) Exh. No. 14: Baxter Rebuttal, at 22-23 (lines 19-6).

COMMENT:

No contrary evidence was introduced.

53. The costs Union Electric incurred to develop and install CSS, AMRAPS, and EMPRV are not extraordinary but are consistent with amounts Union Electric has spent on other computer software development.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 24-26 (lines 20-14).

b) Exh. No. 13: Attachment A (Agreement), at 7 (section 3.e.vi: referring to the new general ledger system installed in 1994, a significant expense for computer software development incurred before the EARP).

c) Exh. No. 6: Westerfield Surrebuttal Schedules, Sch. 11 -- "CSS Fit Assessment Recommendation," at 11-9 (showing the software costs for CSS -- the costs at issue here -- are less than 10 percent of the total costs for CSS cited by Ms. Westerfield as the basis for her claim that these software costs are "extraordinary"), Sch. 7 -- "Cost to Implement C/1," at 7-1 (same).

d) Tr. (Baxter), at 848-51 (lines 23-7).

COMMENT:

No contrary evidence was introduced.

54. During the EARP, Union Electric's accounting policy of expensing computer software development costs were consistent with GAAP, was the predominant practice among all companies, and was considered the preferable practice by the staff of the SEC.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 27 (lines 1-4), at 27 (lines 6-13) (explaining that a change in GAAP concerning the accounting treatment for computer software costs occurred effective January 1, 1999, on a prospective basis only, and so does

not affect the operation of the Agreement for the time period relevant here), at 27-28 (lines 14-6) (whether CSS was in-service during the third sharing period is not relevant to the expensing of its costs as incurred).

b) Exh. No. 15: McKnight Rebuttal, at 16-17 (lines 1-23), at 18-20 (lines 13-10) (explaining that the change in GAAP accounting for computer software costs became effective on January 1, 1999, that this change is not properly applied retroactively, and that it provides for capitalization of some software costs and expensing others contrary to the proposed adjustment of capitalizing all Union Electric's costs for these systems).

c) Tr. (Baxter), at 777-78 (lines 12-25) (explaining that, even after a change in the GAAP accounting standard for computer software effective January 1, 1999, GAAP requires UE to continue to expense computer software costs as incurred).

d) Exh. No. 6: Westerfield Surrebuttal Schedules, Sch. 10 -- Statement of Position 98-1, at 10-32 (providing that the change in GAAP to capitalize some computer software costs should not be applied retroactively).

COMMENT:

No contrary evidence was introduced.

55. If it were appropriate to amortize computer software development costs, given that rapid changes in technology software have a relatively short useful life, such amortization would be calculated over three to five years.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 28-29 (lines 7-2) (explaining that, because of the short useful life of software, "the majority of companies that amortized computer software costs did so over a period of 3 to 5 years").

b) Tr. (Baxter), at 344-45 (lines 22-3), at 732 (lines 2-8).

COMMENT:

Though the Staff claimed a 10-year depreciation schedule was appropriate, they offered no analysis of the actual useful lives of the computer systems at issue here, nor any general, governing legal principle, to support this claim.

INJURIES AND DAMAGES EXPENSES

56. The Company has encountered injuries and damages expenses during the course of its business for decades.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 33 (lines 3-4).

COMMENT:

No contrary evidence was introduced.

57. The Company's long-established accounting policy for injuries and damages expenses is to expense these costs as incurred, in accordance with GAAP.

SUPPORTING EVIDENCE:

a) Tr. (Gruner) at 947 (lines 23-25) ("Q. You agree that the Company conforms with accounting practices of GAAP; is that correct? A. We have never disputed they follow GAAP.").

b) Exh. No. 14: Baxter Rebuttal, at 32 (lines 16-20).

c) Tr. (Baxter), at 965-67 (lines 14-6).

COMMENT:

No contrary evidence was introduced.

58. The Company's injuries and damages reserve reflects management's best estimate of loss contingencies that are probable and reasonably estimable, in accordance with GAAP.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 34-35 (lines 20-2).

b) Tr. (Gruner), at 948 (lines 5-8) ("Q. In connection with litigation claims, [the Company is] required to accrue as an expense probable claims that are reasonably estimable; isn't that right? A. Yes . . . .").

c) Tr. (Baxter), at 965-67 (lines 14-5).

COMMENT:

No contrary evidence was introduced.

59. Over the years, accruals for injuries and damages expenses have fluctuated considerably.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 35 (lines 12-16).

COMMENT:

No contrary evidence was introduced.

60. In the Third Sharing Period, the Company incurred injuries and damages expenses of $20,270,000.

SUPPORTING EVIDENCE:

a) Exh. No. No. 7: Gruner Direct, at 7 (lines 5-6), at Schedule 3-1.

b) Exh. No. 14: Baxter Rebuttal, at 35 (lines 15-16).

COMMENT:

No contrary evidence was introduced.

61. In the Third Sharing Period, the Company made injuries and damages payments of $17,160,897.

SUPPORTING EVIDENCE:

a) Exh. No. 7: Gruner Direct, at 7 (lines 4-5), at Schedule 3-2.

COMMENT:

No contrary evidence was introduced.

62. The Company's injuries and damages expense increased in the Third Sharing Period because a number of large claims were settled for amounts in excess of what had been provisioned for those claims. In addition, there was an increase in occurrences that will eventually result in payments by the Company.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 35 (lines 4-11).

b) Tr. (Baxter), at 964 (lines 11-18).

c) Tr. (Gruner), at 944-45 (lines 10-15)

COMMENT:

No contrary evidence was introduced.

63. In the Third Sharing Period, the Company expensed as incurred its injuries and damages expenses. The Company's accounting policy in the Third Sharing Period was in accordance with its long-established practice.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 32 (lines 18-20).

COMMENT:

No contrary evidence was introduced.

64. **The Staff proposed an unprecedented two-part adjustment to the Company's injuries and damages expense in the Third Sharing Period. The first part is a normalizing adjustment: it adjusts the injuries and damages reserve beginning balance to the average reserve balance of the previous two sharing periods. The second part of the adjustment is to compare the Company's cash payments in the Third Sharing Period to the provision in that period, and to reduce the provision to the cash payments.**

SUPPORTING EVIDENCE:

a) Tr. (Gruner), at 935 (lines 8-15) (describing two-part adjustment and acknowledging that the first part of the adjustment is a normalization adjustment).

b) Exh. No. 12: Brandt Rebuttal, at 37 (lines 19-21).

c) Exh. No. 14: Baxter Rebuttal, at 32 (lines 7-12), at 35-38 (lines 17-4).

COMMENT:

No contrary evidence was introduced.

65. **The Staff's proposed adjustment would reduce injuries and damages expenses reflected in the Third Sharing Period Final Earnings Report by approximately $2.3 million.**

SUPPORTING EVIDENCE:

a) Exh. No. 7: Gruner Direct, at Schedule 3-2.

COMMENT:

No contrary evidence was introduced.

66. **The Staff's proposed adjustment is inconsistent with GAAP.**

SUPPORTING EVIDENCE:

a) Tr. (Baxter), at 979 (lines 2-16).

COMMENT:

No contrary evidence was introduced.

67. The Staff's proposed adjustment is inconsistent with the accounting methodology used by the Company to calculate its injuries and damages expenses in the First and Second Sharing Periods.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 37 (lines 6-8), at 35-38 (lines 17-4).

b) Tr. (Gruner), at 939-40 (lines 25-25).

COMMENT:

No contrary evidence was introduced.

68. The Staff is aware of no precedent for the two-part adjustment to injuries and damages expenses that is proposed in this case.

SUPPORTING EVIDENCE:

a) Tr. (Gruner), at 938 (lines 13-19).

COMMENT:

No contrary evidence was introduced.

69. There is no provision in the Agreement that permits an adjustment to the Company's established accounting methodology for injuries and damages expenses.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 37 (lines 21-24).

b) Exh. No. 14: Baxter Rebuttal, at 35-38 (lines 17-4).

c) Tr. (Gruner), at 940-41 (lines 19-3).

COMMENT:

No contrary evidence was introduced.

70. There is no provision in the Reconciliation Procedure that provides for the normalization of the injuries and damages expenses.

SUPPORTING EVIDENCE:

a) Tr. (Gruner), at 940 (lines 22-25) ("Q. But there is no injuries and damages normalization adjustment in the reconciliation procedure; is that correct? A. No there's not.").

b) Exh. No. 14: Baxter Rebuttal, at 33-34 (lines 7-16).

c) Exh. No. 15: McKnight Rebuttal, at 23 (lines 13-17).

COMMENT:

No contrary evidence was introduced.

71. The Reconciliation Procedure expressly provides for the normalization of certain expenses. For all other expenses, the signatories intended no such normalization adjustment.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 37-38 (lines 24-2) ("The Reconciliation Procedure to the Agreement specifically provides that *certain* costs were to be normalized; for other costs, such as injuries and damages expenses, the parties thereby agreed that no normalization was permitted.").

b) Attachment C, (Reconciliation Procedure), at section 2.c ("The Company will make the following income statement adjustments . . . .: Normalize the expense of refueling the Callaway nuclear plant to provide an annual expense level.").

COMMENT:

Mr. Gruner testified that Section 3.f.vii of the Agreement authorized the adjustment because injuries and damages expenses related to the operation and implementation of the EARP.

DECOMMISSIONING FUND DEPOSITS

72. UE is required to make quarterly deposits each year into a fund that will be used in the future to decommission the Callaway nuclear power plant.

SUPPORTING EVIDENCE:

a) Tr. (Westerfield), at 884-85 (lines 23-2).

b) In the matter of the determination of in-service criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway rate base and related issues, Case No. EO-85-17 & Case No. ER-85-160 ("Callaway Rate Case"), at 109-11.

COMMENT:

No contrary evidence was introduced.

73. IRS regulations require the Company to obtain prior approval from the Commission before making trust fund deposits.

SUPPORTING EVIDENCE:

a) Tr. (Westerfield), at 885 (lines 3-7).

b) Exh. No. 4: Westerfield Rebuttal, at 11 (lines 10-12).

c) Exh. No. 14: Baxter Rebuttal, at 44 (lines 11-13).

COMMENT:

No contrary evidence was introduced.

74. On September 3, 1996, Union Electric Company filed an application with the Commission seeking authorization to make decommissioning trust fund deposits in 1997.

SUPPORTING EVIDENCE:

a) In the Matter of the Application and Request for Expedited Treatment of Union Electric Company for Approval of Decommissioning Cost Estimate and Funding Level of Nuclear Decommissioning Trust Fund, in Contingent Request for Waiver and Quarterly Funding Requirement, Case No. EO-97-86 ("UE Decommissioning Order"), at 1.

b) Tr. (Westerfield), at 885 (lines 8-15).

COMMENT:

No contrary evidence was introduced.

75. On December 1, 1996, UE sought expedited treatment of its application to the Commission for permission to make its decommissioning trust fund deposits.

SUPPORTING EVIDENCE:

a) UE Decommissioning Order, at 1.

COMMENT:

No contrary evidence was introduced.

76. In the absence of a Commission order, the Company was unable to make its first quarter deposit for March 1997 of $1,553,546.

SUPPORTING EVIDENCE:

a) Exh. No. 16: Weiss Rebuttal, at Schedule 5, page 1.

b) Exh. No. 4: Westerfield Direct, at Schedule 3.

COMMENT:

No contrary evidence was introduced.

77. On April 22, 1997, UE, the Staff, and the Office of Public Counsel filed a Unanimous Stipulation and Agreement requesting that the Commission approve the Company's application to make its decommissioning trust fund deposits.

SUPPORTING EVIDENCE:

a) UE Decommissioning Order, at 2-3.

COMMENT:

No contrary evidence was introduced.

78. In the absence of a Commission order, the Company was unable to make its second quarter deposit for June 1997 of $1,553,546.

SUPPORTING EVIDENCE:

a) Exh. No. 16: Weiss Rebuttal, at Schedule 5, page 1.

b) Exh. No. 4: Westerfield Direct, at Schedule 3.

COMMENT:

No contrary evidence was introduced.

79. In the absence of a Commission order, the Company was unable to make its third quarter deposit for September 1997 of $1,553,546.

SUPPORTING EVIDENCE:

a) Exh. No. 16: Weiss Rebuttal, at Schedule 5, page 1.

b) Exh. No. 4: Westerfield Direct, at Schedule 3.

COMMENT:

No contrary evidence was introduced.

80. In the absence of a Commission order, the Company was unable to make its fourth quarter deposit for December 1997 of $1,553,546.

SUPPORTING EVIDENCE:

a) Exh. No. 16: Weiss Rebuttal, at Schedule 5, page 1.

b) Exh. No. 4: Westerfield Direct, at Schedule 3.

COMMENT:

No contrary evidence was introduced.

81. On January 24, 1998, the Commission issued an order approving the Company's request to make its decommissioning deposits trust fund deposits for 1997.

SUPPORTING EVIDENCE:

a) UE Decommission Order, at 11-13.

COMMENT:

No contrary evidence was introduced.

82. The money that was available for the Company's use in 1997 because of the untimeliness of the deposit into the trust fund was a cash working benefit to the Company.

SUPPORTING EVIDENCE:

a) Tr. (Westerfield), at 888 (lines 9-14).

b) Exh. No. 14: Baxter Rebuttal, at 44-51 (lines 8-21).

c) Exh. No. 16: Weiss Rebuttal, at 8 (lines 10-23).

COMMENT:

No contrary evidence was introduced.

83. In setting forth the rules governing the decommission trust fund, the Commission stated: "The Commission believes UE should make payments to the fund in

accordance with IRS regulations and does not oppose the use of the funds by UE between each payment if IRS regulations permit."

SUPPORTING EVIDENCE:

a) Callaway Rate Case, at 111.

b) Exh No. 14: Baxter Rebuttal, at 44 (lines 11-13).

c) Tr. (Westerfield), at 885 (lines 3-7).

COMMENT:

No contrary evidence was introduced.

84. By expressly providing for a cash working capital rate base offset of $24 million in the Reconciliation Procedure, the Signatories agreed that they would not conduct a lead-lag study each year of the EARP of the Company's manifold cash flows.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment C (Reconciliation Procedure), at 2.

b) Tr. (Westerfield), at 889 (lines 16-23).

c) Exh. No. 14: Baxter Rebuttal, at 45 (lines 9-11), at 46 (lines 11-16) ("[A] cash working capital rate base offset was specifically agreed to by the Parties because it was recognized that cash flows could vary due to a wide variety of reasons, either positively or negatively, for the Company. The Parties knew it would be inherently impractical and unfair to attempt to isolate certain cash flows, while ignoring others, in the context of the preparation of the Final Earnings Report.").

COMMENT:

No contrary evidence was introduced.

85. If it were appropriate to make an adjustment to account for the untimely deposit of the decommissioning funds, that adjustment would be calculated by multiplying

the amount of the decommissioning deposits by a short-term interest rate of 5-6%. That amount should then be added to the rate base, and the Company's return on rate base should be recalculated. The appropriate adjustment would then be $177,000.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 49-50 (lines 10-14).

b) Exh. No. 16: Weiss Rebuttal, at Schedule 5, as revised.

COMMENT:

The staff calculated its adjustment by using the AF UPC rate, a composite of long and short-term interest rates, which ranged from 8-10%. The OPC used a 9.25% interest rate.

TERRITORIAL AGREEMENTS EXPENSES

86. The Company's long-established accounting policy for territorial agreements is to recognize the revenues and expenses in the period realized and occurred.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 40 (lines 15-20).

COMMENT:

No contrary evidence was introduced.

87. No provision in the Agreement or Reconciliation Procedure authorizes the Company to alter its consistent accounting policy for territorial agreements.

SUPPORTING EVIDENCE:

a) Exh. No. 12: Brandt Rebuttal, at 29-32 (lines 13-13).

b) Exh. No. 14: Baxter Rebuttal, at 41-43 (lines 14-2).

COMMENT:

Although Mr. Rackers sought support for his adjustment in Sections 3.f.vii and 3.f.viii of the Agreement, he acknowledged that there was no explicit provision in the agreement for an adjustment for territorial agreements. Tr. (Rackers) at 571 ("Q: But the phrase 'territorial agreement' appears nowhere in the reconciliation procedure; is that correct? A: To the best of my knowledge, yes.").

BLACK RIVER

88. On April 28, 1995, the Company and the Black River Electric Cooperative ("Black River") entered into a territorial agreement involving the exchange of service territories and customers.

SUPPORTING EVIDENCE:

a) Exh. No. 23: Direct Testimony of Kenneth L. Schmidt filed in In the Matter of the Application of Union Electric Company and Black River Cooperative, Case No. 95-400, et al. ("Schmidt Black River Testimony") at 2.

COMMENT:

No contrary evidence was introduced.

89. As of June 1995, it was estimated that the service territories received by UE had 6,000,000 fewer KWH than the territories it relinquished; however, one of the principal reasons that UE entered into the agreement was the fact that it was "reserving some significant growth areas."

SUPPORTING EVIDENCE:

a) Exh. No. 23: Schmidt Black River Testimony at 5.

b) Tr. (Rackers), at 562 (lines 12-23).

COMMENT:

No contrary evidence was introduced.

90. The Company identified numerous other benefits resulting from the territorial agreement with Black River, including a "more consolidated distribution service territory," "a more densely populated customer base," increases in efficiency, the ability to obtain "an exclusive service territory," the reduction of duplicative facilities and the elimination of unnecessary distribution facilities.

SUPPORTING EVIDENCE:

a) Exh. No. 23: Schmidt Black River Testimony, at 4-6.

b) Tr. (Rackers), at 560-561 (lines 15-25).

COMMENT:

No contrary evidence was introduced.

91. In rebuttal testimony filed before the Commission in the Black River proceeding, Staff witness Stephen Rackers did not question the existence of such benefits.

SUPPORTING EVIDENCE:

a) Exh. No. 24: Rebuttal Testimony of Stephen Rackers filed in In the Matter of the Application of Union Electric Company and Black River Cooperative, Case No. 95-400, et al. ("Rackers Black River Testimony), at 2.

b) Tr. (Rackers), at 566 (lines 5-8).

COMMENT:

No contrary evidence was introduced.

92. On April 26, 1996, the Company and the Black River Electric Cooperative entered into a revised territorial agreement involving the exchange of service territories and customers.

SUPPORTING EVIDENCE:

a) Order Finalizing Approval of Territorial Agreement, Granting Certificate of Convenience and Necessity, and Approving Tariffs, Case No. EO-95-400 ("Black River Order"), at 5.

COMMENT:

No contrary evidence was introduced.

93. On June 7, 1996, the Commission approved the revised territorial agreement between the Company and the Black River Electric Cooperative.

SUPPORTING EVIDENCE:

a) Black River Order, at 1.

COMMENT:

No contrary evidence was introduced.

94. In approving the Black River agreement, the Commission concluded that the agreement was not detrimental to the public interest.

SUPPORTING EVIDENCE:

a) Black River Order, at 1.

b) Tr. (Rackers), at 553-54 (lines 1-5)

COMMENT:

No contrary evidence was introduced.

95. The Black River Order does not provide that the Staff has a right to reexamine the financial impact of the territorial agreement upon the Company's earnings for purposes of calculating the sharing credit under the EARP.

SUPPORTING EVIDENCE:

a) Black River Order.

COMMENT:

No contrary evidence was introduced.

96. A comparison of the counties in which service areas were exchanged reveals that the number of customers increased from 10,461 in the year July 1, 1995 through June 30, 1996 (prior to territorial exchange) to 10,785 in the year July 1, 1997 through June 30, 1998 (after the territorial exchange).

SUPPORTING EVIDENCE:

a) Exh. No. 28: UE's Response to Staff's Data Request 107.

b) Tr. (Rackers), at 591(lines 9-12).

COMMENT:

No contrary evidence was introduced.

97. A comparison of the counties in which service areas were exchanged reveals that the customer load increased from 447,848,911 KWHR in the year July 1, 1995 through June 30, 1996 (prior to territorial exchange) to 470,528,952 KWHR in the year July 1, 1997 through June 30, 1998 (after the territorial exchange).

SUPPORTING EVIDENCE:

a) Exh. No. 28: UE's Response to Staff's Data Request 107.

b) Tr. (Rackers), at 591 (lines 13-20).

COMMENT:

No contrary evidence was introduced.

98. A comparison of the counties in which service areas were exchanged reveals that the revenue generated increased from $23,106,892.12 in the year July 1, 1995 through June 30, 1996 (prior to territorial exchange) to $23,382,972.69 in the year July 1, 1997 through June 30, 1998 (after the territorial exchange).

SUPPORTING EVIDENCE:

a) Exh. No. 28: UE's Response to Staff's Data Request 107.

b) Tr. (Rackers) at 591-92 (lines 9-20).

COMMENT:

No contrary evidence was introduced.

99. An analysis of the service areas in which counties were exchanged pursuant to the Black River Agreement reveals that annual revenue increased in the amount of $276,080.57.

SUPPORTING EVIDENCE:

a) Exh. No. 28: UE's Response to Staff's Data Request 107 (subtracting "amount" in third column from right -- $23,106,892.12 -- from column on right -- 23,382,972.69).

COMMENT:

No contrary evidence was introduced.

MACON

100. On July 5, 1996, the Company and the Macon Electric Cooperative entered into a territorial agreement involving the exchange of service territories and customers.

SUPPORTING EVIDENCE:

a) Stipulation and Agreement, Case No. EO-97-6 ("Macon Stipulation and Agreement"), at 1.

COMMENT:

No contrary evidence was introduced.

101. On October 2, 1996, the Company and the Macon Electric Cooperative filed with the Public Service Agreement for its approval of a Stipulation and Agreement

pursuant to which the Company and Macon would exchange service territories and customers.

SUPPORTING EVIDENCE:

a) Macon Stipulation and Agreement, at 1.

COMMENT:

No contrary evidence was introduced.

102. In approving the Macon agreement, the Commission concluded that the agreement was not detrimental to the public interest.

SUPPORTING EVIDENCE:

a) Tr. (Rackers), at 553 (lines 1-11).

COMMENT:

No contrary evidence was introduced.

103. As part of the Stipulation and Agreement, the Staff, on the basis of "more current data," reserved the right to re-examine the financial impact of the Macon Agreement for purposes of determining sharing credits under the EARP.

SUPPORTING EVIDENCE:

a) Macon Stipulation and Agreement, at 2 ("Adjustments to book earnings, based on more current data, can be proposed at that time, if necessary.") (emphasis added).

COMMENT:

No contrary evidence was introduced.

104. As of August 30, 1996, the service areas Union Electric received from Macon had fewer customers than the service areas that the Company relinquished; however,

the Company expected that the service areas it received would experience considerable growth.

SUPPORTING EVIDENCE:

a) Exh. No. 25: Direct Testimony of Ronald W. Loesch in In the Matter of the Matter of the Application of Union Electric Company and Macon Electric Cooperative, Inc., Case No. EO-97-6 ("Loesch Macon Testimony")), at 6 ("Although the customer exchange ratio is approximately 3:1, this imbalance could be made up by the addition of one or two large industrial customers in the Moberly or Brookfield areas to be served by UE. As a result of the Territorial Agreement, UE's service territory will be more compact and will be concentrated in areas around Moberly and Brookfield, areas we believe have growth potential.").

COMMENT:

No contrary evidence was introduced.

105. Union Electric identified numerous other benefits resulting from the territorial agreement with Macon, including the removal of duplicative facilities, more public certainty as to whom to contact with service issues, more compact service territories, better and more efficient service, and avoided costs through the elimination of unnecessary facilities.

SUPPORTING EVIDENCE:

a) Exh. No. 25: Loesch Macon Testimony, at 6-8.

b) Tr. (Rackers), at 568 (lines 13-20).

COMMENT:

No contrary evidence was introduced.

COMMENT:

No contrary evidence was introduced.

109. As a result of reduced customer demand, the Macon Territorial Agreement resulted in additional cost savings through excess energy capacity. Excess energy capacity is the quantity of energy that the Agreement freed up, thereby allowing the Company to either sell it on the interchange market or use it to avoid purchases on the interchange market.

SUPPORTING EVIDENCE:

a) Exh. No. 16: Weiss Rebuttal, at Schedule 6.

COMMENT:

Mr. Rackers conceded that he did not know whether or not the Macon Agreement resulted in excess energy capacity. Tr. (Rackers) at 602 ("Q. And you don't know if UE . . . had any excess capacity as a result of the Macon Agreement . . .? A. I don't know that.").

110. The value of the excess energy capacity from the Macon Agreement had a monetary value of $1,313,009.

SUPPORTING EVIDENCE:

a) Exh. No. 16: Weiss Rebuttal, at Schedule 6.

COMMENT:

Mr. Rackers conceded that he did not know whether or not the Macon Agreement resulted in excess energy capacity. Tr. (Rackers) at 602 ("Q. And you don't know if UE . . . had any excess capacity as a result of the Macon Agreement . . .? A. I don't know that.").

111. A comparison of annual results in the year prior to the Macon exchange and the year following the exchange reflects a positive net impact on income in the amount of $196,847.

SUPPORTING EVIDENCE:

a) Exh. No. 16: Weiss Rebuttal, at Schedule 6, *as revised, see* Tr. (Weiss), at 623 (lines 5-6).

COMMENT:

No contrary evidence was introduced.

MERGER AND ACQUISITION COSTS

112. Central Illinois Service Corporation (CIPS) is a regulated pubic utility engaged in the business of providing energy services in the State of Illinois.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix B (Report and Order), at 3.

COMMENT:

No contrary evidence was introduced.

113. CIPSCO Incorporated (CIPSCO) is an Illinois corporation and the parent corporation of CIPSC, a wholly owned subsidiary.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix B (Report and Order), at 2-3.

COMMENT:

No contrary evidence was introduced.

114. On November 7, 1995, UE filed an application with the Commission to merge with CIPSCO.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix B (Report and Order), at 2.

COMMENT:

No contrary evidence was introduced.

115. In the Merger Order, which became effective March 4, 1997, the Commission approved the interstate merger of Union Electric and CIPSCO.

SUPPORTING EVIDENCE:

a) Exh. No. 13 Appendix B (Report and Order).

COMMENT:

No contrary evidence was introduced.

116. The Merger Agreement contemplated that there would be costs associated with the merger of Union Electric and CIPSCO.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix B (Report and Order), at 3.

b) Exh. No. 7: Gruner Direct, at 3 (lines 2-4) ("Transaction costs are costs directly related to bringing about the merger of UE and CIPSCO.").

COMMENT:

No contrary evidence was introduced.

117. The Merger Agreement contemplated that the costs associated with the interstate merger would be borne by customers in both Missouri and Illinois.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment 1 to Appendix B to Rebuttal Testimony of Donald E. Brandt (Agreement) ("Attachment 1 (Agreement)"), at 30 (section 9.b): "UE shall continue to provide to the Staff monthly surveillance reports in the same format which is currently being utilized in the submittals to the Staff (or in some other mutually agreeable format), so that the Staff can continue to monitor UE's *Missouri jurisdictional* electric and natural gas earnings levels.") (emphasis added), at 30-31 (section 9.c): "On a quarterly basis, Ameren and UE shall

provide the Commission with a report detailing *UE's proportionate share* of Ameren." (emphasis added).

COMMENT:

No contrary evidence was introduced.

118. The Merger Agreement estimated that the costs associated with the interstate merger as $71.5 million.

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment 1 (Agreement), at 2 (section 4): "Actual prudent and reasonable merger transaction and transition costs (estimated to be $71.5 million . . .")

b) Exh. No. 13: Appendix B (Report and Order), at 5 (same).

COMMENT:

No contrary evidence was introduced.

119. The Merger Agreement contemplated the possibility that the costs actually incurred as a result of the interstate merger might be less than the Company's original estimate.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 29 (lines 16-19).

b) Exh. No. 13: Attachment 1 (Agreement), at 2-3 (section 4).

COMMENT:

No contrary evidence was introduced.

120. The actual costs associated with the interstate merger have been less than originally anticipated. As of June 30, 1998, the Company had incurred approximately $41-44 million in transaction costs as a result of the interstate merger.

SUPPORTING EVIDENCE:

a) Exh. No. 7: Gruner Direct, at 4 (line 1) (estimating interstate merger costs at $41 million), at Schedule 1 (same).

b) Exh. No. 14: Baxter Rebuttal, at 30 (lines 8-10) (estimating interstate merger costs at $44 million).

COMMENT:

No contrary evidence was introduced.

121. Because the Company succeeded in effecting the interstate merger with fewer costs than had been originally anticipated, ratepayers have benefited.

SUPPORTING EVIDENCE:

a) Tr. (Gruner), at 879 (lines 19-23) ("Q. [I]s it fair to say that as a result of UE's ability to come in under the anticipated merger costs, it will be saving ratepayers money? A. Yes.").

COMMENT:

No contrary evidence was introduced.

122. The terms of the interstate merger agreement provide: "Actual prudent and reasonable merger transaction and transition costs (estimated to be $71.5 million, which reflects the total Ameren Corporation ("Ameren") estimated merger costs presented to the Commission Staff ("Staff") and Office of the Public Counsel ("OPC") in the UE/CIPSCO, Inc. Merger Implementation Plan, less executive severance pay of $1.6 million, but including costs incurred in 1995) shall be amortized over ten years beginning the date the merger closes. The annual amortization of merger transaction and transition costs will be the lesser of: (1) the Missouri jurisdictional portion of the total Ameren amount of $7.2 million; or

(2) the Missouri jurisdictional portion of the total Ameren unamortized amount of actual merger transaction and transition costs incurred to date."

SUPPORTING EVIDENCE:

a) Exh. No. 13: Attachment 1 (Agreement), at 2-3 (section 4).

COMMENT:

No contrary evidence was introduced.

123. In approving the interstate merger, the Commission stated: "Actual prudent and reasonable merger transaction and transition costs (estimated to be $71.5 million) shall be amortized over ten years beginning the date the merger closes. The annual amortization of merger transaction and transition costs will be the lesser of: (1) the Missouri jurisdictional portion of the total Ameren amount of $7.2 million; or (2) the Missouri jurisdictional portion of the total Ameren unamortized amount of actual merger transaction and transition costs incurred to date."

SUPPORTING EVIDENCE:

a) Exh. No. 13: Appendix B (Report and Order), at 5.

COMMENT:

No contrary evidence was introduced.

124. In accordance with the terms of the Agreement, the Company amortized the lesser of: (1) the Missouri jurisdictional portion of the total Ameren amount of $7.2 million *($6.2 million)*; and (2) the Missouri jurisdictional portion of the total Ameren unamortized amount of actual merger transaction and transition costs incurred to date *($41-44 million)*.

SUPPORTING EVIDENCE:

a) Exh. No. 14: Baxter Rebuttal, at 30 (lines 1-17), at 31-32 (lines 9-3).

b) Exh. No. 12: Brandt Rebuttal, at 37 (lines 1-16).

COMMENT:

Mr. Gruner acknowledged that both sentences quoted in Finding of Fact No. 122 were relevant in determining the appropriate amortization amount in the Third Sharing Period. See Tr. (Gruner), at 879 (lines 3-4). However, he testified that the general statement reflected in the first sentence -- regarding the amortization period -- controlled the specific provision reflected in the second sentence -- providing the mechanism for calculating the annual amortization amount. Exh. No. 8: Gruner Surrebuttal, at 2-3 (lines 1-18). See also Exh. No. 11: Robertson Rebuttal, at 12-17 (lines 13-4).

PROPOSED CONCLUSIONS OF LAW

1. The EARP is not a traditional ratemaking.

AUTHORITY:

a) Exh. No. 13: Appendix A (Report and Order), at 4.

b) Exh. No. 12: Brandt Rebuttal, at 3 (lines 15-20).

c) Exh. No. 15: McKnight Rebuttal, at 6 (lines 1-3), at 10 (lines 15-18).

d) Exh. No. 39: Rademan Surrebuttal, at 1 (lines 8-12) ("The Agreement embodied a new, progressive approach to the regulation of rates that marked not only a distinctive break with traditional rate regulation that holds much promise for enhancing the Commission's ability to fulfill its current mission under the law, but also constituted a forward-looking mechanism that could smooth the transition to a competitive electric utility market.").

2. The rates established pursuant to the Agreement were just and reasonable.

AUTHORITY:

a) Exh. No. 13: Appendix A (Report and Order), at 7.

3. **The establishment of the EARP was in the public interest.**

AUTHORITY:

a) Exh. No. 13: Appendix A (Report and Order), at 7.

b) Tr. (Brandt), at 268 (lines 3-16) ("[T]here's a lot of our investors, institutional investors and analysts who are interested in the outcome of this proceeding and whether in Missouri is a deal a deal, and they know this is not the ending . . . . [T]here's bigger fish to fry in the future relative to restructuring and this Commission's role in that.").

4. **The Commission did not and does not have the power to order UE to adopt a plan to share its earnings with its customers.**

AUTHORITY:

a) Exh. No. 13: Appendix A (Report and Order), at 7 ("[T]he Commission could not under current statutes order UE to adopt a plan to share earnings with customers.").

5. **The Commission adopted the Agreement and approved the alternative regulation plan as described in the Agreement.**

AUTHORITY:

a) Exh. No. 13: Appendix A (Report and Order), at 7.

6. **The Agreement constituted a "settlement of an earnings monitoring by the Staff of the Commission."**

AUTHORITY:

a) Exh. No. 13: Attachment A (Agreement), at 1.

7. **The Agreement created contractual obligations that are legally binding on the signatories.**

AUTHORITY:

a) Tr. (Rackers), at 455-56 (lines 3-1) (acknowledging that all the parties to the Agreement gave up something in consideration of the terms of the Agreement).

8. **Section 3.f.vii of the Agreement -- which provides that signatories can bring to the Commission for resolution "issues which cannot be resolved by them, and which are related to the operation or implementation of the Plan" -- does not allow a signatory to propose, or the Commission to order, an adjustment to the calculations of earnings under the EARP that adds to or modifies in any way the methodology for those calculations agreed to by the signatories and set out in the Reconciliation Procedure.**

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 30 (lines 8-10) ("[U]nder Mr. Rackers' reading [that 3.f.vii authorizes the Staff adjustments] there seems to be no limiting principle to the adjustments that can be proposed by the Staff under this provision.").

b) Exh. No. 14: Baxter Rebuttal, at 23-24 (lines 13-14).

c) Exh. No. 39: Rademan Surrebuttal, at 6 (lines 14-19) ("No provision of the Agreement authorizes any party to unilaterally change this methodology of calculating earnings, either by modifying the adjustments that are set out in the Procedure or by adding new adjustments to it."), at 6-7 (lines 22-16).

9. **Adopting the proposed adjustments would render the Agreement illusory, having no binding legal effect.**

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 30 (lines 19-23) ("[I]t is absurd to claim that Section 3.f.vii invested the Staff with the unfettered discretion it now claims -- to

challenge any cost at all, because it somehow relates to the operation of the EARP. According to Mr. Rackers, I signed a contract in which the Company gave up hundreds of million dollars and in return the Company got precisely nothing.").

10. Adopting any or all of the proposed adjustments would constitute a breach of contract.

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 3 (lines 8-9).

b) Exh. No. 14: Baxter Rebuttal, at 4 (line 6-7).

c) Exh. No. 15: McKnight Rebuttal, at 10-11 (lines 5-3) (explaining that the "proposed adjustments of the Staff and OPC . . . violate the terms of the Agreement.").

11. Adopting any or all of the proposed adjustments would impair the contractual obligations established by the Agreement.

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 3 (line 6-9).

b) Exh. No. 14: Baxter Rebuttal, at 4 (line 6-8).

12. Adopting any or all of the proposed adjustments would effect an uncompensated taking of Union Electric's contract rights.

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 3 (lines 9-10).

b) Exh. No. 14: Baxter Rebuttal, at 4 (lines 8-9).

13. Adopting any or all of the proposed adjustments would repudiate the representations adopted and made legally effective by the Commission, and on which Union Electric reasonably relied, and so would destroy the investment-backed expectations of Union Electric created by those representations.

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 3 (lines 11-14).

b) Exh. No. 14: Baxter Rebuttal, at 4 (lines 10-13).

c) Tr. (Baxter), at 346-47 (lines 17-3) (In entering the Agreement, Union Electric "has given up some things," including the "$30 million one-time credit, [the] permanent rate decrease, . . . the merger premium" due to the Company's "reliance on this agreement as we set our expectations." "[W]e've put some real money up for this particular agreement.").

14. Adopting any or all of the proposed adjustments would deny Union Electric's right to due process of law.

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 3 (lines 10-11).

b) Exh. No. 14: Baxter Rebuttal, at 4 (lines 9-10).

15. No provision of the Agreement authorizes a cost to be wholly "deferred" to some future period.

AUTHORITY:

a) Tr. (Rackers), at 2 (lines 10-13) (The sharing credits that are the focus of the EARP are determined "on a one-time basis" for each year of the EARP.)

b) Exh. No. 14: Baxter Rebuttal, at 18 (lines 8-13) ("[T]his Agreement was not established to determine future rates to be charged to customers, as is the case in a typical ratemaking proceeding . . . . The terms of this Agreement were established to determine the 'sharing credits' to be provided to customers for a specified sharing period.").

c) Exh. No. 15: McKnight Rebuttal, at 13 (lines 8-22) (pointing out that there is no basis in MPSC Case No. 00-99-43 for Ms. Westerfield's characterization of that case establishing some sort of "stated preference" of the Commission for the deferral of Year 2000 costs).

16. There is no provision in the Reconciliation Procedure that provides for the normalization of the injuries and damages expenses.

AUTHORITY:

a) Tr. (Gruner), at 940 (lines 22-25) ("Q. But there is no injuries and damages normalization adjustment in the Reconciliation Procedure; is that correct? A: No there's not.").

b) Exh. No. 15: McKnight Rebuttal, at 23 (lines 13-17).

17. The Reconciliation Procedure expressly provides for the normalization of certain expenses. For all other expenses, the signatories intended no such normalization adjustment.

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 37-38 (lines 24-2)("The Reconciliation Procedure to the Agreement specifically provides that *certain* costs were to be normalized; for other costs, such as injuries and damages expenses, the parties thereby agreed that no normalization was permitted.").

18. The Company accurately calculated its injuries and damage expense in the Third Sharing Period.

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 37-38 (lines 17-2).

b) Exh. No. 14: Baxter Rebuttal, at 32-38 (lines 4-4).

19. By expressly providing for a cash working capital rate base offset of $24 million in the Reconciliation Procedure, the signatories agreed that they would not conduct a lead-lag study each year of the EARP of the Company's manifold cash flows.

AUTHORITY:

a) Exh. No. 13: Attachment C (Reconciliation Procedure), at section 2.f.

b) Tr. (Westerfield), at 889 (lines 16-23).

c) Exh. No. 14: Baxter Rebuttal, at 45 (lines 9-11), at 46 (lines 11-16) ("[A] cash working capital rate base offset of $24 million was specifically agreed to by the Parties because it was recognized that cash flows could vary due to a wide variety of reasons, either positively or negatively, for the Company. The Parties knew it would be inherently impractical and unfair to attempt to isolate certain cash flows, while ignoring others, in the context of the preparation of the Final Earnings Report.").

20. The Company correctly concluded that no adjustment was required to account for the untimely deposits into the decommissioning trust fund.

AUTHORITY:

a) Exh. No. 14: Baxter Rebuttal, at 44-51 (lines 8-21).

b) Exh. No. 12: Brandt Rebuttal, at 36 (lines 1-20).

21. The company's long-established accounting for territorial agreements is to recognize the revenues and expenses in the period realized and occurred.

AUTHORITY:

a) Exh. No. 14: Baxter Rebuttal, at 40 (lines 15-20).

22. No provision in the Agreement and Reconciliation Procedure authorizes the Company to alter its consistent accounting policy for territorial agreements.

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 29-32 (lines 13-13).

b) Exh. No. 14: Baxter Rebuttal, at 41-43 (lines 14-12).

23. The Company correctly made no adjustment for the Black River and Macon Territorial Agreements.

AUTHORITY:

a) Exh. No. 12: Brandt Rebuttal, at 29-32 (lines 13-13).

b) Exh. No. 14: Baxter Rebuttal, at 41-43 (lines 14-12).

c) Exh. No. 16: Weiss Rebuttal, at 9 (lines 1-14).

24. Section 4 of the Merger Agreement provides: "Actual prudent and reasonable merger transaction and transition costs (estimated to be $71.5 million, which reflects the total Ameren Corporation ("Ameren") estimated merger costs presented to the Commission Staff ("Staff") and Office of the Public Counsel ("OPC") in the UE/CIPSCO, Inc. Merger Implementation Plan, less executive severance pay of $1.6 million, but including costs incurred in 1995) shall be amortized over ten years beginning the date the merger closes. The annual amortization of merger transaction and transition costs will be the lesser of: (1) the Missouri jurisdictional portion of the total Ameren amount of $7.2 million; or (2) the Missouri jurisdictional portion of the total Ameren unamortized amount of actual merger transaction and transition costs incurred to date."

AUTHORITY:

a) Exh. No. 13: Attachment 1 (Agreement), at 2-3 (In approving the interstate merger, the Commission held: "Actual prudent and reasonable merger transaction and transition costs (estimated to be $71.5 million) . . . shall be amortized over ten years

beginning the date the merger closes. The annual amortization of merger transaction and transition costs will be the lesser of: (1) the Missouri jurisdictional portion of the total Ameren amount of $7.2 million; or (2) the Missouri jurisdictional portion of the total Ameren unamortized amount of actual merger transaction and transition costs incurred to date."), Appendix B (Report and Order), at 5.

25. **The first sentence of Section 4 of the Merger Agreement -- which caps the amortization period at ten years -- is controlled by the second sentence -- which sets forth a specific mechanism for calculation the actual amortization amount.**

AUTHORITY:

a) Exh. No. 14: Baxter Rebuttal, at 30 (lines 1-17), at 31-32 (lines 9-3).

b) Exh. No. 12: Brandt Rebuttal, at 37 (lines 1-16).

26. **In accordance with the terms of the Agreement, the Company amortized the lesser of (1) the Missouri jurisdictional portion of the total Ameren amount of $7.2 million *($6.2 million)*; and (2) the Missouri jurisdictional portion of the total Ameren unamortized amount of actual merger transaction and transition costs incurred to date *($41-44 million)*.**

AUTHORITY:

a) Exh. No. 14: Baxter Rebuttal, at 30 (lines 1-17), at 31-32 (lines 9-3)

b) Exh. No. 12: Brandt Rebuttal, at 37 (lines 1-16).

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 1999, I caused copies of the foregoing document to be served, as noted below, upon the following parties:

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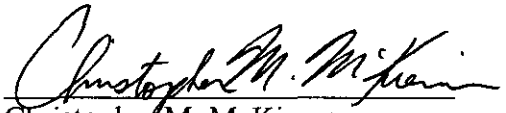

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