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FILED
MAY 18 2004
Missouri Public Service Commission

RE: In re: Application of Union Electric Company
Case No. EO-2004-0108

Dear Mr. Roberts:

Enclosed for filing please find an original and eight copies of the Post-Hearing Brief of Union Electric Company (highly confidential version) and an original and eight copies of the Post-Hearing Brief of Union Electric Company (non-proprietary version). This brief is being filed to meet today's deadline. As stated in the Certificate of Service, a copy of this brief is being served on counsel of record.

Thank you for your assistance.

Sincerely,

James B. Lowery

Enclosure
c w/enc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION OF
THE STATE OF MISSOURI

FILED
MAY 18 2004
Missouri Public Service Commission

Case No. EO-2004-0108

# POST-HEARING BRIEF OF UNION ELECTRIC COMPANY D/B/A AMERENUE


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## PRELIMINARY STATEMENT

### a. The proposed transfer is straightforward and beneficial.

This case is, or should have been, rather straightforward. The Company wants to transfer its Illinois electric and gas distribution and Illinois electric transmission assets to its sister company, AmerenCIPS, itself an Illinois Commerce Commission ("ICC") regulated public utility. The transfer frees-up existing, Company-owned, low-cost base load generation to meet the Company's long-term needs for energy and capacity in Missouri. Staff generally favors transferring these Illinois assets and generally favors the Company meeting its long-term needs in this fashion. The ICC has approved the electric portion of this transfer, and the parties to the ICC case involving the natural gas assets have agreed upon the transfer (ICC approval of that agreement is expected). The Federal Energy Regulatory Commission ("FERC") has also approved the transfer. The assets are located in Illinois and primarily serve only Illinois customers.

As outlined in the Revised Summary of Benefits[1] reproduced at the end of this Preliminary Statement, completion of this transfer brings substantial benefits to Missouri.

In fact, Staff has recently submitted additional evidence that shows the Company has in fact *understated* the benefits of the transfer. There is also other evidence of record suggesting that the Company's analyses are conservative, and that the benefits are likely greater than has been argued by the Company.

There is no proof, indeed no allegation, that the proposed transfer would in any way affect the Company's ability to reliably and adequately provide utility service to its customers – all of whom will be Missourians once the transfer is completed.

[1] Ex. 72. The reproduced Revised Summary of Benefits has been annotated slightly in this brief (see shaded text) to take into account the transmission analyses (Exs. 71, 73, and Affidavit of Dr. Michael S. Proctor dated April 26, 2004).

By freeing-up an additional 6% of Company-owned, base load generation to serve Missouri's needs, the transfer advances this Commission's repeatedly expressed preference that the Company supply its long-term capacity and energy needs with Company-owned generation. In addition, the transfer will free the Company, and this Commission, from the inevitable conflicts that sometimes arise from having one utility operating under two separate regulatory regimes in two different states – one a retail choice state, and one a traditional public utility regulation state.

Those who oppose the transfer, or who at least oppose it unless a long list of conditions is imposed, have raised a laundry list of concerns. The record shows that these concerns arise from potential, *speculative* issues only, in that they all depend upon the occurrence of a series of future, speculative events that may or may not ever occur. These concerns also all relate to presently unquantified and unquantifiable future cost or future rate impacts that can be (and should be) dealt with in an appropriate future rate case where proper test year costs and revenues – in fact all test year costs and revenues – are considered *in toto*. At bottom, an examination of these concerns, and certainly a close examination of them, demonstrates that those who express opposition to the transfer have woefully failed to present compelling evidence of any direct and present detriment sufficient, under the law or the facts, to warrant this Commission denying the Company its right to divest its Illinois properties to a sister company.

### b. Imposing conditions on the transfer is inappropriate and will preclude its completion

Not only does the evidence in this case not warrant denial of permission for the transfer, it also does not warrant the imposition of conditions. The Company desires to be forthright and clear about its intentions regarding this transfer and regarding the various conditions that have been proposed. As Company witness Craig D. Nelson[2] testified, the Company is not going to complete this transfer if the conditions Staff and Public Counsel have asked this Commission to impose, are in fact imposed. As discussed below, an exception to that statement is the amendment to the Joint Dispatch Agreement ("JDA") the Company has committed to make if the Commission determines it is absolutely essential to impose that condition. The Company is also not going to forego the transfer if it has to contribute $272,000 annually over the next 15 months to the nuclear decommissioning fund. Outlined below are sound and compelling reasons why neither of these conditions should be imposed, but the transfer can occur if they are imposed. That is not true with respect to the other conditions. For instance, the Company is not going to give up the right to seek recovery of the generation-related liabilities and future capital costs that may (or may not) arise in the future from the 6% of additional generation that Missouri will obtain as a result of the transfer.

The Company has come to this Commission with a mechanism to help the Company meet its long-term energy and capacity needs for the benefit of Missouri. That mechanism is to transfer these Illinois assets to AmerenCIPS at a book value of approximately $138 million. Consequently, low-cost, coal-fired base load generation with a book value of approximately $223 million will become available to provide the additional energy and capacity Missouri needs. The record in this case, as discussed below, demonstrates this is a mechanism that this Commission should approve by granting the permission requested herein.

[2] Mr. Nelson is Vice-President of Corporate Planning for Ameren Services Company ("AMS").

## AMERENUE ILLINOIS SERVICE TERRITORY TRANSFER
## SUMMARY OF BENEFITS TO MISSOURI RATEPAYERS—REVISED [Shaded Material Added for this Brief]

**1. Background**

- AmerenUE seeks to transfer its Illinois transmission and distribution assets and liabilities (gas and electric) to AmerenCIPS.

*Source: Nelson Direct, pp. 5-9; Schedules 1-2*

**2. Benefits to Missouri Ratepayers**

**A. Generation**

- Currently, AmerenUE's low-cost, primarily base-load generation is allocated approximately 92% to Missouri, 6% to Illinois and 2% to FERC.
- At transaction closing, Missouri will obtain Illinois' share of AmerenUE generation increasing its allocation to 98%.
- By acquiring this additional 6% of AmerenUE's low-cost ($374/kw) generation, Missouri ratepayers will realize a 26% savings when compared to the next least-cost option (gas fired generation at $471/kw).
- As a consequence of this reallocation, Missouri would also acquire an additional 6% allocation of AmerenUE's generation-related liabilities (pre- & post-closing).

*Sources: Voytas Direct, p. 2; Voytas Surrebuttal, Schedule 1; Weiss Surrebuttal, p. 9; Nelson Direct, Schedule 1*

**B. Joint Dispatch Agreement**

- As a condition of approval of this transaction by the MoPSC, AmerenUE is agreeable to amending the JDA such that revenues from off system sales will be allocated between the generating parties (AmerenUE and AEG) based upon generation output rather than load. This amendment will benefit Missouri ratepayers by at least $7 million per year (the projected benefit is actually $24 million per year).

*Sources: Nelson Surrebuttal, p. 10; Voytas Surrebuttal, p. 4; Exhibit 51*

**C. Transmission**

- Based on the methodology for allocating transmission plant and revenues, revenue requirements for AmerenUE's Missouri customers as a result of the Metro East transfer are reduced by $4.9 million per year. This is offset by $4.5 million per year due to a reduction in third party revenues allocated to Missouri. Overall, the transfer results in a net benefit of $0.4 million per year to Missouri. [Expected to be $1.5 million per year and, according to Dr. Proctor's analysis, from $1.8 to $3 million per year]

*Source: Transmission Analysis by Gary Weiss*

**D. Total Benefits to Missouri Ratepayers**

- The total benefit to Missouri ratepayers for the additional allocation of low-cost AmerenUE generation ($2.4 million/yr), the JDA amendment ($7 million/yr) and transmission ($0.4 million/yr.) is approximately $9.8 million/yr. Discounted at 9.5%, the net present benefit is at least $94 million (could be as high as $255 million depending on market prices for electricity). [If expected higher levels of transmission benefits are taken into account, these numbers are even higher]

*Sources: Nelson Surrebuttal, p. 10; Voytas Direct, p. 7; Voytas Surrebuttal, p. 4; Weiss Transmission Analysis*

**E. No Detriment to Missouri Ratepayers**

- Clearly, based upon the foregoing, there is no detriment to Missouri ratepayers.

*Sources: Nelson Surrebuttal, pp. 2-5, 10*

**3. Miscellaneous**

- Funds held in Illinois Nuclear Decommissioning Trust Fund will be transferred to Missouri Decommissioning Trust Fund. Going forward, Missouri would be responsible for 98% (up from 92%) of future decommissioning contributions.
- Do not believe Affiliate Transaction Rules apply, but request a waiver if Commission determines otherwise.
- Staff and OPC have raised issues regarding EEInc. and $SO_2$ allowances that are not properly part of this case – Staff has indicated its intent to file a separate investigation on these matters.

*Sources: Redhage Direct, pp. 3-4; Nelson Direct, p. 9; Nelson Surrebuttal, pp. 3-4, 15-17, 23-24*

**4. Conclusion**

**The proposal offered by the Company is a tremendous economic benefit to Missouri ratepayers.**
**In addition, it makes AmerenUE a "Missouri-only" Company and removes it from conflicting regulatory objectives from doing business in both regulated and unregulated states.**

*Sources: Nelson Direct and Surrebuttal*

## STATEMENT OF FACTS

AmerenUE owns electric and gas distribution assets located in the Metro East area across the Mississippi River from St. Louis, Missouri. These assets serve approximately 62,000 Illinois electric and 18,000 Illinois natural gas customers.[3] AmerenUE also owns transmission assets in Illinois, as well as a generating plant at Venice, Illinois. AmerenUE proposes to transfer all[4] of these Illinois electric and gas distribution and transmission ("T&D") assets to its sister company, AmerenCIPS, which itself is a rate-regulated Illinois public utility. The transfer will occur at net book value, which is estimated to be approximately $138 million at the time of closing.[5] The capital structures of each of AmerenUE and AmerenCIPS will not be materially affected by the transfer and the transfer will have no material effect on AmerenUE's return on equity.[6] AmerenUE's Venice, Illinois generating plant will not be transferred to AmerenCIPS.[7] There will be no effect on tax revenues for any Missouri political subdivision since none of the assets involved are located in Missouri.[8] None of the electric or gas distribution assets have ever been in Missouri rate base for ratemaking purposes.[9]

AmerenUE's Illinois customers represent approximately 6% of AmerenUE's current electric load.[10] Approximately 92% of AmerenUE's current electric load is Missouri retail, with the remaining 2% being wholesale customers.[11] The effect of the Metro East transfer is that an

[3] AmerenUE's principal service territory is in Missouri, where it serves approximately 1.167 million electric and approximately 112,000 natural gas customers. Tr. at p. 1203, l. 2-12 (Testimony of Dr. Proctor); Nelson Dir. (Comm'n Ex. 5) at p. 3, l. 17-20. Mr. Nelson's Direct Testimony refers to all 130,000 AmerenUE natural gas customers, 18,000 of which are in Illinois.
[4] See ¶¶ 7 and 8 of the Company's Application in this case describing a minor amount of Illinois property, primarily transmission assets crossing the Mississippi River, which will not be transferred. See also Nelson Dir. at p. 7, l. 4 to p. 8, l. 15.
[5] Nelson Dir. at p. 6, l. 4-19.
[6] Id. at p. 7, l. 1-2.
[7] Id. at p. 7, l. 7-8.
[8] Nelson Sur. (Comm'n Ex. 6) at p. 2, l. 9-12.
[9] Tr. at p. 1706, l.8-11 (Testimony of Mr. Nelson); Tr. at p. 1055, l. 25 to p. 1056, l. 8 (Testimony of Ms. Fischer).
[10] Tr. at p. 519, l. 6-9 (Testimony of Mr. Nelson).
[11] Tr. at p. 391, l. 22 to p. 392, l. 7 (Testimony of Mr. Nelson).

additional 6% of AmerenUE-owned base load generation will now serve Missouri retail customers. In effect, "AmerenUE-Missouri" is exchanging approximately $138 million of T&D assets for access to approximately $223 million (597 MW at a book value of $374/kW) of generation assets.[12] Upon completion of the transfer, AmerenUE will no longer serve any Illinois customers, and AmerenUE will become a Missouri-only utility, subject only to the state regulation imposed by this Commission.[13] Approval of the transfer in this case would be the *second* time this Commission has approved transfer of the Company's Illinois assets, though there were no generation-related savings to Missouri from the first transfer because AmerenUE was going to supply AmerenCIPS's load under a 10-year power supply agreement.[14] The transfer as currently proposed is more advantageous to Missouri than the transfer previously approved by this Commission because generation-related (and transmission-related) savings are part of the current transfer.[15]

** ______________________________

______ [16] ______________________________

______________________________ [17] ______

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______________________________ [18] ______________________________

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[12] Voytas Dir. (Comm'n Ex. 9) at p. 2, l. 10-12.
[13] Nelson Dir. at p. 11, l. 15-22.
[14] Tr. at p. 389, l. 23 to p. 390, l. 2 (Testimony of Mr. Nelson). This Commission approved transfer of these same assets, with the exception of the transmission assets located in Illinois and involved in the current proposal, when the Company's merger with Central Illinois Public Service Company was approved in Case No. EM-96-149. Tr. at p. 531, l. 25 to p. 533, l. 8 (Testimony of Mr. Nelson); Ex. 37, § 10, p. 33. The transfer was not completed at that time because the ICC opposed the transfer due to its concerns about the above-mentioned purchased power agreement between AmerenUE and AmerenCIPS. Tr. at p. 370, l. 17 to p. 371, l. 12 (Testimony of Mr. Nelson).
[15] Tr. at p. 533, l. 19 to p. 534, l. 4 (Testimony of Mr. Nelson).
[16] ** ______________________________ **
[17] ** ______________________________

______________________________ **
[18] ** ______________________________ **



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[19]:

| EE Inc. Contract | Year 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|
| Extended[20] | | | | |
| Expired | | | | |

[21]:

| EE Inc. Contract | Year 2004 | 2005 | 2006 | 2007 |
|---|---|---|---|---|
| Extended[22] | | | | |
| Expired | | | | |

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[19] ** **

[20] ** **

[21] ** **

[22] ** **



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**[23]

The purpose of the transfer is twofold: first, to free-up needed energy and capacity to meet AmerenUE's long-term needs using low-cost, Company-owned base load generation; and second, to simplify the current dual system of state regulation over AmerenUE's public utility service by allowing AmerenUE to focus solely on providing Missouri public utility service under Missouri's traditional regulatory environment as contrasted with the retail-choice regulatory regime in Illinois.[24] The Company has experienced difficulty in balancing and implementing the divergent regulatory regimes in place in the two states.[25] The Staffs of both this Commission and the ICC agree that simplifying the current system of dual regulation is beneficial.[26]

The next-best alternative to meet the Company's long-term energy and capacity needs is to obtain more energy and capacity via natural gas-fired peaking plants.[27] Staff has expressed a clear preference for meeting the Company's long-term energy and capacity needs via the Metro East transfer versus buying or building gas-fired peakers.[28] Staff believes there are good reasons for the transfer and generally favors it.[29]

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[23] **

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[24] Tr. at p. 464, l. 5 to p. 465, l. 22 (Testimony of Mr. Nelson).

[25] Nelson Dir. at p. 11, l. 18-20; Tr. at p. 464, l. 5 to p. 465, l. 22 (Testimony of Mr. Nelson); Tr. at p. 1221, l. 7 to p. 1222, l. 3 (Testimony of Dr. Proctor).

[26] Tr. at p. 1790, l. 10-19 (Testimony of Dr. Proctor); Voytas Sur. at p. 21, l. 4-24.

[27] Voytas Dir. at p. 4, l. 16-19; Tr. at p. 1263, l. 4 to p. 1264, l. 16 (Testimony of Dr. Proctor). Unlike base load generation, gas-fired peakers run only a small percentage of the time – typically from about one to five percent of the time. Wallace Sur. (Comm'n Ex. 22) at p. 6, l. 6-13. Company witness Matthew T. Wallace is the Combustion Turbine Group Manager for AmerenUE.

[28] Tr. at p. 1591, l. 6-19 (Testimony of Mr. Nelson).

[29] Id.; Tr. at p. 1790, l. 10-19 (Testimony of Dr. Proctor).



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The Company's analyses, which examined the financial impact of the transfer over a 25-year period,[30] show that the transfer, and the resulting access to existing Company-owned base load generation to serve its Missouri customers (ignoring transmission-related savings), creates generation-related savings of at least approximately $2.4-2.5 million per year versus the alternative of meeting its resource needs using gas-fired peakers.[31] Additional Company analysis relating to transmission-related savings indicates that the transfer will save the Company an additional $0.4 million per year, using conservative assumptions, and at least $1.5 million per year using expected conditions.[32]

Staff's recently submitted additional transmission-related savings analysis[33] indicates that the transmission-related benefits from the transfer range from at least $1.841 million per year and could be up to just over $3 million per year.[34] The expected annual savings from completing the Metro East transfer as compared to the next-best alternative (the gas-peaker option) thus range from a conservative approximately $2.8-2.9 million per year (generation-related savings of $2.4-2.5 million plus transmission-related savings of $0.4 million) to an "expected case" of around $5.5 million per year (generation-related savings of $2.4-2.5 million plus transmission-related savings of about $3 million). The Company anticipates the pure financial benefits will be even greater because, *inter alia*, the Company expects natural gas prices to be higher than those assumed in its analyses, and expects its load to continue to grow.[35] These benefits are discussed in more detail in Section I.b of the Argument portion of this Brief,

[30] The Commission's resource planning rules require that analyses of this type be done over a time horizon of at least 20 years. 4 CSR 240-22.060(4).
[31] Voytas Dir. at p. 7, l. 7-9 and Sch. 4 thereto; Ex. 72.
[32] Ex. 71 and Ex. 73.
[33] Affidavit of Michael S. Proctor dated April 26, 2004 ("Dr. Proctor's Analysis").
[34] Id.
[35] Voytas Dir. at p. 6, l. 19-22; Ex. 59 at p. 68; Tr. at p. 822, l. 23 to p. 823, l. 1 (Testimony of Mr. Nelson) (forecasting natural gas prices that are higher than the $5.86/MMBTU used in the analysis and projecting an annual load growth of 2% per year which will continue to increase the need for base load generation).

*infra.* The foregoing benefits do not take into account additional financial benefits relating to the JDA amendment discussed below.

In rebuttal testimony, Staff raised certain economic issues relating to the JDA, including issues raised and resolved in the Company's last rate case (see Section III.A of the Argument section of this Brief, *infra*). As the Commission knows, the JDA is an agreement between AmerenUE, AmerenCIPS and Ameren Energy Generating Company ("AEG"). It was approved by this Commission when Union Electric Company merged with Central Illinois Public Service Company.[36] In brief, the JDA is designed to promote the economic dispatch of the generating plants of each of AmerenUE and AEG, first to serve each company's respective native load, and then to provide energy to each other, as needed, and to provide other reciprocal benefits, some of which are described in Mr. Voytas's Surrebuttal Testimony.[37] The Company does not believe the JDA should be or needs to be amended in connection with this case.[38] If the Commission determined it necessary to condition its approval of the transfer on an amendment to the JDA relating to the sharing of profits from off-system power sales, the Company has indicated it would use its best efforts to fulfill that condition and complete the transfer.[39] The Company has no plans to pursue such an amendment apart from the transfer.[40] The Company's analyses indicate that such an amendment produces additional financial benefits of at least $7 million per year.[41] Using expected electricity prices, the Company's analyses indicate that the benefit from such an amendment is more likely to be approximately $24 million per year.[42] The total annual benefits to Missouri arising from the transfer – including the generation-related savings, the

[36] Tr. at p. 366, l. 7 to p. 367, l. 14 (Testimony of Mr. Nelson); Ex. 36 at pp. 10-11.
[37] Voytas Sur. at p. 6, l. 11 to p. 7, l. 4
[38] Nelson Sur. at p. 5, l. 23 to p. 7, l. 4.
[39] Nelson Sur. at p. 8, l. 17 to p. 9, l. 23.
[40] Tr. at p. 842, l. 14 to p. 843, l. 5 (Testimony of Mr. Nelson).
[41] Ex. 72; Voytas Sur. at p. 3, l. 16 to p. 4, l. 7.
[42] Voytas Sur. at p 4, l. 8-21.

transmission-related savings, and the JDA amendment, if required – are expected to total just short of $30 million per year, and probably more, given the probable increase in natural gas prices and the expected load growth for the Company as discussed above.[43]

The Company's electric rates are frozen until at least June 30, 2006, as a result of the Commission's Order approving the Stipulation and Agreement in Case No. EC-2002-1.[44] The Company's natural gas rates are similarly frozen until at least June 30, 2006, as a result of the Commission's Order approving the Stipulation and Agreement in Case No. GR-2003-0517.[45]

None of the electric T&D assets in Illinois to be transferred have been utilized, directly or indirectly, in providing public utility service to Missouri.[46] None of the natural gas assets in Illinois to be transferred have been utilized, directly or indirectly, in providing public utility service to Missouri.[47] The transfer of the electric T&D assets has been approved by the ICC, and an agreement among the parties in the pending ICC natural gas asset transfer case is before the ICC for approval, which the Company expects to obtain shortly.[48]

## APPLICABLE LEGAL STANDARDS

The Company seeks permission to transfer these assets under Section 393.190.1, RSMo.[49] That permission is to be granted unless the transfer would be detrimental to the public

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[43] Generation-related savings: $2.4-2.5 million; transmission-related savings: $3 million; JDA-related benefits: $24 million.
[44] Ex. 35 (at p. 2 of the Stipulation and Agreement in Case No. EC-2002-1).
[45] Issued by the Commission on January 13, 2004.
[46] Nelson Dir. at p. 8, l. 16 to p. 9, l. 3. For ratemaking purposes, Missouri's allocated share of the entire AmerenUE transmission system, including the transmission system assets located in Illinois that are to be transferred, have been taken into account in setting Missouri rates, as have a portion of the transmission system operating and maintenance costs.
[47] Id.; Nelson Sur. at p. 5, l. 1-16. There has been a minor "operating" connection between the Alton, Illinois LDC and AmerenUE's Venice and Meramec power plants, as discussed further below.
[48] Tr. at p. 423, l. 3-7 (Testimony of Mr. Nelson).
[49] Though the Company has elected to seek the Commission's permission to transfer these Illinois assets, there is a substantial question about the necessity of doing so given that the subject assets are located in another state and serve customers in another state, an issue recognized by the Commission in its Order on Reconsideration Concerning Discovery issued in this case at p. 5, n. 9.

interest.[50] This Commission recently recognized, as it has consistently done, that "'[t]he obvious purpose of this provision [§ 393.190.1] is to ensure the continuation of adequate service to the public served by the utility.'"[51]

This Commission applies the following factors when considering whether a Section 393.190.1 transaction meets the "not detrimental" standard: (1) the applicant's experience in the utility industry; (2) the applicant's history of service difficulties; (3) the applicant's general financial health and ability to absorb the proposed transaction; and (4) the applicant's ability to operate the assets safely and efficiently.[52]

This Commission has also properly recognized that it "must be mindful that the right to transfer or encumber property is an important incident of the ownership thereof and that a property owner should be allowed to do such things unless it would be detrimental to the public."[53] To deny a public utility the right to have that say (to decide whether to dispose of their property) is to deny it an incident important to its ownership of property.[54]

The law is clear that in order to deny a private, investor-owned company this important incident of property ownership, there must be "*compelling* evidence on the record showing that a

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[50] State ex rel. City of St. Louis v. Pub. Serv. Comm'n, 73 S.W.2d 393, 400 (Mo. banc 1934).

[51] In re Missouri-American Water Company, et al., Case No. WM-2004-0122 (Report and Order, issued November 20, 2003, 2003 Mo. PSC LEXIS 1496), quoting State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980).

[52] Report and Order, Missouri-American Water Company, supra, citing In the Matter of the Joint Application of Missouri Gas Energy et al., Case No. GM-94-952 (Report and Order, issued October 12, 1994, 3 Mo. P.S.C.3rd 216, 220).

[53] In re Kansas City Power and Light Company, Case No. EM-2001-464 (Order Approving Stipulation and Agreement and Closing Case, issued August 2, 2001, 2001 Mo. PSC LEXIS 1657), citing State ex rel. City of St. Louis, 73 S.W.2d at 400.

[54] State ex rel. City of St. Louis, 73 S.W.2d at 400. See also, State ex rel. Gen'l Tele. Co. of the Midwest v. Pub. Serv. Comm'n, 537 S.W.2d 655, 660 (Mo. App. K.C. 1976) (the state is "not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership").

public detriment is *likely* to occur" (emphasis added).[55] And, the detriment must be a "*direct* and *present* detriment" (emphasis added).[56]

The burden to establish that the transfer is not detrimental, as that standard is described above, is on the Company, as the applicant. The Company is not required to demonstrate any affirmative benefit from the transfer.[57] However, those who assert the existence of a detriment bear the burden of going forward with compelling[58] evidence of a likely direct and present detriment sufficient to establish that the transfer would in fact be detrimental to the public interest.[59]

## ARGUMENT

### I. BENEFITS OF THE TRANSFER

#### a. The proposed transfer enhances the Company's ability to provide adequate and reliable public utility service to Missouri.

The proposed transfer makes available to Missouri an additional 6% "slice" of the capacity and energy produced from each and every Company-owned generating plant. This additional generation is predominantly low-cost, base load generation, including the Company's proven and reliable coal-fired fleet, the Callaway plant, and hydroelectric power from the Osage Plant at the Lake of the Ozarks. The uncontroverted evidence in this case is that having access to this additional Company-owned generation in fact enhances the Company's ability to serve its

[55] Order, Kansas City Power and Light Company, supra.
[56] Id.
[57] In re Sho-Me Power Corporation, Case No. EO-93-259 (Report and Order, issued September 17, 1993, 1993 Mo. PSC LEXIS 48).
[58] Not suppositions and not possible detriments that require multiple "if-then" statements before they could ever arise (e.g., "If a future liability arises, and if it falls in a test year, and if it is not reduced by normalization, and if it is not otherwise disallowed, then rates might be impacted).
[59] In re Gateway Pipeline Company, Inc., Case No. GM-2001-585 (Report and Order, issued October 9, 2001, 2001 Mo. PSC LEXIS 1371); State ex rel. City of St. Louis, 73 S.W.2d at 400; Section 386.430, RSMo.; Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 30 (Mo. banc 1991) (the party asserting the affirmative of an issue [i.e., that the transfer is detrimental] bears the burden of proof on that issue).

customers.[60] There is indeed no issue relating to the provision of adequate and reliable utility service presented by transferring the subject assets to AmerenCIPS.

The governing law therefore makes clear, indeed crystal clear, that the Company has met its burden of proof to establish that the proposed transfer is not detrimental to the public interest.[61] Indeed, there is not even an allegation that the transfer will affect the Company's ability to properly provide public utility service to its Missouri, and Missouri-only, customers.

**b. <u>The generation and transmission-related savings resulting from the transfer offer substantial benefits to Missouri.</u>**

The Company is not required to produce evidence of, or prove, the existence of an affirmative benefit as a result of the proposed transfer.[62] The Company has nonetheless done so.

The Company's analyses indicate that the transfer produces, on an annual basis, generation-related savings (versus the next-best option, gas peaking units) of at least approximately \$2.4-2.5 million per year. As suggested by Dr. Proctor, and requested by Chair Gaw, the Company performed additional analyses relating to possible transmission-related savings as a result of the transfer and concluded, conservatively, that there were transmission-related savings of \$0.4 million per year. Under more likely expected conditions, the Company's analyses indicated that there would likely in fact be transmission-related savings from the transfer of \$1.5 million per year. The Company's analyses therefore show that the affirmative financial benefits from the transfer total at least approximately \$4 million per year.

The foregoing benefits shown by the Company's analyses are in fact conservative, and likely understate the actual benefits. And the Company has not tried to overstate the benefits, as evidenced by at least two facts.

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[60] Nelson Sur. at p. 2, l. 8-9 and p. 4, l. 6-19.
[61] <u>State ex rel. City of St. Louis</u>, 73 S.W.2d at 400.
[62] <u>Sho-Me Power Corporation</u>, <u>supra</u>.

First, Mr. Nelson testified that the Company did not perform a transmission-related savings analysis because it appeared to the Company to be a "no-brainer" that the only effect the transfer of these Illinois transmission assets might have on the Company's Missouri revenue requirement would be a positive effect.[63] Both the Company's analysis, discussed above, *and Dr. Proctor's Analysis relating to transmission,*[64] demonstrate that Mr. Nelson was right – it was a no-brainer. In response to the Company's submission of its transmission analysis, Dr. Proctor conducted his own analysis and concluded that the transmission-related benefits from the transfer are at least $1.841 million per year, assuming no decline in third-party transmission revenues.[65] Taking into account an *expected* reduction in third-party transmission revenues, Dr. Proctor's analysis indicates a benefit of at least $2.813 million per year and perhaps just over $3 million per year.[66] The greater benefits are likely because the evidence in this case is uncontroverted that the Company's transmission revenues are likely to decrease.[67] In fact, both the Company's analysis, showing an expected transmission-related benefit of at least $1.5 million per year, and Dr. Proctor's analysis, showing a transmission-related benefit of about $3 million per year, assumed only a 25% reduction in third party transmission revenues.[68] Those revenues may, in fact, go away entirely.[69]

Second, the Company did not perform additional "year-by-year" analyses discussed by Dr. Proctor on the last day of hearings in this case that, the evidence in this case shows, would have in fact enhanced the generation-related benefits of the transfer. As the Company explained

[63] Tr. at p. 1543, l. 5-14 (Testimony of Mr. Nelson). See also Voytas Dir. at p. 6, l. 22 to p. 7, l. 2 (wherein Mr. Voytas also correctly predicted that transmission-related analyses would show savings for Missouri).
[64] Incidentally, Dr. Proctor's Analysis relating to transmission is the *only* analysis Staff did during the nearly eight months between the filing of this case and the hearings.
[65] Dr. Proctor's Analysis at ¶ 9.
[66] Id.
[67] Tr. at p. 1257, l. 19-25 (Testimony of Dr. Proctor).
[68] Ex. 71; Dr. Proctor's Analysis at ¶ 9.
[69] Tr. at p. 1257, l. 19-25 (Testimony of Dr. Proctor); Ex. 63 (FERC Order Accepting Agreement Establishing Going-Forward Principles and Procedures, and Extending Dates, Dk. No. EL02-111-004, Issued March 19, 2004).

at pages 27-29 of its Statement Regarding Staff's Suggestion that Additional Least Cost Analyses be Completed,[70] the record in this case already shows that formally performing additional analyses along the lines advocated by Dr. Proctor would show still more benefits.[71]

Dr. Proctor suggested that more analysis could be done regarding fuel savings, and predicted that such analysis may very well show more benefits.[72] The record in this case demonstrates that Dr. Proctor is very likely correct. The Company forecasts that it will continue to experience load growth at a rate of about 2% per year.[73] It is quite obvious that if the Company's load grows, the incremental load will be served by the lower-cost existing base load generating units (primarily coal-fired units using cheaper coal as opposed to higher-priced natural gas) under the transfer scenario rather than by high-cost gas-fired peakers under the CTG scenario. That fact itself confirms that the level of fuel savings projected in the Company's existing least-cost analysis will be maintained at the expected level, and would likely increase.[74] As those fuel savings increase, the benefits of the transfer increase. Additional formal analyses are not needed to "prove" this rather straightforward point, which shows that the Company's analyses are conservative and probably understate the affirmative financial benefits of the transfer, financial benefits the Company is not required to show in any event.

Dr. Proctor also made a second suggestion regarding additional analyses. Dr. Proctor suggested that the Company analyze for the next five years potential profits from off-system sales generated by running the gas peakers that would have to be built if the transfer did not occur.[75] Presumably, Dr. Proctor's theory is that the analysis could show large profits from gas

[70] Filed April 14, 2004 (Late-Filed Exhibit 69).
[71] Tr. at p. 822, l. 13 to p. 823, l. 1 (Testimony of Mr. Nelson); Tr. at p. 1608, l. 17 to p. 1609, l. 23 (Testimony of Mr. Voytas).
[72] Tr. at p. 1781, l. 20-23 (Testimony of Dr. Proctor).
[73] Ex. 59 at p. 68.
[74] Voytas Dir. at p. 6, l. 8-22; Tr. at p. 822, l. 13 to p. 823, l. 1 (Testimony of Mr. Nelson).
[75] Tr. at p. 1785, l. 15-24 (Testimony of Dr. Proctor).

peakers which in theory might make them a more attractive option relative to completing the Metro East transfer. This analysis is also unnecessary and any supposed advantage it might show for gas peakers is counterintuitive and is refuted by the record in this case. The record reflects that gas peaking plants run only a very small percentage of the time – from one to five percent, depending on the type of machine.[76] Typically, the gas peakers are turned on not to produce energy to sell into the market, but to meet very short-term peak energy and capacity needs. Thus, the percentage of time the peakers are producing energy that can be sold at a profit is even lower than the percentage of time the peakers run. Couple those facts with the Company's expectations for natural gas prices (the fuel for the peakers) in the future,[77] and it is easy to conclude that there would likely be few times when electricity prices are high enough to justify running the gas peakers for the purpose of producing power for resale, other than to Missouri retail customers. In other words, the relatively high cost of natural gas will prevent the peakers from being "in the money" most of the time.

Staff and Public Counsel level various criticisms at the Company's analysis. Staff for example takes issue with the test year approach (referred to by Dr. Proctor as a "snapshot" approach) employed by Mr. Voytas in his analysis. Yet the test year approach is the very approach discussed in detail with Staff and Public Counsel in connection with detailed discussions of the transfer starting in January and February 2002.[78] The Company took this approach because it allowed the Company to focus on the most important elements of the analysis while reducing or eliminating the many uncertainties that forecasting could not accurately predict.[79] This analysis relied upon test year data, some of which was normalized,

[76] Wallace Sur. at p. 6, l. 4-13.
[77] See Ex. 59 at p. 68.
[78] Voytas Sur. at p. 10, l. 13 to p. 12, l. 16; Tr. at p. 1687, l. 1 to p. 1688, l. 3 (Testimony of Mr. Voytas).
[79] Id.; See also Tr. at p. 1686, l. 4-25 (Testimony of Mr. Voytas).

providing the Commission with an objective framework by which to judge the benefits associated with the transfer.

As noted above, Dr. Proctor suggested the analysis was deficient (and implied a detriment might therefore exist) for not examining transmission revenue issues, yet those analyses show yet more benefits. While formal analyses using forecasted information were not done (given that the basis of the analysis was to use the test year approach and assumed that the relative difference between cost and revenues, over time, would remain relatively constant[80]), the record indicates that the benefits will likely be greater than the Company has advocated due to the impact of expected higher natural gas prices and load growth, as detailed above. At bottom, the Company took the approach that was most reasonable under the circumstances, an approach that yielded conservative results, and an approach discussed with Staff in detail, which at least at one point had their concurrence. The Company suspects if it had conducted its analysis using forecasted numbers versus the test year approach, it would have faced criticism for not taking the test year approach due to the very difficulties a forecasted approach presented, as outlined by Mr. Voytas in his testimony cited above.

In summary, there is substantial and competent evidence of record that the transfer will produce affirmative financial benefits of more than $5 million per year, and probably more. Analyses indicate that the annual generation-related savings are approximately $2.4-2.5 million per year plus annual transmission-related savings of approximately $3 million. These savings ignore what are likely additional fuel savings arising from the generation, as discussed above, and ignore any JDA-related benefits, discussed below.

[80] Tr. at p. 1604, p. 21 to p. 1605, l. 2 (Testimony of Mr. Voytas).

### c. If deemed necessary by the Commission, the amendment offered by the Company with regard to the JDA offers yet more benefits

The lack of any detriment to the Company's ability to properly serve its customers after the transfer, the lack of any proof of direct and present detriments that would authorize this Commission to deny the Company the permission it seeks, and the added huge benefits of the transfer outlined immediately above more than support approval of this transfer. As discussed in more detail later in this Brief (see Section III.A of the Argument section of this Brief, *infra*), Staff is nevertheless attempting to take a second bite of the JDA apple by arguing for JDA amendments in this asset transfer case.

The Company has indicated, via sworn testimony, that if the Commission determines it must impose this condition alone, it would use its best efforts to amend the JDA to provide for the sharing of profits from off-system sales based upon generating output versus load. If that is the Commission's decision, the Company will follow through with the transfer on that condition.[81] If that amendment is ordered then, conservatively, an additional $7 million per year of benefit will accrue to Missouri.[82] In fact, under expected conditions based upon the Company's current estimates of future electricity prices, the additional benefit is more likely to be around $24 million per year.[83] On a net present value basis, this amendment alone would produce benefits of from $79 million up to $240 million.[84]

### d. The transfer has other benefits as well

As previously noted, the Company desires to free itself (and those who regulate it in this State – this Commission and its Staff) from the dual, and sometimes conflicting, regulatory

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[81] The other two parties to the JDA, AmerenCIPS, and Ameren Energy Generating Company ("AEG") are willing to make this change. Tr. at p. 433, l. 16-25 and p. 843, l. 1 to p. 845, l. 6 (Testimony of Mr. Nelson). The Company would also expect to obtain required regulatory approvals. Tr. at p. 541, l. 15 to p. 542, l. 10 (Testimony of Mr. Nelson).

[82] Ex. 72.

[83] Ex. 72; Voytas Sur. at p. 4, l. 8-21.

[84] Id.

regimes that exist in Missouri and in Illinois. Staff itself agrees that it makes sense for the Company to free itself from two sets of state regulation. While difficult to quantify, this too has benefits for the Company and Missouri.

## II. THE DETRIMENTS ALLEGED IN THIS CASE ARE SPECULATIVE.

### a. **Staff has provided no analyses to support any of its alleged detriments, all of which relate to future, speculative cost impacts that might, or might not, have some future ratemaking impact.**

This case was filed on August 17, 2003, and the Company filed its direct testimony, including its least-cost analysis, on September 17, 2003. Staff had until January 31, 2004 – more than four months – to file its rebuttal testimony. Staff raises all kinds of possible detriments,[85] and proposes all kinds of conditions, but fails to back any of it up with meaningful analysis. Raising speculative, unsupported arguments is hardly compelling evidence of a direct and present detriment that is likely to occur sufficient to deprive the Company of its right – its property right – to dispose of its property as it sees fit. That is, however, what this Commission's Staff apparently is asking this Commission to do.

The examples of the Staff's lack of analyses are numerous. Each of these issues is discussed in more detail below, but consider the following examples:

1. Mr. Bible vehemently opposes allowing the Company to forego contributing $272,000 per year (for the next 15 months) toward the nuclear decommissioning fund for Callaway, despite Mr. Redhage's analysis[86] that shows that such a contribution is not necessary. Did Mr. Bible or any staff member challenge Mr. Redhage's analysis, perform their own, or even attempt to perform their own? The answer is "no."[87]

2. Mr. Meyer and Ms. Fischer[88] make all kinds of claims about alleged detriments arising from "liabilities and costs," but provide no analysis to support the actual

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[85] As discussed further below, in nearly all cases Staff cannot even state that any of these alleged detriments are in fact detriments, and certainly cannot state that these detriments are likely to occur.
[86] The *only* analysis on this issue in evidence in this case.
[87] Tr. at p. 335, l. 23 to p. 336, l. 4 (Testimony of Mr. Bible). Staff witness Ronald L. Bible is the Manager of the Financial Analysis Department for Staff. See also Tr. at p. 274, l. 10-13 (Testimony of Mr. Meyer). Staff witness Greg R. Meyer is a Regulatory Auditor V for Staff.
[88] Staff witness Janis E. Fischer is a Regulatory Auditor for Staff.

existence of the detriments they claim might exist. In fact, the only thing they ever attempted to quantify (and they did not do that until the hearings) was 6% of future *capital expenditures* at AmerenUE power plants, capital expenditures that might or might not be incurred, but even if they are incurred *would be incurred in the future* ***at a time when the plants are serving Missouri customers only.***

3. Neither Dr. Proctor nor Mr. Bax[89] provided any analysis of, nor did they attempt to quantify, any alleged detriments relating to the transfer of the Illinois transmission assets to AmerenCIPS.[90]

4. Mr. Sommerer raised a couple of concerns regarding natural gas issues, but he provided no analyses that support the actual existence of any detriment, or that quantified any detriment. For example, Judge Thompson asked Mr. Sommerer about the potential detriment Mr. Sommerer raised relating to the possibility that the discounted transportation rate for the Fisk/Lutesville, Missouri local distribution company ("LDC") might not be as good after the current contract expires in 2006 unless the Fisk/Lutesville LDC continues to receive transportation under the same contract as the Alton, Illinois LDC which is to be transferred to AmerenCIPS. Mr. Sommerer indicated that he could not provide any specific number in terms of the probability that the detriment would occur at all, but his "best guess" was that the occurrence of some detriment in this regard was "as likely to happen as not to happen."[91] "Best guesses" do not constitute compelling evidence of a direct and present detriment, and of course this "best guess" related to a potential financial detriment that would not in any case occur until after 2006.

5. Mr. Campbell was also unable to provide any analyses to support the actual existence of any detriment relating to $SO_2$ emission allowances, and could not quantify any detriment. He had no opinion on how AmerenUE should structure its bank of $SO_2$ allowances, nor could he say that AmerenUE's bank was structured improperly.[92] Mr. Campbell could suggest no amount to back-up his recommendation that AmerenUE somehow be "compensated" for future compliance costs relating to $SO_2$ sales or trading activities.[93]

6. Finally, Dr. Proctor performed no least-cost analyses relating to generation,[94] and the only analysis he did perform supports the transfer.

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89 Staff witness Alan J. Bax is a Utility Engineering Specialist III in the Energy Department of the Utility Operations Division of Staff.

90 Save Dr. Proctor's Analysis of transmission revenue requirements which, as discussed above, shows a *benefit* as a result of the transfer.

91 Tr. at p. 1012, l. 21-25 (Testimony of Mr. Sommerer). Staff witness David M. Sommerer is the Manager of the Procurement Analysis Department of Staff.

92 Tr. at p. 597, l. 5-9 and l. 20-22 (Testimony of Mr. Campbell). Staff witness Richard J. Campbell is a Utility Regulatory Engineer I in the Engineering Analysis Section, Energy Department, Utility Operations Division of Staff.

93 Tr. at p. 605, l. 2-23 (Testimony of Mr. Campbell).

94 Tr. at p. 1774, l. 9-15 and p. 1782, l. 18-23 (Testimony of Dr. Proctor).

**b. There is simply no substantial and competent evidence – no compelling evidence as required by law – of any likely present and direct detriment.**

The parties asserting that this transfer is detrimental to the public interest have the burden of going forward with sufficient evidence to support their particular assertions.[95] That evidence must be compelling.[96] The compelling evidence of record must also show that the detriment is likely to occur, and that it is a direct and present detriment.[97] Merely proving that a direct and present detriment is likely to occur is still insufficient to deny the utility the right to transfer its property given that an isolated detriment may be outweighed by benefits of the transfer.[98] An examination of each of the many alleged detriments demonstrates that none of them meet these binding legal standards. For ease of reference, the Company will, to the extent practical, address these alleged detriments generally in the order provided by Staff's list of conditions, to which the Company previously responded.[99]

## III. THE SPECIFIC ALLEGED "DETRIMENTS"

### A. THE JDA.

#### i. The JDA is not a proper issue in this case because, *inter alia*, the effects of the JDA amendments Staff seeks were already taken into consideration in setting the Company's base rates

Dr. Proctor suggests that this Commission should condition approval of the transfer on the Company's agreement to make two amendments to the JDA. First, that the Company should be required to amend the JDA to provide for a sharing of profits from off-system sales based

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[95] In re Gateway Pipeline Company, Inc., supra.
[96] In re Kansas City Power and Light Company, supra ("The Commission notes that it is unwilling to deny private, investor-owned companies an important incident of the ownership of property unless there is *compelling evidence on the record* showing that a public detriment is likely to occur" (emphasis added)).
[97] Id.; State ex rel. City of St. Louis, 73 S.W.2d at 400.
[98] In re Gateway Pipeline Company, Inc., supra (Recognizing that a detriment may not render a transaction detrimental and may be "offset by benefits" of the transaction).
[99] Staff's List of Conditions Necessary for Staff's Recommendation that the Commission Approve Ameren's Proposed Metro East Transfer (filed April 6, 2004) and AmerenUE's Reply thereto (filed April 14, 2004, being Late-Filed Exhibit 69).

upon generating output and not based on load.[100] Second, an amendment should be required whereby transfers of energy between AmerenUE and its affiliates be priced at a "market" price versus incremental cost.[101]

These amendments have nothing to do with this case, and in fact any financial impacts that making, or not making, these amendments might have were settled, in a settlement approved by this Commission, when the Company's base rates were set as part of the settlement of Case No. EC-2002-1.[102] The JDA has not changed since Case No. EC-2002-1 was settled.[103] Staff is therefore trying to hold this transfer hostage by claiming the existence of a purely financial detriment, in the middle of a rate moratorium, to coerce the Company into making amendments to the JDA even though such amendments and the financial impacts thereof were settled when the Company agreed to substantial rate reductions and a rate moratorium in settling Case No. EC-2002-1.

Dr. Proctor does not deny that these issues were settled, as evidenced by his testimony in this case on cross-examination, as follows:

> Q: "Now, you addressed these same issues in a previous case involving AmerenUE; isn't that correct." A: "That's correct."
>
> Q: And you filed testimony in the company's last electric rate case, EC-2002-1, on the JDA; isn't that right." A: "Yes. Except we call it a complaint case rather than a rate case."[104]
>
> Q: "Now you'll recall that the parties to the complaint case were able to settle – to resolve all of the issues to that case; isn't that correct.?" A: "That's correct."[105]

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[100] Proctor Reb. at p. 17, l. 4-9 (Comm'n Ex. 14).
[101] Id.
[102] A specific monetary adjustment to reduce the Company's revenue requirement by approximately $3.5 million per year was proposed by Dr. Proctor in his testimony in that case. Late-Filed Ex. 69, Sch. C thereto (Dr. Proctor's Case No. EC-2002-1 Direct Testimony at p. 15). This revenue imputation is reflected in several specific adjustments contained on the accounting schedules filed by the Staff with its direct case in EC-2002-1 which were discussed by Dr. Proctor in his testimony in this case. Tr. at p. 920, l. 8-13 and p. 922, l. 24 to p. 924, l. 6 (Testimony of Dr. Proctor).
[103] Tr. at p. 925, l. 3-6 (Testimony of Dr. Proctor).
[104] Tr. at p. 920, l. 8-14 (Testimony of Dr. Proctor).

The base rates established by the settlement in Case No. EC-2002-1, and the rate moratorium, reflected "a resolution of the concerns of all of the signatory parties," as the Staff acknowledged in its Memorandum in Support of the July 15, 2002 Stipulation and Agreement in Case No. EC-2002-1. The Company certainly understood that these very same JDA issues were on the table and were settled as part of the EC-2002-1 settlement.[106] JDA issues have no legitimate place in this case.

### ii. <u>Regardless, Staff has failed to prove the existence of any direct and present detriment that is likely to occur arising from the JDA.</u>

Dr. Proctor agrees that his testimony in this case relating to the JDA has nothing to do with the Company's ability to provide adequate and reliable service, and that his issues are "purely financial."[107] Under the legal principles that govern the Commission's decision in this case, these "JDA issues" therefore cannot preclude the permission the Company seeks herein. Dr. Proctor in fact recognizes that these issues are ordinarily addressed in a rate case and "would be addressed in a rate case."[108] In fact, Dr. Proctor admits that there is nothing to stop Staff from filing testimony in the Company's next rate case similar to the testimony Staff filed in Case No. EC-2002-1. Thus, in the next rate case, Staff is free to advocate these changes to the JDA and is free to propose similar monetary adjustments to the Company's cost of service.[109] Dr. Proctor also agrees that rates will not increase between now and the next rate case, regardless of whether the JDA is, or is not, changed in connection with this transfer.[110]

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[105] Tr. at p. 923, l. 20-23 (Testimony of Dr. Proctor).
[106] Tr. at p. 402, l. 2-17 (Testimony of Mr. Nelson); Nelson Sur. at p. 6, l. 15-18.
[107] Tr. at p. 915, l. 6-13 and p. 919, l. 1-5 (Testimony of Dr. Proctor).
[108] Tr. at p. 919, l. 1-9 (Testimony of Dr. Proctor).
[109] Tr. at p. 939, l. 6-18 (Testimony of Dr. Proctor).
[110] Tr. at p. 939, l. 19-21 (Testimony of Dr. Proctor).

Interestingly enough, in Dr. Proctor's testimony in Case No. EC-2002-1, he argued that it is appropriate for the Commission to make adjustments to the JDA in the context of the Company's rate complaint proceeding, since "[t]he best that regulators can do in the context of a merger case *or an asset transfer case*, is to review the overall benefits and costs to make a recommendation about whether or not the proposed merger or asset transfer is not detrimental to the public interest" (emphasis added).[111] In other words, based upon Dr. Proctor's testimony, it is Staff's legal position that no adjustment to the JDA is possible in this asset transfer proceeding!

Dr. Proctor also agrees that making one of the two changes (relating to off-system sales) would provide further monetary benefits from the transfer,[112] and while the Company does not believe that amendment ought to be required, if this Commission finds such a requirement to be necessary, the fact remains that the benefits of the amendment will exist. With regard to the other change to the JDA advocated by Dr. Proctor, Dr. Proctor agrees that, today, there is no transparent market available that actually would allow the Company to implement such an amendment.[113] Dr. Proctor expects there to be such a market when the Midwest Independent System Operator, Inc., ("MISO") implements its Day 2 market.[114] Dr. Proctor also agrees that implementation of such a market is a very complex undertaking, and Dr. Proctor agrees that there are alternative ways to price energy transfers between AmerenUE and its affiliate in any event.[115] Dr. Proctor would not foreclose other options, such as a share the benefits approach.[116]

[111] Sch. D to Late-Filed Exhibit 69 (Dr. Proctor's Surrebuttal Testimony in Case No. EC-2002-1 at pp. 23-24).
[112] He would argue that only part of the $7 million to $24 million annual benefit the Company indicates the JDA amendment relating to off-system sales would create arises from the transfer, but even Dr. Proctor would attribute more than half (from about $3.6 million to about $12 million) per year to the transfer itself. In any event, it is undisputed that millions of dollars of benefit would result.
[113] Tr. at p. 929, l. 12-21 and p. 934, l. 7-10 (Testimony of Dr. Proctor).
[114] Implementation is currently scheduled for December 1, 2004, but that date has slipped before. Dr. Proctor agrees it could slip some more. Tr. at p. 1223, l. 19 to p. 1224, l. 6 (Testimony of Dr. Proctor).
[115] Tr. at p. 931, l. 4-7 and p. 932, l. 8-12 (Testimony of Dr. Proctor).

The Company has committed to studying these other options, but indicates that it needs time to do so.[117] The Company believes it makes more sense for the MISO to actually have, in place with some operating experience behind it, a Day 2 market that the Company and Staff can see in actual operation and study before deciding to change the JDA based upon a market that we have not yet seen, and for which we have no operating experience. The Company's belief is not rocket science; it's common sense. Common sense dictates that if market price is but one option for addressing the transfer price issue under the JDA, if there is no current market price, and if there are still other options that ought to be considered, it would be foolish to force a particular amendment today in the middle of a rate moratorium. The Company and Staff may ultimately agree on changes to the JDA. If they do not, Staff no doubt will file testimony and propose adjustments in the Company's next rate case, just as it did less than two years ago. In that event, this Commission will decide if those adjustments must be taken into account in setting just and reasonable rates for the Company's customers.

### B. LIABILITIES.

There is considerable inconsistency, and thus at times confusion, with regard to the exact basis of Staff's position regarding liabilities, but at bottom Staff appears to allege the potential existence of two principal detriments. First, Staff raises concerns about environmental liabilities,[118] such as asbestos litigation costs or payments,[119] and site clean-up costs. Second,

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[116] Tr. at p. 936, l. 22 to p. 937, l. 15 (Testimony of Dr. Proctor).
[117] Nelson Sur. at p. 11, l. 5 and p. 12, l. 2; Voytas Sur. at p. 6, l. 1-10.
[118] As discussed in Section III.B.iii, infra, Staff also, incredibly, argues that future capital expenditures for future capital assets are also "liabilities."
[119] Staff characterizes these as "environmental" in nature. In fact, asbestos claims are generally claims alleging personal injury, often by former employees alleging exposure to asbestos. For purposes of this discussion, the Company will include these claims in the "environmental" category. Of the 121 such cases filed against AmerenUE, 50 have been dismissed outright and 22 have been settled. Ex. 59 at p. 170. The Company has established reserves for those which remain. Typically, the Company is named as a defendant along with many other defendants in these cases, and the average number of defendants per case is 60. Id.

Staff raises concerns about whether the appropriate balance sheet liabilities are being "transferred" from AmerenUE to AmerenCIPS.

### i. <u>Environmental liabilities, which are predominantly generation-related, remain, and ought to remain, with AmerenUE given that AmerenUE is retaining the benefit of all of its existing generation.</u>

Setting aside for now future capital expenditures[120] (which are not liabilities in any event), there are three possible categories of these environmental liabilities, the first of which will be AmerenCIPS's responsibility, and the second two of which will remain the responsibility of AmerenUE. First, there are liabilities that arise from an event or occurrence taking place after the closing of the transfer – a post-closing liability. If the post-closing liability relates to the T&D assets being transferred to AmerenCIPS, AmerenCIPS will bear 100% of the liability. If the post-closing liability relates to the Company's generation, AmerenUE will bear that liability. There is no dispute about those.

Second, there are environmental liabilities (which are almost exclusively generation-related)[121] that may or may not result in future payments and which today are unknown and unquantified, and that arose from an event or occurrence that took place before the closing - a pre-close environmental liability.[122] AmerenUE today owns the generation assets from which these pre-close environmental liabilities may have arisen, and AmerenUE will, after the transfer, continue to own and obtain the sole benefit from those generation assets. The issue Staff raises here is whether AmerenCIPS (or Ameren Corporation) ought to somehow bear 6% of these

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[120] <u>See</u> Section III.B.iii, <u>infra</u>.

[121] Tr. at p. 1438, l. 11-14 (Testimony of Mr. Weiss); Tr. at p. 1714, l. 6-16 (Testimony of Mr. Nelson).

[122] Even if the liability arises from an event occurring prior to the closing of the transfer, if it arose from the Illinois T & D Business (i.e., the assets that are solely in Illinois rate base), it is not a liability that would be a part of the Company's Missouri cost of service anyway, and thus it does not matter to Missouri ratepayers whether AmerenUE "assigns" that liability to AmerenCIPS or does not assign it. Tr. at p. 449, l. 16-25 and p. 1424, l. 19 to p. 1425, l. 3 (Testimony of Mr. Getz).

contingent pre-close environmental liabilities on the theory that prior to the transfer about 6% of the generating output from the generation assets was serving Illinois customers.[123]

There is a third category of environmental liabilities – which is in fact a subset of the second category (the pre-close environmental liabilities) that are known and measurable and for which the Company has already established (and thus expensed) reserves based upon its estimate of the potential exposure.[124] The issue Staff raises here is the same – whether AmerenCIPS (or Ameren Corporation) ought to somehow bear 6% of these quantified pre-close environmental liabilities if the amounts reserved turn out to be too low at some point in the future. If the reserves are adequate, then there is no future ratemaking impact at all because the amounts already established as reserves have already been expensed for ratemaking purposes.[125]

### ii. <u>**The only evidence Staff has presented relating to these liabilities is that there might be a future, unquantified (and unquantifiable) detriment that might, in turn, later affect rates, if (a) expenses actually have to later be paid; (b) Staff or another party does not seek normalization or disallowances; and (c) this Commission actually allows the future expenses to be recovered in rates.**</u>

Ms. Fischer was one of two Staff witnesses whose testimony deals primarily with these liability issues. Ms. Fischer came at this issue from a couple of different angles. First, Ms. Fischer raised questions about whether the transfer price ought to be increased so that AmerenCIPS would pay AmerenUE a higher transfer price for the assets to "compensate" AmerenUE for unknown liabilities. Staff did not quantify this hypothetical transfer price.[126] Second, Ms. Fischer addressed liabilities independent of the transfer price issue. Staff agrees

[123] Tr. at p. 1444, l. 15-20 (Testimony of Ms. Fischer). There is a pre-close environmental liability that is being transferred to AmerenCIPS – the Alton Town manufactured gas site in Alton, Illinois. This site is a T&D related site and therefore its liability is being transferred with the Illinois "Business" being transferred to AmerenCIPS.
[124] Presently, the Company has booked – reserved – approximately $30 million to cover future payments for injuries and damages, which include quantified environmental (including asbestos) liabilities. Tr. at p. 1430, l. 17-24 (Testimony of Mr. Weiss).
[125] Tr. at p. 1425, l. 15-23 (Testimony of Mr. Getz).
[126] Tr. at p. 1062, l. 15-17 (Testimony of Ms. Fischer).

that its issue relating to liabilities is a cost issue – a future cost issue – and thus, perhaps, a future rate issue.[127] This is not an issue relating to the Company's ability to provide adequate and reliable utility service. Rather, it is purely a cost –a future cost – issue.[128] Staff also agrees that these are in effect long-term *contingent* liabilities that may never, in Judge Thompson's words, "manifest" themselves at all.[129] Staff also agrees that rates would not change until 2006 and that at that time the rates would be based upon a comprehensive review of all AmerenUE costs, and all AmerenUE liabilities, and all AmerenUE revenues, and not just a particular liability.[130] In fact, Staff agrees that as part of its comprehensive review it will normalize items and may propose disallowances and that only after that, if a liability must be paid, would it affect rates.[131] Staff has not quantified, and cannot quantify, the potential liabilities.[132] Staff cannot even say the liabilities will occur, or that they are likely to occur – they may not materialize at all.[133] Those facts alone demonstrate there is simply no compelling evidence of a direct and present detriment that is likely to occur arising from the "liabilities" issue Staff raises. As a result, the Company's permission to transfer these assets cannot be denied on this basis as a matter of law.[134]

A simple example illustrates that this issue is not nearly as significant as Staff wants this Commission to believe. Let us assume, *for argument's sake only*, that the actual sums paid on

[127] Tr. at p. 1064, l. 9-18 (Testimony of Ms. Fischer).
[128] Tr. at p. 1468, l. 13 to p. 1469, l. 4 (Testimony of Ms. Fischer).
[129] Tr. at p. 1079, l. 4-6 (Testimony of Ms. Fischer).
[130] Tr. at p. 1064, l. 15 to p. 1065, l. 3 (Testimony of Ms. Fischer).
[131] Tr. at p. 1065, l. 4-10 (Testimony of Ms. Fischer).
[132] Tr. at p. 1499, l. 1-6 (Testimony of Ms. Meyer).
[133] Tr. at p. 1079, l. 4-6 and p. 1086, l. 5- 12 (Testimony of Ms. Fischer). As discussed below, the only quantification (and quantification alone does not make it likely to occur) that Staff could "come up with" doesn't deal with liabilities at all. It deals with future capital expenditures. In terms of liabilities, the best Staff could do was argue that there might be some, in some amount, later.
[134] As noted above, the Company would also respectfully submit that even a likely purely financial impact, particularly one that is unquantified or whose quantification is speculative, is not a detriment that can preclude permission to transfer assets under Section 393.190.1, RSMo. Regardless, there is no showing that any detriment is present and likely nor is there any quantification of such detriment.

AmerenUE's liabilities are twice the approximately $30 million AmerenUE has reserved and thus already expensed.[135] In other words, AmerenUE ends up spending $60 million instead of the $30 million it has reserved. Keep in mind that the first $30 million is already expensed so it will have no rate impact when AmerenUE pays it and could not, even in theory, pose a financial detriment to ratepayers. But, it is true that in theory, the Company could seek to include the additional $30 million of costs that have not previously been reserved and expensed in its cost of service in a future rate case. Does that mean that AmerenCIPS should have borne the extra $30 million? Does it mean that $30 million of operating expense will be included in setting Missouri electric rates in the future? The answer to both questions is "no."

First, the disputed amount in the above example is not $30 million – it is 6% of $30 million, or $1.8 million. So, perhaps, over some indeterminate number of years in the future, AmerenUE might have $1.8 million of costs it would not have had without the transfer.[136] Will that $1.8 million be included in AmerenUE's future Missouri cost of service? Perhaps. But we first have to ask, was it incurred in a test year? We then have to ask, was it subject to normalization or disallowance for some other reason? We also have to ask, was it enough to lead to a rate case at all? Who knows? We do know that in the Company's last rate case Staff proposed a $5.2 million adjustment relating to expenses for damages to normalize the amount of such expenses.[137] That proposal is a perfect example of the kind of adjustments Staff might seek to make even if the Company under-set its reserves as described herein. Both Ms. Fischer and

[135] If the $30 million is adequate, there will be no future expense (and thus there could be no future rate) impact. Tr. at p. 1512, l. 24 to p. 1513, l. 3 (Testimony of Mr. Meyer).
[136] And AmerenUE will have also realized the benefits of having access to 98% of this base load generation.
[137] Tr. at p. 1462, l. 3-10 (Testimony of Ms. Fischer); Ex. 75, at Acct. Sch. 10-6, at Adj. No. 14.

Mr. Meyer admitted that the Staff could propose adjustments and that the Commission may accept them.[138]

The point is not that the number will be \$30 million, \$60 million, \$10 million,[139] \$100 million, or \$0.[140] No one knows, or can know, what the number will be. That's why these kinds of liabilities are called "contingent" liabilities.[141] Staff's speculation that some liability of some undeterminable amount might occur does not sustain Staff's burden to present compelling evidence of a direct and present detriment that is likely to occur.

### iii. <u>**Staff's absurd arguments relating to future capital expenditures demonstrate the total failure of Staff's case.**</u>

Staff seems to recognize that it has wholly failed to meet its burden on this issue, and that realization has led to what is nothing less than an absurd attempt to characterize – in fact recharacterize – future capital expenditures that might or might not occur as "environmental liabilities." In other words, Staff argues that capital assets are not assets at all. Rather, in Staff's world, capital assets are "liabilities." From that novel base, Staff takes the absurd position that Illinois customers ought to forever bear 6% of the cost to install or construct *future* capital assets needed for *future* environmental compliance at Company-owned power plants that, *at the time the expenditures are made, will not have served Illinois customers for many years.*[142] Ms. Fischer, on cross-examination, was clear in this regard:

[138] Tr. at p. 1457, l. 7 to p. 1460, l. 25 (Testimony of Ms. Fischer); Tr. at p. 1509, l. 1 to p. 1510, l. 20 (Testimony of Mr. Meyer).
[139] If it were \$10 million dollars and if Staff felt that the \$30 million of expense that had been reserved had been included in the Company's cost-of-service in setting rates, Staff might in fact propose the revenues be imputed to the Company because its reserves turned out to be more than needed, which, if the Commission agreed, would benefit future ratepayers. Tr. at p. 1454, l. 22 to p. 1456, l. 17 (Testimony of Ms. Fischer).
[140] Or, more accurately, 6% of those numbers (\$1.8, \$3.6, \$0.6, \$6 million, or \$0).
[141] Tr. at p. 1079, l. 1-6 (Testimony of Ms. Fischer).
[142] Tr. at p. 1718, l. 1-13 (Testimony of Mr. Nelson).

> Q. "If 92 percent's the right number[[143]], is it your contention that AmerenUE Missouri should only pay 92 percent of future capital expenditures that are made when 98 percent of the generation is serving Missouri?" A. "Yes."[144]

Ms. Fischer went on to concede that this was her stance despite the fact that the capital asset installed in the future would not control $SO_2$ or NOx emissions during any period when AmerenCIPS was receiving the benefit of the generation, but rather, would only control such emissions from and after installation *at a time when only Missouri was (and had been for some time) receiving the benefit of the generation.*[145] The expenditures would be made, if at all, to allow continued operation of the plants *for the sole benefit of Missouri customers*, yet Staff believes Illinois customers (or the Company or its parent or affiliates) ought to pay for them.

When asked by her lawyer to explain the basis for arguing that *future capital expenditures* are now "liabilities," Ms. Fischer provided the following explanation:

> "Well, in the example he [Mr. Lowery] gave with the NOx and the $SO_2$ – *and I have a very limited knowledge of the power plants*, but I believe when they [AmerenUE] set up the generation units, the amount of emissions is the result of what type of generation they put into place and what type of apparatuses they put into place with the generation to determine the amount of $SO_2$ levels and NOx levels that are emitted into the atmosphere. And at the time they put that generation in place, they make a determination as to what costs they're willing to incur to emit whatever amount of $SO_2$ and NOx into the atmosphere. And so the fact that they made the determination of how to set up those generation units and the customers in Illinois and Missouri benefited – benefited from the generation at those sites up and to the date of the transfer, that whatever method of allocation of the ultimate cost to get those emissions up to the standard that the EPA or whoever determines is the acceptable level, that that be – should be the responsibility of all the customers that benefited from that generation from the point it was put into place until the date of the transfer" (emphasis added).[146]

Ms. Fischer's logic was clearly suspect based on her admission that she has "very limited knowledge of the power plants." The Company has not built a coal-fired power plant (where

[143] 92% being the current Missouri retail portion of AmerenUE's electric load.
[144] Tr. at p. 1465, l. 16-20 (Testimony of Ms. Fischer).
[145] Tr. at p. 1465, l. 21 to p. 1466, l. 19 (Testimony of Ms. Fischer).
[146] Tr. at p. 1479, l. 19 to p. 1480, l. 15 (Testimony of Ms. Fischer).

$SO_2$ and NOx emissions would primarily be at issue) for decades.[147] Staff's contention is, apparently, that utilities ought to spend tens or hundreds of millions of dollars 30, 40, 50 years *before the law requires any expenditure at all* when plants are "set up." From that premise, Ms. Fischer and Staff want AmerenCIPS (or Ameren) to bear expenditures that *might* be made, 6, 11, 15, 20 years from now and which if made would be made so that the subject power plants could continue to be operated *for the benefit of* Missourians, and not for the benefit of AmerenCIPS or its *Illinois* customers. One can only imagine what this Commission's predecessors would have done had the Company sought to include unnecessary capital expenditures in its rate base when the plants were "set up" 30-50 years ago. Or perhaps Staff is second-guessing Missouri's long-term reliance on low-cost coal-fired generation, and believes the Company should have built two or three more nuclear power plants so future pollution control equipment of this type would never become an issue.

The Company simply cannot imagine that this Commission's predecessors would have sanctioned capital expenditures for equipment that was not (and may still not be) required until decades later. It is, however, on that basis that Staff now seeks to rest much of its case relating to the supposed "detriment" arising from "environmental liabilities."

Even Staff doesn't have agreement on the validity of this "AmerenCIPS (or Ameren Corporation) should have set up their plants differently" theory. In the course of discussing with Judge Thompson that Staff generally favors the transfer, but is looking for some "insurance" against "potential bad things that could go wrong," Dr. Proctor raised environmental issues as the kind of things for which "insurance" is sought. Future capital expenditures were not one of the things on Dr. Proctor's mind. In fact, Dr. Proctor did not identify these future capital expenditures as a detriment:

[147] Tr. at p. 1486, l. 10-16 (Testimony of Mr. Meyer).

Q. "But you're suggesting that there may be some area of special and unreasonable risk that the transfer will expose the ratepayers to?"

A. "Yes."

Q. "Okay. Identify those areas for me, if you can."

A. "* * * But, you know, if you're talking about cleaning up pollution problems, okay – and *I'm not talking about making investments in capital to continue generating from a plant. That's not what I'm talking about.* What I'm talking about is cleaning up asbestos. That would be one example" (emphasis added).[148]

The Company does not know what it might have to spend over the next couple of decades on pollution control equipment. Technology may change and environmental regulations may change and so may other factors.[149] The Ameren 10-K, so heavily relied upon by Staff, only contains *preliminary estimates* based upon *proposed* regulations.[150] The 10-K is not the basis for determining a utility's cost of service.

Regulatory proposals come and go everyday. What may occur if George W. Bush is re-elected versus if John Kerry is elected – who knows? Neither man may be President when these expenditures occur, if they occur at all. At the end of the day, the best Staff could do was to argue that 6% of $1 billion in possible future capital expenditures was about $60 million, and then argue that this potential $60 million detriment should "sink" the transfer.[151] Every one of those dollars, if spent, would be spent in the future, and would likely not be spent in the same year. The present value of the expenditures would be much less than the figure used by Staff, and this Commission would have to decide, after Staff and everyone else has an opportunity to normalize or disallow the capital expenditures, what part of those capital expenditures belong in

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[148] Tr. at p. 1794, l. 5-20 (Testimony of Dr. Proctor).

[149] See Section III.C of this Brief, infra.

[150] In its 10-K, the Company has provided its "preliminary estimates of capital costs based on current technology . . . to comply with the $SO_2$ and NOx rules, as proposed." Ex. 59 at p. 58. For AmerenUE, these "preliminary estimates" based on "proposed" rules, for 2010, are $250 - $350 million and, for 2015, are $300 - $500 million. If you scour the 10-K there are preliminary estimates of possible future capital expenditures for various issues totaling about $1 billion over the next 15 or 20 years.

[151] Tr. at p. 1471, l. 4-11 (Testimony of Ms. Fischer).

rate base. That theory in every respect – including the quantity and quality of evidence – is wildly speculative.

### iv. <u>Staff's contention that the Company may not have "transferred" sufficient balance sheet liabilities is incorrect and irrelevant.</u>

The last main aspect of Staff's concern regarding liabilities deals with whether the Company has "transferred" sufficient balance sheet liabilities to AmerenCIPS. Staff's concern misses the point.

As Mr. Weiss explained in direct and succinct terms,[152] with the exception of two of the Company's 22 balance sheet accounts, how AmerenUE handles those accounts, and whether some amount is, or is not, "transferred" to AmerenCIPS, is *irrelevant* to Missouri ratepayers.

It is irrelevant to Missouri ratepayers because, by definition, if a liability arising from an operating expense is, today, or is, as of the transfer date, already reflected in a liability account on AmerenUE's balance sheet, that liability has already been expensed -- it will have no future impact on rates, regardless of who pays it or when it is paid.[153] The Company has endeavored to "transfer" the balances in the liability accounts that relate specifically to the "Business" being transferred to AmerenCIPS as of the closing of the transfer. However, if the Company was to miss something in this regard, and AmerenUE later has to cut a check – pay cash – to discharge that liability, that payment will not affect Missouri rates. Cash is not an asset in AmerenUE's rate base for ratemaking purposes, and a future payment to clear a liability already on the balance

[152] Weiss Sup. Sur. (Comm'n Ex. 8) (consisting of only 3 pages and plus a 3-page Schedule GSW-3). Company witness Gary S. Weiss is Director, Regulatory Accounting and Depreciation in the Controllers' Function for AMS.
[153] Tr. at p. 1425, l. 15-23 (Testimony of Mr. Getz). Mr. Michael J. Getz is Director, Plant Accounting in the Controllers' Function for AMS. <u>See also</u> Weiss Sup. Sur. at p. 2, l. 13-22 and p. 3, l. 1-14 and Sch. GSW-3 thereto. <u>See also</u> Tr. at p. 1446, l. 24 to p. 1451, l. 12 (Testimony of Ms. Fischer).

sheet is not an operating expense that would impact cost-of-service later, even if the payment itself were made in a test year for a future rate case.[154]

Mr. Weiss noted that there were two balance sheet accounts – Account No. 228 and Account No. 253 – that could produce future ratemaking impacts.[155] These accounts reflect reserves for injuries, damages, and environmental claims, which were discussed above.[156] Therefore, as discussed above in relation to the example where AmerenUE had reserved $30 million for environmental liabilities, but ended up spending $60 million over some number of future years, if the reserve ends up being too low there could be a future ratemaking impact. To summarize that discussion, the potential ratemaking impact would be a maximum of only 6% of any shortfall in the reserved amounts, and how it would be treated is not certain because we do not know if it would fall in a test year, or whether the Commission would normalize it or otherwise disallow some portion.

v. **Staff's entire position on the issue of liabilities is unreasonable.**

The Company believes there are benefits – huge benefits – from the transfer. The Company has done its best to quantify those benefits and has presented substantial and competent evidence of record in support of those benefits. Dr. Proctor's discussion with Judge Thompson on the last day of the hearings[157] illustrates the fundamental flaw in Staff's case, and that flaw is apparent in spades when looking at the issue of liabilities.

In trying to explain why the Staff in fact would like to see the transfer occur, but has opposed it, Dr. Proctor discussed "insurance against some of the potential bad things that could go wrong," and it was obvious that he was primarily talking about liabilities. His own testimony

[154] Tr. at p. 1452, l. 12-19 (Testimony of Ms. Fischer).
[155] Weiss Sup. Sur. at p. 3, l. 1-14 and Sch. GSW-3 thereto (discussion regarding Accts. 228 and 253).
[156] See Id. (Primarily environmental claims, including asbestos-related claims).
[157] Tr. at p. 1790, l. 10 to p. 1796, l. 13 (Testimony of Dr. Proctor).

demonstrates that Staff has failed to produce compelling evidence of any direct or present detriment that is likely to occur:

> "But let me throw another thing in. And that is the things that *can't be quantified.* I can't put a number on them, *I can't put a probability on them.* I can't factor them into that kind of analysis. What do I do with those kind of things? Particularly if those things – even though they may seem to have a *very small probability of happening*, that if they do, they could be really bad. I think the Staff's perspective on those things is it is – that we need to try to get protections – and the way I put it, those are the kinds of things you insure. We would want to get some kind of protection against those things. The other things will weigh out, but – but *those are the one that we'd like to get some insurance against*" (emphasis added).[158]

Judge Thompson then sought clarification and asked Dr. Proctor if he was talking about detriments that, though *maybe unlikely*, nevertheless might expose Missouri ratepayers to some detriment, and Dr. Proctor confirmed that he was in fact talking about such items. Dr. Proctor also agreed that the Commission is not in the business of ensuring ratepayers against calamity.[159]

The "liabilities" Staff alleges may be detriments are unknown, uncertain, speculative, unquantified, and unquantifiable. If they are ever paid at all, they probably would not be paid all in one year, they might or might not fall in a test year, and they would likely be spread out over many years – in fact over decades. In the context of AmerenUE's $2 billion cost of service, which will likely increase over time, these speculative liabilities simply cannot justify refusal to approve an application to transfer assets under Section 393.190.1, RSMo.[160]

### C. $SO_2$ ALLOWANCES

From various angles, Staff, though it did not apparently think this was a potential detriment until raised by Mr. Kind, argues that there might be higher, future environmental compliance costs arising from the Company's past $SO_2$ sales and trading activities.

[158] Tr. at p. 1792, l. 19 to p. 1793, l. 7 (Testimony of Dr. Proctor).
[159] Tr. at p. 1794, l. 2-4 (Testimony of Dr. Proctor).
[160] In re Missouri Gas Energy et al., supra.

### i. The existence of a "detriment" is highly speculative and its existence has therefore not been established as a matter of law.

The speculative nature of this alleged detriment is apparent. Commissioner Clayton asked Staff witness Campbell: Q. "Is it fair to state that Staff's position is, for the most part, very speculative in terms of whether there would be an increased impact on Missouri ratepayers? A. There is some speculation."[161] In trying to answer Commissioner Clayton's follow-up question on how much is "some," Mr. Campbell indicated that Staff had not quantified, and that he was not sure Staff *could* quantify, any potential detriment.[162] It would in fact require "a lot of speculation" to determine the fair treatment of future environmental compliance costs relating to the Company's treatment of $SO_2$ allowances to date, a treatment that would not be decided in any event until a later rate case.[163] The effect, if any, of the Company's management of its $SO_2$ allowance bank to-date on future rates is speculative.[164]

If environmental laws remain static and if the Company did not sell any allowances in the future, the Company would have enough allowances to cover emissions through 2033.[165] ** ______________________________ **[166] $SO_2$ allowances could be worth more in the future, and they could be worth less – or become worthless.[167] Holding too many allowances could itself be detrimental, and many things have to be taken into account in deciding how to manage the allowance bank.[168] Many factors affect the $SO_2$

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[161] Tr. at p. 607, l. 8-12 (Testimony of Mr. Campbell).
[162] Tr. at p. 608, l. 3-13 (Testimony of Mr. Campbell).
[163] Tr. at p. 623, l. 6 to p. 624, l. 14 (Testimony of Mr. Campbell).
[164] Tr. at p. 623, l. 24 to p. 624, l. 13 (Testimony of Mr. Campbell); Tr. at p. 676, l. 1-20 (Testimony of Mr. Kind). Public Counsel witness Ryan P. Kind is the Chief Utility Economist for the Office of the Public Counsel.
[165] Tr. at p. 748, l. 3-14 and p. 802, l. 9-17 (Testimony of Mr. Moore). Company witness James C. Moore II is a Senior Emissions Trader for AmerenEnergy Fuels and Services Company ("AFS").
[166] ** ______________ **
[167] Tr. at p. 592, l. 21 to p. 594, l. 18 (Testimony of Mr. Campbell). Tr. p. 691 l. 2-7 (Testimony of Mr. Kind).
[168] If, for example, SO2 allowances, due to changes in environmental laws or otherwise, become worth much less or become worthless, holding an excessive bank could harm ratepayers because it would deprive them of revenues to help the Company meets its revenue requirement that the Company could realize from selling allowances. Tr. at p. 628, l. 11-15 (Testimony of Mr. Campbell).

allowance market and thus these factors can affect whether allowances will have value in the future and how many allowances may be available in the market.[169] Environmental laws may change.[170] New proposals show up all of the time.[171] Some proposals pass, and some don't pass, depending for example on the politics of those in office in the future.[172] Technology changes, and costs change.[173]

Before any issue relating to the Company's management of its $SO_2$ allowance bank could have a rate impact, a rate impact that by definition would have to occur, if at all, in the future, several things would have to occur. The Company would have to run out of allowances; would either not be able to obtain more allowances in the market, or the price would be too high; would then have to install emissions equipment; would then have to seek to recover those costs in a rate case; and the Commission would have to allow recovery of increased costs arising from these $SO_2$ activities.[174] And who knows if the costs would arise from these $SO_2$ activities, because who knows what the $SO_2$ allowances may or may not be worth when future costs might have to be incurred?

In summary, the result of the decisions the Company makes with regard to how it manages its $SO_2$ allowance bank will not be known for years, and when those results are known and can be quantified, this Commission will have to make a judgment about what rate treatment any impact of those decisions may have. This Commission cannot speculate about those rate treatments today and deny the asset transfer based on that speculation.

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[169] Tr. at p. 592, l. 11-25 (Testimony of Mr. Campbell); Tr. at p. 748, l. 3-18 (Testimony of Mr. Moore).
[170] Tr. at p. 625, l. 22-25 to p. 626, l. 15 (Testimony of Mr. Campbell).
[171] Of the proposals to date, none have changed SO2 requirements. Moore Sur. (Comm's Ex. 21) at p. 2, l. 4-14.
[172] Tr. at p. 805, l. 12 to p. 806, l. 13 (Testimony of Mr. Moore).
[173] Tr. at p. 627, l. 7-14 (Testimony of Mr. Campbell).
[174] Tr. at p. 598, l. 17 to p. 600, l. 1 (Testimony of Mr. Campbell).

### ii. $SO_2$ issues do not in any event belong in this case.

The Company's sworn testimony is that it is in compliance with the Commission's orders respecting its $SO_2$ allowances.[175] ** [176] [177] ** Other than the year in which they were issued, it is undisputed that there is no distinction between the usefulness, price, or ability to buy, sell, trade, or swap a Phase I versus a Phase II allowance.[178] Staff now contends that since the Company has sold Phase II allowances it acquired through trades or loans in the $SO_2$ allowance market, the Company may not be in compliance with the Commission's Order in Case No. EO-98-401. However, Staff's position in that regard is at odds with its own recommendation in Case No. EO-98-401, which advised this Commission the Stipulation and Agreement in that case allowed the Company to "sell half of *all current and future allowances* without seeking specific Commission approval" (emphasis added).[179] Furthermore, the Company has filed reports each year since the Case No. EO-98-401 Order was issued, and Staff has never objected to the Company's management of its $SO_2$ allowance bank and in fact did not do so at all until after Mr. Kind raised the issue late in this asset transfer case.[180]

The "$SO_2$ issue" is a red herring. Both Chair Gaw and Commissioner Murray asked Mr. Kind whether, in effect, the Missouri Public Service Commission would likely allow the Company (or any utility for that matter) to violate a Commission Order, have that violation result

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175 Moore Sur. at p. 4, l. 5-12; Tr. at p. 886, l. 12 to p. 887, l. 13 (Testimony of Mr. Voytas).
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177 ** **
178 Tr. at p. 600, l. 16 to p. 602, l. 4 (Testimony of Mr. Campbell); Tr. at p. 632, l. 20 to p. 633, l. 2 and p. 634, l. 23 to p. 635, l. 1 (Testimony of Mr. Kind); Tr. at p. 699, l. 15-16 (Testimony of Mr. Moore).
179 Tr. at p. 601, l. 24 to p. 603, l. 2 (Testimony of Mr. Campbell); Ex. 42. at p. 3.
180 Tr. at p. 604, l. 22 to p. 605, l. 1 (Testimony of Mr. Campbell).



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in a cost impact, and then simply pass those costs through to ratepayers.[181] Even Mr. Kind agreed that the Commission would not do so.[182] Mr. Campbell agreed that this is really not an issue that needs to be, or that even can be, effectively dealt with in this asset transfer case. He testified that he thought in a future rate case, the Commission would "probably have a more secure hold" on what the impact might be.[183]

Mr. Campbell's rather straightforward testimony is a perfect illustration of why the law requires those who allege that detriments exist to show their existence by compelling evidence, and to show the existence of a direct and present detriment that is likely to occur. Otherwise, as would be the case here, private property owners like the Company would be unlawfully deprived of their right to transfer their property.

### D. NATURAL GAS

Staff raised two potential detriments relating to natural gas, as follows: (a) Staff alleges that after October 31, 2006, when the current natural gas transportation contract that serves both the Alton, Illinois LDC and the Fisk/Lutesville, Missouri LDC expires, Fisk/Lutesville may, because it is a small system, not be able to get as good a transportation rate post-2006 as it might be able to get if it were still tied together with the Alton LDC; and (b) Staff alleges that gas supply or storage costs for the Venice and Meramec power plants might be higher after the transfer because those plants will no longer "obtain" those services pursuant to arrangements

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[181] Tr. at p. 645, l. 25 to p. 626, l. 6 and p. 649, l. 19 to p. 650, l. 12 (Testimony of Mr. Kind). In the present case, Mr. Kind argues that the Company is selling too many SO2 allowances. In Case No. EC-2002-1, Mr. Kind argued the Company was not selling enough! He advocated in that case that over $28 million in SO2 allowance revenues should be imputed to the Company for ratemaking purposes. See Rebuttal Testimony of Ryan Kind, Case No. EC-2002-1, at pp. 27-28, attached to Late-Filed Ex. 69 as Schedule E.

[182] Mr. Kind tried to qualify his answer by tying it to "existing" law and to "this Commission," presumably implying that the Legislature may change the law to reward utilities for violating Commission orders or that later Commissioners might do the same. The Company would not similarly assume that this Commission will fail to discharge its duties under the law.

[183] Tr. at p. 620, l. 14 to p. 621, l. 5 (Testimony of Mr. Campbell). Even Mr. Kind agrees that resolution of any issues Staff or Public Counsel may have regarding SO2 issues should properly be dealt with elsewhere. Tr. at p. 669, l. 11 to p. 670, l. 23 (Testimony of Mr. Kind).

with the Alton LDC. Importantly, it should be recalled that the only natural gas customers served by the assets being transferred are Illinois gas customers served by assets located in Illinois.[184] Therefore, no gas revenue requirement study was done because it was not relevant or necessary given that the only gas assets involved are Illinois jurisdictional gas distribution assets and customers, and there will essentially be no difference in the Company's gas revenue requirement before or after the transfer.[185]

### i. Other pertinent facts relating to these natural gas issues.

Regarding the issues raised by Mr. Sommerer relating to Fisk/Lutesville area, there is one firm transportation contract shared by AmerenUE-Missouri and AmerenUE-Illinois, and it is via that contract that both the Alton, Illinois LDC and the Fisk/Lutesville, Missouri LDC obtain natural gas transportation.[186] The contract will remain with AmerenUE through its remaining term, which ends October 31, 2006.[187] The 530 dekatherms ("dth") of capacity for Fisk/Lutesville is therefore unaffected by the transfer.[188] When that contract expires in 2006, Ameren Energy Fuels and Services, on behalf of AmerenUE and AmerenCIPS, will negotiate a new contract for both the Alton LDC and the Fisk/Lutesville LDC at the same time. Ameren will use its substantial negotiating leverage to obtain the best possible rates and terms.[189] The Company has a history of being able to negotiate favorable contracts because of its purchasing power.[190] If Ameren Corporation's acquisition of Illinois Power is consummated, Ameren will have even more leverage which it can bring to bear in such negotiations.[191]

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[184] Tr. p. 419, l. 7-14 (Testimony of Mr. Nelson).
[185] Id.; Tr. p. 534, l. 11 to p. 535, l. 1 (Testimony of Mr. Nelson).
[186] Massmann's Sur. (Comm'n Ex. 17) at p. 5, l. 6 to p. 7, l. 18. Company witness James J. Massmann is Director, Natural Gas Supply and Transportation in the Natural Gas Supply and Transportation Department of AFS.
[187] Id.
[188] Id.
[189] Id. at p. 6, l. 9 through p. 7, l. 18.
[190] Tr. at p. 1101, l. 15-20 (Testimony of Mr. Sommerer).
[191] Id.; See also Tr. at p. 1102, l. 10-14 (Testimony of Mr. Sommerer).

Regarding Mr. Sommerer's issues relating to AmerenUE power plants, AmerenUE's Venice and Meramec power plants have historically obtained transportation, storage and natural gas under arrangements made primarily to serve the Alton LDC. The Alton LDC has always taken precedence with respect to those arrangements.[192] When the power plants have needed natural gas transportation, they have been charged a price designed to constitute a market price, and after the transfer, the plants can buy transportation in the market, also at a market price.[193] The plants will also be able to obtain natural gas storage and use the same monthly balancing service offered by the storage provider, MRT, that formerly was used by the Alton LDC and, indirectly, by the plants.[194] That service has been only seldom used by the plants in any event.[195] Regarding gas supply, the plants' gas needs were always subordinate to the needs of the Alton LDC, and typically, the highest priced gas obtained in a month for the Alton LDC was charged to the plants.[196] In the end, there is no basis to conclude that the price paid to service these plants will materially differ from today because of the asset transfer.

### ii. There are no detriments.

The Fisk/Lutesville issue *could* not occur until after October 31, 2006, since the current discounted transportation contract will remain under the ownership and control of AmerenUE, for Fisk/Lutesville, and it will be AmerenCIPS who will have to go bid on the capacity that will be released by AmerenUE for resale under FERC-required capacity release procedures. After October 31, 2006, Fisk/Lutesville will have to renew that contract or obtain a new one. As noted above, Ameren will use its full negotiating strength to obtain the best deal it can, and the Fisk/Lutesville contract will be negotiated with the Alton contract. Staff's "compelling"

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[192] Tr. at p. 1103, l. 22-25 (Testimony of Mr. Sommerer); Massmann's Sur. at p. 8, l. 18-19 (Comm'n Ex. 17).
[193] Massmann Sur. at p. 8, l. 22 to p. 9, l. 10; Tr. at p. 1006, l. 3-19 (Testimony of Mr. Sommerer).
[194] Massmann Sur. at p. 10, l. 1 to p. 11, l. 10.
[195] Id. at p. 10, l. 22; p. 11, l. 1-2.
[196] Massmann Sur. at p. 11, l. 11 to p. 12, l. 7.

evidence of a "present" detriment that is "likely" to occur on this issue is that it is as "likely to happen as not" (a coin-flip) that there might be a detriment in the form of less of a discount for Fisk/Lutesville (post-2006) than would have existed if the transfer did not occur (and it was still tied-in with Alton).[197]

Mr. Massmann did not flip a coin. In response to Judge Thompson's questions, Mr. Massmann testified that loss of the discount is "unlikely" to occur and cited specific examples where Ameren has used its negotiating strength to obtain those discounts.[198] Mr. Massmann testified he does not believe any detriment to Fisk/Lutesville is even plausible.[199] Before such a detriment *could* occur, October 31, 2006, has to arrive; Ameren would have to *not* negotiate the contracts together; Ameren would have to fail to take advantage of its considerable negotiating leverage; the impact would have to be enough to affect rates; Staff would have to choose not to propose an adjustment or a disallowance;[200] and to top it off, this Commission would have to disagree with the adjustment or disallowance if it is proposed and in any event would have to determine that the cost was reasonable before it could contribute to any future rate increase.[201]

But even if we assume, purely for argument's sake, that Mr. Sommerer's worst nightmare comes true and the Fisk/Lutesville LDC loses the ability to obtain any discount at all,[202] the record in this case shows that *at worst* AmerenUE's natural gas cost of service, in total, might increase up to a whopping $10,000.[203] *At worst*, that *might* add up to an additional 50 cents per

[197] Tr. at p. 1012, l. 21 to p. 1013, l. 2 (Testimony of Mr. Sommerer).
[198] Tr. at p. 1090, l. 19 to p. 1091, l. 5 (Testimony of Mr. Massmann).
[199] Tr. at p. 1095, l. 5-8 (Testimony of Mr. Massmann). See also Tr. at p. 1748, l. 5-13, wherein Mr. Nelson also testified that it was most likely that the same discount would be obtained for Fisk/Lutesville.
[200] Staff has and can do so. Tr. at p. 1004, l. 24 to p. 1005, l. 6 (Testimony of Mr. Sommerer).
[201] The Commission has the power to disallow costs in rate cases (Tr. at p. 1008, l. 22 to p. 1009, l. 1 (Testimony of Mr. Sommerer)), and of course has a duty to ensure that rates are just and reasonable. §393.130, RSMo.
[202] Mr. Sommerer concedes that there might not be a discount, with or without the transfer. Tr. at p. 1010, l. 14-20 (Testimony of Mr. Sommerer).
[203] Tr. at p. 1012, l. 21 to p. 1013, l. 5 (Testimony of Mr. Sommerer).

month to the gas bill of the average natural gas customer in the Fisk/Lutesville, Missouri area at some indeterminate future point in time.

With respect to the detriment regarding the Venice and Meramec plants, not only did Mr. Massmann testify that there is no plausible detriment,[204] but if one assumed, again purely for argument's sake, that a detriment could arise, the detriment would, *at worst*, result in the addition of about seven-tenths of one cent (0.7 cents) per month to the average Missouri electric customer's bill.[205]

The Company respectfully submits that potential "detriments" of such a magnitude (in fact, lacking in magnitude) could not, even if they existed (a fact the Company denies) constitute a detriment sufficient to deny or condition this transfer as a matter of law.

**E. NUCLEAR DECOMMISSIONING.**

As part of the proposed asset transfer, the Company has proposed to transfer 98% (2% is attributable to wholesale customers) of the funds currently held in the Illinois jurisdictional sub-account of the Callaway Plant tax-qualified nuclear decommissioning trust fund to the Missouri jurisdictional sub-account since AmerenUE would no longer operate as a utility subject to ICC jurisdiction. This will allow the Company to have access to those funds for the benefit of Missouri when Callaway is ultimately decommissioned.[206] The Company has also proposed to allocate the costs associated with decommissioning to those who will receive the generation – 98% to Missouri retail load and 2% to wholesale load. Staff does not object to either proposal.[207] The Company also proposes to continue to fund the tax-qualified Callaway nuclear

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[204] Tr. at p. 1091, l. 6-25 (Testimony of Mr. Massmann).
[205] Tr. at p. 1096, l. 16 to p. 1097, l. 22 (Testimony of Mr. Massmann).
[206] The funds in the Illinois jurisdictional subaccount that would be transferred to Missouri had a market value of approximately $13.8 million as of June 30, 2003. Redhage Dir. (Comm'n Ex. 3) at p. 4, l. 12-21.
[207] Redhage Sur. (Comm'n Ex. 2) at p. 2, l. 9 to p. 3, l. 4; Bible Reb. (Comm'n Ex. 3) at p. 2, l. 17 to p. 3, l. 2. Company witness Kevin L. Redhage is a Financial Professional in the Financial Planning and Investments Department for AFS.

decommissioning trust fund at the level approved by this Commission (approximately $6.2 million) between the time of the transfer and the Company's next triennial decommissioning fund review, scheduled to occur in September 2005.[208] This would mean that the Company would no longer fund the approximately $272,000 per year formerly[209] (before the transfer) collected from Illinois ratepayers. Staff opposes this and wants the Company to continue to fund it.[210]

The Company has presented substantial and competent evidence that there is no need to fund the $272,000.[211] The Staff has presented *no* evidence, compelling or otherwise, to the contrary.[212]

If the Company is going to contribute this $272,000 annually over the next 15 months, compliance with applicable Internal Revenue Service regulations will be required.[213] That would in effect require the Company, Staff and this Commission to consume valuable time and resources to, in effect, perform a full-blown triennial review *now*. Otherwise, the Company cannot contribute these sums to the tax-deductible qualified fund. The Company would have to set up, from scratch, a Missouri non-qualified fund to hold these funds,[214] and would not obtain the tax deduction this Commission has ordered the Company to obtain.[215]

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[208] Redhage Dir. at p. 10, l. 1-2; Redhage Sur. at p. 2, l. 15-21.
[209] Voytas Dir. at p. 3, l. 13-15; Tr. at p. 231, l. 15-24 (Testimony of Mr. Redhage).
[210] The Company will not collect the $272,000 after the transfer. Tr. at p. 231, 1. 15 to p. 232, 1. 8 (Testimony of Mr. Redhage).
[211] Redhage Sur. at p. 6, l. 12 to p. 9, l. 3, and Schedules 1-3 thereto.
[212] Staff has done no study of any kind on this issue. Tr. at p. 335, l. 23 to p. 336, l. 4 (Testimony of Mr. Bible).
[213] Redhage Sur. at p. 11, l. 9 to p. 12, l. 28 (e.g., The IRS "shall not provide a taxpayer [AmerenUE] with a schedule of ruling amounts [i.e. allow the deductibility of the contributions] unless *a public utility commission* [the MoPSC] . . . has . .. [determined the contributions are in cost of service – the $272,000 has not been determined to be in the Company's Missouri cost of service by this Commission] . . ." and "disclosed the after-tax return and any other assumptions and determinations used . . ." in establishing the amount that is in the cost of service (citing 26 CFR 1.468A-3(g)).
[214] Tr. at p. 230, l. 13-19 and p. 327, l. 23 to p. 329, l. 22 (Testimony of Mr. Redhage).
[215] See Tr. at p. 10, l. 18 to p. 11, l. 8 (indicating that the Company is required to maximize the tax deductibility of its contributions).

There simply is no detriment relating to the Company's request – a fact admitted by Staff.[216] If it turns out that the Company's current analysis is wrong, and that when analyses are done in September 2005, a little extra must be contributed post-September 2005 to "make-up" for not contributing $272,000 over the next 18 months or so, then this Commission can order it.

It is unfortunate that it is necessary to take up roughly two pages in this Brief to address this issue. The Company believes that the record in this case shows the Company's simple request that it not fund this $272,000 for the next 15 months was, and is, reasonable and sensible, will not harm ratepayers, and ought to be granted.[217] Further, there will be numerous triennial reviews after 2005 to ensure that an appropriate amount is being collected from ratepayers since AmerenUE's license to operate Callaway will continue until at least 2024.[218]

## F. TRANSMISSION.

Staff has raised a financial, not an operational,[219] issue arising from the transfer of the Illinois portion of the Company's transmission system to AmerenCIPS. The issue does not exist, at all, unless and until Ameren splits the combined AmerenUE/AmerenCIPS control area into two separate control areas.[220] Even if the control area is split, the existence of a detriment is speculative, as discussed below. But given that the Company has no intention to split the systems into two control areas, this issue by definition arises from nothing more than pure

[216] Mr. Bible, in response to Commissioner Clayton's questions, indicated that he did not believe that the nuclear decommissioning issue is a detriment relating to whether the transfer is detrimental to the public interest. Tr. at p. 345, l. 6-21 (Testimony of Mr. Bible).
[217] As previously indicated, the Company will, assuming no other unacceptable conditions are imposed, proceed with the transfer regardless of what the Commission decides on this issue.
[218] Ex. 59 at p. 11.
[219] Tr. at p. 1192, l. 1-14 (Testimony of Dr. Proctor).
[220] Tr. at p. 1139, l. 21-25 (Testimony of Mr. Bax); Tr. at p. 1163, l. 3 to p. 1164, l. 23 (Testimony of Dr. Proctor). Dr. Proctor attempted to argue that future changes to the JDA might somehow cause some financial impact even if one control area were maintained, but concedes that under the current JDA there would be no such impact and concedes that he is not aware of any intention on the part of the Company to change the JDA in a way that would lead to this concern being a reality. Id. He characterizes this concern about a JDA change as being "concerned about possibilities." Tr. at p. 1165, l. 3-6 (Testimony of Dr. Proctor).

speculation.[221] Furthermore, Dr. Proctor indicated during the hearings that if he got the transmission analysis information he believed should be done, these transmission issues may not be an issue at all.[222]

Dr. Proctor agrees the most likely scenario in the near future is that the Company's transmission system will be operated in one control area within the MISO.[223] As of the writing of this Brief, AmerenUE in fact has transferred functional control to the MISO via its contractual relationship with GridAmerica, as approved by this Commission in Case No. EO-2003-0271, and it is likely that AmerenUE will remain in the MISO in that fashion for at least the next five years.[224] And even if the control area is split, at least as long as AmerenUE is in the MISO, the Service Agreement approved as part of the Commission's Order in Case No. EO-2003-0271 ensures that this Commission continues to set the transmission component of the rates for the Company's Missouri retail customers.[225] It matters not whether an AmerenUE power plant (such as Venice) is connected to an AmerenUE line or to an AmerenCIPS line because in both cases, at least as long as AmerenUE is in the MISO, the transmission rate that is paid is the same.[226] Parenthetically, Staff could cite no instance where AmerenUE had been charged to use an AmerenCIPS transmission line.[227] Given the current and intended operation of the AmerenUE/AmerenCIPS transmission lines, there is no need for an AmerenUE plant to be

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[221] Tr. at p. 535, l. 2-16 (Testimony of Mr. Nelson); Tr. at p. 1122, l. 5-10 and l. 17-21 and p. 1127, l. 20 to p. 1128, l. 25 (Testimony of Mr. Pfeiffer). Company witness Edward C. Pfeiffer is Director of the Transmission Planning and Services Department of AFS. See also Tr. at p. 1729, l. 13-20 (Testimony of Mr. Nelson).
[222] Tr. at p. 1223, l. 2-11. Dr. Proctor now has that analysis -- both the Company's and his own. Both show substantial benefits relating to the transfer of the Illinois transmission assets to AmerenCIPS, this potential "transmission-related detriment" discussed by Dr. Proctor ought not exist at all, and in any event, is even more speculative.
[223] Tr. at p. 1251, l. 19 to p. 1252, l. 1 and p. 1168, l. 18 to p. 1169, l. 7 (Testimony of Dr. Proctor).
[224] Ex. 61 (approval for 5 years after control is transferred (until May 1, 2009)); Tr. at p. 1169, l. 2-12 (Testimony of Dr. Proctor).
[225] Tr. at p. 1170, l. 13 to p. 1171, l. 17 (Testimony of Dr. Proctor).
[226] Tr. at p. 1165, l. 7-16 and p. 1171, l. 18-25 (Testimony of Dr. Proctor).
[227] Tr. at p. 1159, l. 24 to p. 1160, l. 12 (Testimony of Dr. Proctor).

connected to an AmerenUE transmission line to avoid transmission charges.[228] After the transfer, the AmerenUE plants at issue will still remain in the Ameren control area.[229] AmerenUE can designate its power plants (or any other power plant) as a network resource for service to its load whether or not the plant is connected directly to an AmerenUE line.[230]

Staff's "concern" boils down to the following: (a) *if*, at some future point in time, the Company's transmission system is not part of the single, control area with AmerenCIPS; and (b) *if*, at some future point in time, even if (a) occurs, the Company is not in the MISO; and (c) *if*, at some future point in time (most likely not until after May 1, 2009), there are charges assessed for transactions originating in the MISO's footprint that "sink" in what would then be an AmerenUE-only control area, *then* there *might* be transmission charges which *might* be higher than they would have been if AmerenUE owned every transmission line to every plant from which AmerenUE obtains power and those charges *might* affect rates – in the future – probably not until at least 2010, or beyond. How likely is this?

There is a mere 20-25% probability that the *worst* possible scenario might occur.[231] What is this worst-case scenario? That perhaps, there *might or could be* transmission charges of *up to* $12 million or up to $13.8 million per year. How bad would that be? At worst, about 80 cents per month per electric customer.[232] That worst case scenario of course cannot happen unless (a), and (b), and (c) occur, plus this Commission would have to allow the financial impacts to flow through in rates.

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[228] Tr. at p. 1162, l. 5-10 (Testimony of Dr. Proctor).
[229] Tr. at p. 1162, l. 17-22 (Testimony of Dr. Proctor).
[230] Tr. at p. 1121, l. 18-24 (Testimony of Mr. Pfeiffer).
[231] Tr. at p. 1241, l. 13-16 and p. 1242, l. 1-4 (Testimony of Dr. Proctor).
[232] Tr. at p. 1193, l. 15-17 and p. 1203, l. 4-12 and p. 1234, l. 11 to p. 1235, l. 13 and p. 1243, at l. 13-14 (Testimony of Dr. Proctor).

Note that this "worst case scenario" is premised upon there being charges for transactions originating outside one control area and sinking in another – it is premised on there being pancaked transmission rates, or something similar thereto. Dr. Proctor agrees that the continuation of pancaked rates is contrary to FERC's RTO policies which are to eliminate pancaked transmission rates, and Dr. Proctor agrees that the very kind of financial impact he is concerned about would be a pancaked rate.[233] Dr. Proctor indicated he was not familiar with it, but indeed FERC has recently issued an order that would likely preclude the very kinds of charges (pancaked transmission charges) Dr. Proctor assumes would have to exist to cause his unlikely worst case scenario to occur at all.[234]

The proposed transfer results in transfer of legal title – ownership – of poles, wires, easements, and transmission substations – to AmerenCIPS.[235] Changing title does not affect the load carrying capability of the line.[236] It does not affect whether AmerenUE can designate a plant as a network resource, or what congestion charges may or may not be,[237] nor does it create constraints or overloads on the system.[238] It is further very likely that changing title will never have any effect on transmission costs at all, as discussed above. Changing title does accomplish one thing, however – as Dr. Proctor himself found. It reduces AmerenUE's Missouri revenue requirement on an annual basis by as much as $3 million to the benefit of Missouri.

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[233] Tr. at p. 1179, l. 7-23 (Testimony of Dr. Proctor). See also Tr. at p. 1729, l. 13-20 (Testimony of Mr. Nelson).
[234] Dr. Proctor indicated he had not read the FERC's recent Order in Docket No. EL02-111-004. Regardless, that Order will eliminate "through and out rates in those regions [within PJM and the MISO] by December 1, 2004, just over seven months from now. See Ex. 63, Order Accepting Agreement Establishing Going-Forward Principles and Procedures, and Extending Dates, issued by the FERC on March 19, 2004, at ¶¶ 1, 6.
[235] Staff did not dispute or attempt to dispute in any material way any of Mr. Pfeiffer's testimony. See Pfeiffer Sur. (Comm'n Exh. 13) at pages 1-7.
[236] Tr. at p. 1138, l. 10-25 (Testimony of Mr. Bax).
[237] Tr. at p. 1290, l. 10-16 (Testimony of Mr. Pfeiffer).
[238] Tr. at p. 1139, l. 4-9 (Testimony of Mr. Bax).

## IV. AG PROCESSING.

The record in this case reflects that the "detriments" that Staff or Public Counsel identify, and about which they *must* produce compelling evidence establishing that the detriments are direct and present and likely to occur, in fact are not direct, are not present, and are, at best, speculative. Staff and Public Counsel have, however, and no doubt will, argue that this Commission nonetheless must speculate about future rate impacts as a result of the Supreme Court's decision in State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n.[239] The Company previously addressed this issue in its Response to Staff's "list" of conditions, but for the Commission's convenience, the Company substantially repeats that discussion below.

### a. **AG Processing does not require that this Commission turn this case into a ratemaking review of speculative, unquantified, future cost or ratemaking issues.**

The issue in the AG Processing case was whether this Commission must decide a major issue at the very heart of the merger involved in that case – *Aquila's specific request*, as part of the merger plan *for which it sought specific Commission approval*, that the Commission approve recovery of a merger premium ($92 million) representing 34% of the total value of the merger ($270 million). Aquila therefore itself interjected a major ratemaking issue into its Section 393.190.1 case, which was an inherent element of the merger plan that Aquila put before the Commission for decision. The extent – the "cost" – of the large merger premium was therefore a known, specifically quantifiable (and in fact quantified) issue and it was part of the deal – it had to be considered. On the facts before it, the Supreme Court thus concluded that this known, quantified issue should have been considered by the Commission *in that case*.

According to the most recent information filed with the Commission regarding Aquila and St. Joseph Power & Light (who, as the Commission knows, was merged into Aquila),

[239] 120 S.W.3d 732 (Mo. banc 2003).

Aquila's total Missouri revenue requirement was approximately $360 million, and St. Joseph Power & Light's total Missouri revenue requirement was approximately $100 million. The merger premium that was an integral part of the merger itself therefore represented not just 34% of the value of the merger, but a full 20% of the combined revenue requirement for the merged companies. Not surprisingly, the Supreme Court found that the Commission ought to consider this quantified, known, central issue – that the Commission ought to consider a known merger premium in, of all places, a merger case involving a merger plan reflecting a merger premium.

According to the most recent information on file with this Commission (in fact using Staff's accounting schedules[240] and Mr. Weiss's Surrebuttal Testimony[241]), AmerenUE's combined electric and gas Missouri revenue requirement is in excess of $2 billion. AmerenUE is in a rate moratorium until 2006. The record is clear: there is no quantified, or quantifiable, central and essential issue before this Commission for determination. In short, AG Processing does not apply to speculative, future and unquantified issues, as this Commission has recently recognized in Missouri-American, supra, decided just a few months ago. In the Missouri-American case, decided after AG Processing, this Commission declined to determine, and decided it need not determine, the proper value of the assets being sold for ratemaking purposes (the proper value of which might range from only $53,150 to as much as $335,000). The Commission declined to determine that value for ratemaking purposes, even though the ultimate value could later affect rates, because there was not sufficient evidence before the Commission to allow it to make that determination. In its Report and Order in Missouri-American, this Commission stated as follows: "The Commission does not have sufficient evidence before it to determine if an acquisition premium exists." And, this Commission went on to state that by

[240] Ex. 75.

[241] Ex. 7, at p. 9, lines 9-10.

"considering the value of the assets in the context of a rate case [and not in this case], the Commission can be assured of considering all necessary factors in determining just and reasonable rates. The Commission will deny the request to set the rate base at the purchase price for ratemaking purposes."

In the Missouri-American case, this Commission considered the application of the AG Processing case and properly determined that it need not decide a future ratemaking issue because there was no ability to quantify the asset value based upon the evidence before it.

The Commission's decision in Missouri-American is consistent with AG Processing for the reasons given above. Whether a merger premium existed or what it might be was *not known* in Missouri-American. Both issues were speculative. Both the existence of a merger premium, and its amount, were *known* in AG Processing. Neither the "evidence" Staff has proffered in this case, nor Staff's arguments, tend to show (and certainly do not show by compelling evidence of record) any quantified, present, direct detriment that is likely to occur. That was not the case in AG Processing. There was no dispute about the size of the merger premium *at issue* in that case. When one considers the relative size of the merger premium in AG Processing compared to the revenue requirements of the companies involved, and compared to the cost of the merger itself, and when one takes into account the financial condition of Aquila, it is not at all surprising that the Supreme Court would hold that considering this large, quantified merger premium was a necessary and essential issue in *that* case. That is true in part because it is reasonable to conclude that there could have been an effect on service to be provided by Aquila to its newly acquired customers, given Aquila's financial condition, if recovery of the merger premium was not allowed in rates.

### b. Another recent case involving Aquila fails to support Staff's and Public Counsel's positions herein.

Public Counsel has cited another recent Commission decision, also involving Aquila, involving Aquila's request to pledge *all* of its Missouri assets to secure a $430 million loan.[242] Public Counsel asserts that the Aquila Asset Pledge Order authorizes this Commission to ignore the burden Public Counsel and Staff have under the law to establish by compelling evidence that a direct and present detriment sufficient to sink the transfer is likely to occur. The Aquila Asset Pledge Order provides no such authority.

In issuing the Aquila Asset Pledge Order, this Commission had before it a "financially unstable" utility that was already in "financial peril" as a result of its unregulated operations.[243] This Commission specifically found, consistent with the standards enunciated in State ex rel. City of St. Louis, supra, that a pledge of Aquila's Missouri assets could impose a burden on Missouri ratepayers, which "could include a loss of service, since the loan agreement arguably allows the creditor to bypass the Commission, and immediately foreclose upon and sell the [utility] assets."[244]

Aquila came to this Commission for permission to pledge *all* of its Missouri assets in part to support unregulated operations because of Aquila's need, at one time, to pledge assets worth at least $417.5 million to secure a $430 million loan – *a specifically quantified risk* in the event Aquila defaulted. The linchpin of the Commission's determination that the particular permission Aquila sought was detrimental was twofold. First, because of the risk of foreclosure and, frankly, because of Aquila's "financially unstable" condition, there was a clearly quantified detriment to consider – the foreclosure of *$430 million* of Missouri utility assets. Second, the

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242 In re Aquila, Inc., Case No. EF-2003-0465 (Report and Order issued Feb. 24, 2004, 2004 Mo. PSC LEXIS 238) (the "Aquila Asset Pledge Order").
243 Id.
244 Id.

very reason Aquila cited in support of its request to pledge its Missouri assets *no longer existed* when it came time to decide the case because, by then, Aquila had already pledged *other* assets in other states to secure the loan.[245] Thus, Aquila had already qualified for the loan (which in part was sought to avoid having to pay a penalty associated with the pay-off of another loan secured by unregulated Canadian assets Aquila desired to sell) and there was no need to risk foreclosure of $430 million of utility assets.[246] On those facts, the Commission determined a detriment existed that precluded the asset pledge.

AG Processing and the Aquila Asset Pledge Order both involve Aquila, and both involve a quantified, concrete and quite substantial, particularly for Aquila, risk that, if the risk arose, was likely to affect Aquila's ability to provide service. This is because Aquila's financial condition could have put this Commission in the position of either forcing ratepayers to bear whatever financial impact may result, or exposing Missouri ratepayers to a loss of service, or at least a lower quality of service. Those decisions are therefore reconcilable with the purpose of Section 393.190.1: to ensure that a transfer does not negatively impact the utility's ability to provide adequate and reliable service. The considerations at work in cases involving Aquila are simply not at issue in cases involving the Company.

At bottom, AG Processing is simply a reaffirmation of the standards set 70 years ago by the Supreme Court in State ex rel. City of St. Louis.[247] The issue in a Section 393.190.1 case was and is: has the utility made a prima facie case that the asset transfer will not negatively impact its ability to provide adequate utility service; and if so, have opponents presented *compelling* evidence that a *direct* and *present* detriment is *likely* to occur? The future possibility

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[245] Id.
[246] Id.
[247] It is noteworthy that the Supreme Court cites State ex rel. City of St. Louis in its opinion in AG Processing, including a citation to the standard set forth in State ex rel. City of St. Louis as discussed above.

that *no more than* 6% of costs that were formerly allocated to Illinois customers, in the context of a Missouri cost of service that is in excess of $2 billion for a *financially strong utility,* is not a direct or present detriment. That is particularly true when that financially strong utility is in a rate moratorium that does not end until more than two years from now.

## CONCLUSION

While, unfortunately, the size of the record in this case suggests otherwise, the Company continues to believe that the proposal the Company has made by seeking permission to transfer these Illinois assets is rather simple. As the Company has indicated in previous filings, what this Commission must decide is:

- Does Missouri want the benefit of low-cost, Company-owned, base load generation and, if the Commission believes it necessary, an amendment to the JDA that substantially enhances the benefits of the transfer, or does it not want those benefits;

- Should the Commission properly recognize that the Company is entitled to make decisions with regard to the disposition of its property and that it should not be deprived of its right to make those decisions based upon future, speculative costs, and possible ratemaking impacts; and

- Will the Commission allow Staff to extract a ransom from the Company in connection with the Company's request in this case in the form of JDA amendments having nothing to do with this case, record-access requirements, also having nothing to do with this case, and conditions relating to decisions on power contracts that do not expire until the end of 2005, also having nothing to do with this case?

The Company is confident that it has, under the law and the facts, established that the proposed transfer is in fact not detrimental to the public interest as required by law. The Company is similarly confident that this Commission will do its duty under the law and will decide this case based upon facts backed up by substantial and competent evidence of record, not based on speculation. The Company respectfully requests that the Commission therefore issue its order approving the Illinois asset transfer as requested by the Company's Application in this case.[248]

Dated: May 18, 2004.

Respectfully Submitted,

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[248] As the record in this case reflects, the Company is not requesting "ratemaking approval" of the transfer. Tr. at p. 290, l. 1-12; Tr. at p. 1696, l. 12-15 (Testimony of Mr. Nelson). Subject to that qualification, the Company requests that the Commission's order include those items provided for in the prayer for relief in the Company's Application; provided that there is no need for item (l) if the Company is not required to contribute the approximately $272,000 formerly collected from Illinois customers to the Callaway nuclear decommissioning fund, or if the Company otherwise is required to contribute that sum to a non-qualified nuclear decommissioning fund that, as discussed above, would have to be created for Missouri. Items (c) and (e) are also unnecessary if, as the Company argues, the Commission determines that the affiliate transaction rules do not apply to this transaction.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the following parties of record by e-mail this 18th day of May, 2004, at the e-mail addresses set forth below:

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