BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filings of Union Electric Company d/b/a Ameren Missouri, to Increase Its Revenues for Retail Electric Service.	)))	File No. ER-2011-0028

POST-HEARING REPLY BRIEF OF AMEREN MISSOURI

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I. RETURN ON EQUITY

Union Electric Company d/b/a Ameren Missouri (Ameren Missouri or Company) has shown that a return on equity (ROE) of at least 10.4 percent is required to fairly compensate current investors and attract future investment. An honest look at the work product underlying the ROE recommendations of the Missouri Industrial Energy Consumers (MIEC) and the Missouri Energy Group (MEG) (as opposed to the recommendations themselves) verifies this estimate, as does the national average ROE of 10.30 percent. On the other hand, the Missouri Public Service Commission Staff's (Staff) recommendation of 8.75 percent wholly ignores investor requirements. It is of no concern to Staff that adopting Staff witness David Murray's recommended ROE would devastate shareholders and signal to the investment community that capital investment is not welcome in Missouri. Rational investors would pack their bags for states such as Iowa, Illinois and Minnesota, where regulators have recently authorized returns of 10.44 percent, 10.5 percent and 10.74 percent, respectively.

Between the lowest return that is not confiscatory and the highest that is not inordinate, there is a rather wide zone in which a return may be reasonable under some circumstances and not under others. The witnesses obviously differ over what this zone should be in this case, and what number within that zone represents an appropriate ROE. Staff does not provide meaningful information to assist the Missouri Public Service Commission (Commission) in reconciling these competing recommendations. The Commission should start this process by examining the overlap between the high end of MEG witness Billie Sue LaConte's range (10.6 percent) and the low end of Ameren Missouri witness Robert Hevert's range (10.4 percent). Then there is the high end of MIEC witness Michael Gorman's range, 10 percent. As explained in the Company's Initial Brief, the high end of Mr. Gorman's range is skewed by his Sustainable Growth

Discounted Cash Flow (DCF) and by giving 50 percent weight to his Capital Asset Pricing Model (CAPM).[1] His 10.5 percent Constant Growth DCF[2] is squarely within the overlap between Mr. Hevert and Ms. LaConte. Averaging his Constant Growth and Multi-Stage DCF returns would lower the high end of his range to 10.3 percent – still close to the other witnesses and equal to the national average for the past 12 months.[3]

The Multi-Stage DCF approach is not the only method for estimating ROE, but the Commission has expressed a preference for this approach and the witnesses in this proceeding give greater weight to it.[4] The gap between Mr. Gorman and Mr. Hevert's Multi-Stage DCF analyses is largely explained by one factor: the appropriate measure of GDP growth. Both witnesses use expected growth in Gross Domestic Product (GDP) as a proxy for long-term (final stage) growth in their Multi-Stage models. Mr. Hevert relies on public data to calculate long-term GDP growth of 5.65 percent. Mr. Gorman relies on data that does not match the final stage of his model to assume long-term GDP growth of 4.9 percent. Mr. Hevert performed several analyses using a growth rate of 5.275 percent, the midpoint of his calculation of long-term GDP growth and Mr. Gorman's.[5] (Notably, this midpoint is not much higher than analysts' 10 year forecast of 5.1 percent and Mr. Gorman's own average sustainable growth calculation of 5.08 percent.) Using a midpoint growth rate of 5.275 percent would increase MIEC's Multi-Stage DCF return from 10.16 to 10.53 percent.[6]

In evaluating the competing ROE recommendations presented to the Commission, it is important to look beyond the wrapping and examine what's in the box. Mr. Gorman and Ms. LaConte performed analyses that corroborate Mr. Hevert's recommendation. Instead of

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[1] Ameren Missouri's Initial Brief, pp. 21-24.
[2] Ex. 409, p. 18, Tbl. 1 (Gorman Surrebuttal).
[3] Ameren Missouri's Initial Brief, pp. 27, 44.
[4] *Id.*, p. 12.
[5] *Id.*, pp. 28-29.
[6] *Id.*, p. 29, n.137.

addressing their analyses candidly, they use a variety of averaging tricks to try to support lower recommendations than their own work indicates. An honest look at all of the evidence supports an authorized ROE of at least 10.4 percent.

A. The MIEC and MEG analyses do not support their ROE recommendations.

Missouri utilities compete with utilities in every other jurisdiction for a limited supply of investor capital. Ameren Missouri is a riskier investment. Riskier investments require higher returns. Integrated electric utilities, electric utilities relying on coal-fired generation, utilities whose comparable risks, whatever they may be, are relatively higher must be able to properly compensate investors for taking on that greater risk. If not, not only will current investors flee to other utilities (or other industries); future investors will never come.

Since the global recession all but a handful of authorized ROEs for electric utilities nationwide have exceeded 10 percent.[7] Indeed, as discussed below, every single recent electric ROE award in Midwestern states surrounding Missouri has met or exceeded 10 percent – many well in excess. Against that backdrop, Mr. Gorman and Ms. LaConte recommend much lower ROEs. This is not a mere coincidence. Nor is it the product of reliable methods reasonably applied. Their ROEs are artificially depressed; their attacks on Mr. Hevert's analyses disingenuous and self-serving.[8] An ROE below 10.4 percent is unreasonable. Any ROE below 10 percent is extremely rare. Investors do not expect that. And investors will not entertain it.

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[7] *Id.*, p. 18.

[8] Likewise, the Office of Public Counsel (OPC) claims that "the Commission should not be swayed by arguments that inflated rates of return will allow Ameren Missouri to attract capital at some always-unquantified discount, or that dropping below the fateful 10.00% return on equity mark will make investors swoon. So long as Ameren Missouri can pay its bills and so long as investors are willing to invest, all questions are at an end so far as the investor interest is concerned." OPC's Initial Brief, p. 7. OPC makes this claim, despite the fact that the Commission adopted the 10.1 ROE recommendation of OPC's own witness less than a year ago. *Re Union Electric Co. d/b/a AmerenUE*, Case No. ER-2010-0036, *Order and Report* (May 28, 2010) p. 23. Putting aside the fact that OPC did not provide any analysis in this proceeding concerning what a reasonable return would be, OPC's unsupported prediction that investors will not "swoon" at an ROE of less than 10 percent is completely short-sighted and fails to account for the fact that the national average of ROEs in the last 12 months is well above 10 percent.

MEG notes that Ms. LaConte's recommended ROE range is "nearly identical" to that of Mr. Gorman.[9] If only that was a recognized test of reasonableness. Two wrongs do not make a right. Both Mr. Gorman and Ms. LaConte's contrived midpoints are unjustifiably low – the result of flawed assumptions and improper weighting.[10] They fall below Mr. Hevert's lowest reasonable ROE for Ameren Missouri of 10.4 percent. They fall below the national average of 10.3 percent.[11] They fall below the neighboring average of 10.23 percent.[12] They fall below the 10.1 percent Ameren Missouri received in its last rate case.[13] They even fall below the 10 percent threshold set forth in the Commission's most recent electric rate case.[14] Indeed, they fall below every ROE authorized by the Commission for electric utilities in the past 10 years.[15]

MIEC claims that all four ROE experts "relied on essentially the same methodologies."[16] Staff similarly claims that all experts used "much the same methods."[17] But the devil is in the details. And the details glossed over here by the other parties are the differences in techniques and approaches that explain why Ms. LaConte and Mr. Gorman's recommended midpoints fall unreasonably below Mr. Hevert's range, and even below 10 percent. The parties would like the debate to be all about what growth rates are used (and that is an important distinction).[18] But differences in growth rates are not the only factor driving down MEG and MIEC's ROE recommendations below 10 percent. If it were all about inputs, then neither Ms. LaConte nor

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[9] MEG's Initial Brief, p. 2.
[10] *See generally* Ameren Missouri's Initial Brief, pp. 20-32.
[11] *Id.*, p. 18.
[12] *Id*.
[13] *Re Union Electric Co. d/b/a AmerenUE*, Case No. ER-2010-0036, *Order and Report* (May 28, 2010) p. 23.
[14] *Re Kansas City Power & Light (KCPL)*, Case No. ER-2010-0355 (Apr. 12, 2011).
[15] In the past ten years, the Commission has authorized an ROE of 10 percent twice for electric companies. *Re Kansas City Power & Light*, Case No. ER-2010-0355 (Apr. 12, 2011); *Re Empire District Electric Co. (Empire)*, Case No. ER-2001-299 (Sept. 20, 2001). Every other ROE authorized for electric companies during that period has exceeded 10 percent.
[16] MIEC's Initial Brief, p. 6.
[17] Staff's Initial Brief, p. 57.
[18] Staff's Initial Brief, pp. 57-58; MIEC's Initial Brief, p. 6.

Mr. Gorman would have any DCF estimates above 10 percent. But all of their Constant Growth and Multi-Stage DCF estimates *exceed* 10 percent.[19]

Ameren Missouri's Initial Brief sets forth the three major flaws in Mr. Gorman's results and will not be repeated in detail here.[20] Suffice it to say, each flaw is a difference in technique or approach that serves to artificially depress his ROE estimates. Through creative averaging, Mr. Gorman gives insufficient weight to the Commission-preferred DCF results and overweighs CAPM estimates he admits are problematic.[21] None of his DCF results fall within his range, and he waters down his Constant Growth and Multi-Stage DCF results with Sustainable Growth results that conveniently go down on surrebuttal, while the rest of his ROE estimates go up. Indeed, that Mr. Gorman uses his Sustainable Growth at all, with its faulty assumptions, is a major difference in methods that artificially drives down his range.[22] The end result is an ROE range whose ceiling is arbitrarily capped at 10 percent (below both his Multi-Stage and Constant Growth DCF results) and whose floor is set by unreliable CAPM estimates. And while it is acceptable to use long-term GDP growth as the final stage growth rate in a Multi-Stage DCF, Mr. Gorman has not determined long-term GDP correctly.[23]

MIEC suggests that Mr. Hevert's DCF results should be rejected as "overstated."[24] His growth rates for his Constant Growth model supposedly are "too high to be sustainable over a long-term period."[25] His Multi-Stage growth rates apparently should be ignored because they "exceed reasonable estimates of long-term GDP growth."[26] But MIEC fails to offer any evidence to support these assertions, other than Mr. Gorman saying it is so. That Mr. Hevert's

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[19] Ex. 409, p. 18, Table 1; Ex. 452, p. 7, Table 1 (LaConte Surrebuttal).
[20] *See generally* Ameren Missouri's Initial Brief, pp. 20-29.
[21] *Id.*, pp. 21-24.
[22] *Id.*, pp. 24-27.
[23] *Id.*, pp. 27-29.
[24] MIEC's Initial Brief, p. 7.
[25] *Id.*, p. 11.
[26] *Id.*, p. 12.

growth rates may surpass Mr. Gorman's estimates of 10-year GDP growth or Mr. Gorman's estimates of what he thinks long-term "Sustainable Growth" should be, however, does not prove that Mr. Hevert's growth rates are unsustainable or excessive. Mr. Gorman's predictions should not be considered a more accurate approximation of long-term growth than rates based on observable market information.

MIEC's criticisms fail to hold water in light of the analyses (and bias) of its own expert. MIEC claims, without proof, that the growth rate of 4.36 percent was "the only growth rate used by Mr. Hevert which is a reasonable estimate of long-term sustainable growth."[27] Meanwhile, its own expert, Mr. Gorman, uses a median sustainable growth rate of 4.55 percent, and calculates an average sustainable growth rate of 5.08 percent.[28] MIEC also contends that Mr. Hevert's Multi-Stage DCF models relied on a GDP growth rate that "substantially exceeds market participants' outlooks for future GDP growth."[29] But contrary to MIEC's assertion, Mr. Hevert did not rely "on only historical data to derive an estimate of future GDP growth."[30] Mr. Hevert's long-term growth rate of 5.65 percent (not 5.75 percent) is based on publicly available data and specifically incorporated market-derived measures of expected inflation.[31] Thus, Mr. Hevert's terminal stage growth rate is calculated to reflect expectations of *investors*, who actually are active "market participants," not the expectations of *economists*. Mr. Gorman, on the other hand, relies on projected future real GDP growth by consensus "analysts" (or his own view of long-term sustainable growth) in his models, while rejecting as overstated consensus analysts' earnings growth projections. Some consensus analysts' projections are apparently more equal than others.

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[27] *Id.*, p. 13.
[28] Ex. 409, Schedule MPG-SR7.
[29] MIEC's Initial Brief, p. 13.
[30] *Id*.
[31] Ameren Missouri's Initial Brief, p. 15, n. 44-45.

As for Ms. LaConte's approach, her newfound faith in the relevance of her CAPM estimates lacks justification, if not credibility.[32] If her CAPM results were nothing but a check on reasonableness before, it defies logic why suddenly now they support lowering the bottom of her estimated ROE range. Nor can Ms. LaConte justify this eleventh hour change in her techniques by wrapping her results in pronouncements of law that are anything but new. No one disputes that various approaches can be considered and relied upon to estimate a utility's required return.[33] Nor does anyone dispute that, under certain market conditions (not present here), the CAPM model results can be given weight in determining the ROE.[34] Including her CAPM estimates provides neither "a good approximation of the return on equity" nor "further balance to the DCF and Risk Premium methods and results."[35] The Commission already has recognized the model's potentially questionable underlying assumptions.[36] Even Mr. Gorman acknowledges that relying on CAPM model results at this time is questionable.[37] The only purpose it serves is to artificially lower her ROE range to fall in line with that of Mr. Gorman.

Putting aside differences in growth rates and other assumptions and inputs, giving appropriate weight to the MEG and MIEC's experts' methods and estimates produces ROEs closer to Mr. Hevert's recommended range, and certainly above 10 percent.[38] The simple average of Mr. Gorman's Constant Growth and Multi-Stage DCF estimates results in a midpoint ROE of 10.3 percent.[39] Including the high end of his CAPM results as his lowest reasonable return still produces a midpoint ROE of 10.15 percent – approximately equal to the results of his

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[32] *Id.*, pp. 30-32.
[33] *Id.*, p. 10.
[34] *See generally* Ex. 121, pp. 33-35 (Hevert Direct).
[35] MEG's Initial Brief, p. 2.
[36] *Re: Kansas City Power & Light Co.*, Case No. ER-2007-0291, *Report and Order* (Dec. 6, 2007) p. 15 (the CAPM model is "not used in many regulatory jurisdictions because of the additional data requirements and potentially questionable underlying assumptions").
[37] Ameren Missouri's Initial Brief, pp. 24-25, n. 104.
[38] *Id.*, pp. 29, 32.
[39] Ex. 409, p. 18, Table 1.

Multi-Stage DCF, even before correcting it to reflect appropriate long-term GDP growth.[40] Similarly, Ms. LaConte's original recommended midpoint (before she depressed it with her CAPM estimates) is 10.2 percent. And her range (even with her CAPM estimates) still exceeds the low end of Mr. Hevert's range by 20 basis points.[41] Simply averaging the three experts' Multi-Stage DCF estimates indicates an ROE of 10.5 percent – a full 50 basis points above the high end of Mr. Gorman and Ms. LaConte's recommended range.[42]

Both Mr. Gorman's and Ms. LaConte's final ROE recommendations are intentionally and unreasonably low. The Commission should adopt neither. As explained by Mr. Hevert, the authorized ROE for Ameren Missouri should be 10.70 percent, and no less than 10.40 percent.

B. The Commission should not entertain Staff's unnecessary and dangerous "new paradigm" experiment.

Insanity, it has been said, is doing the same thing over and over and expecting a different result. Mr. Murray has repeatedly testified that ROEs authorized by state utility commissions are unreasonably high compared to what is done in the "real world."[43] In this case, Staff points to valuations performed for a goodwill impairment test and a valuation of generating assets. In the last case Staff also pointed to valuations performed by pension funds. Enough is enough. Either Mr. Murray is right and every other ROE witness and state commission is wrong, or Mr. Murray's recommendation is not the product of mainstream thought. The Commission can draw its own conclusion, but Staff's own brief points to the latter.

Staff acknowledges that investors, not witnesses, drive the cost of equity.[44] But to suggest that "asset valuators" also drive the cost of equity represents a fundamental

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[40] Ameren Missouri's Initial Brief, p. 22.
[41] *Id.*, p. 32.
[42] Ex. 123, p. 3 (Hevert Surrebuttal) (10.97 percent); Ex. 409, p. 18, Table 1 (10.16 percent); Ex. 452, p. 7, Table 1 (10.38 percent).
[43] Ameren Missouri's Initial Brief, p. 32, n. 156; p. 39, n. 198.
[44] Staff's Initial Brief, p.56.

misunderstanding of mainstream ROE analysis.[45] Staff points to "independent valuation analyses" that are "strikingly different" from the ROE estimates provided by the mainstream witnesses in this case.[46] Staff does not come right out and say that the Commission should rely on these valuations; it merely suggests that this information "should be considered by the Commission."[47]

The easy answer to the question of why the valuations cited by Mr. Murray reflect lower returns on equity estimates is because the valuations were performed in a different context and for different purposes. None were prepared for the purpose of estimating the current investor required ROE.[48] The 2009 board presentation summarizing Lazard & Associates valuation of Ameren's generation assets was prepared for Ameren's Board of Directors for the purpose of valuing generation assets.[49] The Duff & Phelps report was prepared to test for goodwill impairment.[50] Neither report is publicly available.[51] And the reports from UBS and Goldman Sachs provided stock price targets for Ameren Corp.[52] The task in this case is to estimate a required return to adequately compensate investors and attract future investment – not to estimate future stock prices for Ameren Corp. or determine the fair value of individual assets or business units.

Recognizing that mainstream thought does not support its recommendation, Staff urges this Commission to embrace a "new paradigm" and radically change its approach to establishing authorized ROEs. Under the "new paradigm," "the commission's return-setting analysis [w]ould

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Staff's statement that all witnesses agree that the same methods are used to value assets and ROE is wrong. Staff's Initial Brief, p. 66. Mr. Hevert, Mr. Gorman and Ms. LaConte all testified otherwise. *See* Ameren Missouri's Initial Brief, pp. 41-42.
[49] Ex. 220, Schedule 1-3 HC (Murray Surrebuttal); Ameren Missouri's Initial Brief, pp. 40-41.
[50] Ameren Missouri's Initial Brief, pp. 40-41.
[51] *Id.*, pp. 39, 42.
[52] *Id.*, pp. 36-38.

by keyed off the lowest reasonable rate rather than, as it has been, the average of recently awarded returns."[53] What Staff characterizes as a "flawed" and "arbitrary" zone of reasonableness would be disregarded.[54] The Commission would simply pick the "lowest reasonable rate." No judgment would be required to decide what is "reasonable." The lowest ROE recommended in the case would automatically be deemed the "lowest reasonable rate," and the ROE the Commission would authorize.[55]

The notion that a "new paradigm" is needed is based on the flawed assumption that the Commission *must* authorize an ROE within a zone of reasonableness based on recent average ROEs. It does not. The zone of reasonableness is a screening tool, a "sanity check," if you will. *Hope* effectively requires state commission's to consider a zone of reasonableness, with confiscation being the floor and excess profits the ceiling.[56] This Commission's zone of reasonableness defines the floor and ceiling by reference to recent ROEs authorized in other jurisdictions. Any zone is necessarily subject to criticism as being "arbitrary,"[57] but a 200 bps zone of reasonableness casts a broad net. The zone of reasonableness thus calls attention to recommendations that fall outside the mainstream, and signals to the Commission that closer scrutiny is needed. There may be rare cases where a recommendation above or below the zone is reasonable, but these are few and far between. If the Commission encounters such a case, it may

[53] Staff's Initial Brief, p. 62.
[54] *Id.*, p. 60.
[55] Taking a similar short-sighted approach, OPC quotes *Federal Power Commission v. Natural Gas Pipeline Co.* for the proposition that "[I]f the rate permits the company to operate successfully and to attract capital all questions as to 'just and reasonable' are at an end so far as the investor interest is concerned. OPC's Initial Brief, p. 7 (*quoting* 315 U.S. 575, 606-607 (U.S. 1942).) Exactly. A rate cannot be just and reasonable if it does not include a return that meets investor expectations and adequately attracts the capital necessary to run the utility. Authorizing a return lower than the overwhelming majority of returns allowed in every other jurisdiction serves no one's interest, not the investor looking to invest, not the utility needing the investment, and not the consumer relying on the utility for safe, adequate and reliable service.
[56] *Hope*, 320 U.S. at 603
[57] Staff's Initial Brief, pp. 60-61.

authorize an ROE outside the zone.[58] The only witness in this proceeding who believes that an ROE outside the zone would be reasonable is Mr. Murray. To adopt Mr. Murray's recommendation, the Commission would have to disregard the testimony and evidence of every other ROE witness.

It is also not true that the zone of reasonableness "pulls the ROE in any case toward the average."[59] Recent authorized ROEs in Missouri have been below the national average; in some cases well below.[60] And even if the Commission authorized ROEs at or above the national average, Staff does not explain why this would be a bad thing. The Company is entitled to earn a return comparable to other utilities with similar risks.[61] The Commission cannot know whether its authorized returns are comparable without examining returns authorized in other jurisdictions.

Ultimately, Staff's "new paradigm" is a solution in search of a problem. Even Staff recognizes that "the Commission's Zone of Reasonableness analysis has been upheld in the face of every challenge by zealous counsel."[62] If the Commission wishes to experiment with a "new paradigm," it should consider authorizing an ROE at or *above* recent averages in order to

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[58] *Re: Kansas City Power & Light Company*, Case No. ER-2010-0355, *Report and Order* (Apr. 12, 2011) p. 123. ("[The zone] should not be taken as an absolute rule that would preclude consideration of recommendations that fall outside that zone.").
[59] Staff's Initial Brief, p. 60.
[60] *Re Union Electric Co., d/b/a AmerenUE*, Case No. ER-2010-0036, *Report and Order* (May 28, 2010) p. 122, 124 (10.59% average / 10.1% allowed.); *Re Union Electric Co., d/b/a AmerenUE*, Case No. ER-2007-002, *Report and Order* (May 22, 2007) p. 38, 44 (10.36% average / 10.2% allowed); *Re: Aquila, Inc. d/b/a Aquila Networks*, Case No. ER-2007-0004, *Report and Order* (May 17, 2007) (May 17, 2007) p. 56, 64 (10.36 average / 10.25% allowed).
[61] *Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944).
[62] Staff's Initial Brief, p. 61 (emphasis added). S*ee also State ex rel. Praxair, Inc. v. Public Service Comm'n,* 328 S.W.2d 329, 340-41 (Mo. App., W.D. 2010) (Appellate Court denied Office of Public Counsel's challenge to the Commission's zone of reasonableness method to determine Empire's ROE); *State ex rel. Public Counsel v. Public Service Comm'n*, 274 S.W.3d 569, 574 (Mo. App., W.D. 2010) (Ameren Missouri contended on appeal that the zone of reasonableness did not apply to its rate request. Rather, the rate should have been set on the average. The Court upheld the Commission's use of the zone.).

determine whether this will mitigate the need for frequent rate filings.[63]

Staff's attempt to distill the point at which an authorized ROE becomes confiscatory and unlawful is an exercise in futility. It is like trying to define obscenity – the courts know it when they see it.[64] And no attempt is made to define the point of excessive profit.[65] If we assume that Staff is correct – that an ROE of 8.75 percent would survive Constitutional scrutiny (a point the Company by no means concedes) – this does not answer the question of whether the Commission, as a quasi-legislative body, should establish a policy of authorizing ROEs that are just a hair above confiscation. The consequences of such a policy deserve serious consideration.

If the Commission wishes to establish a policy to chase investment capital out of Missouri, it should adopt Mr. Murray's recommendation. The map below shows the most recent ROE authorized for an electric utility in neighboring states:

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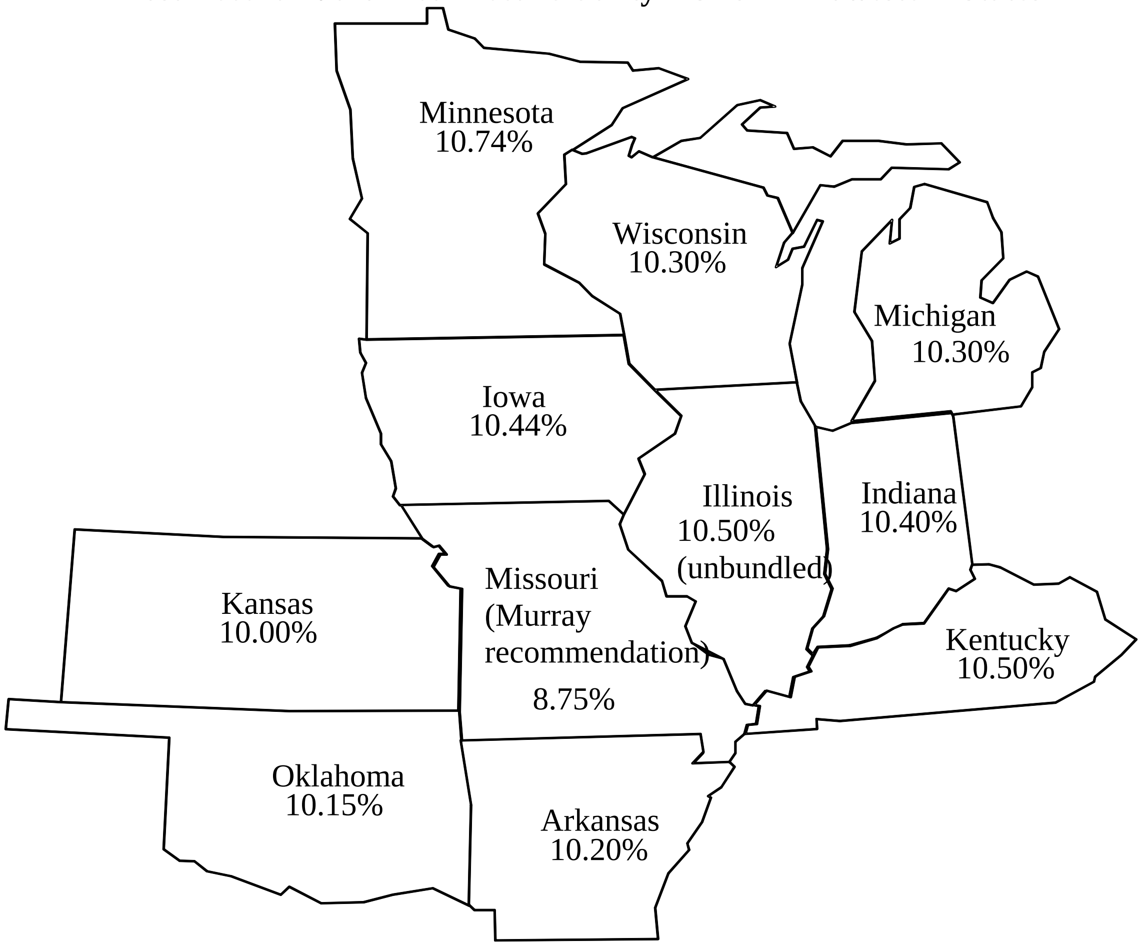
[63] Numerous parties complain about the fact that this is Ameren Missouri's fourth rate case in four years. *See, e.g.*, MIEC's Initial Brief, p.1. MIEC says that these rate increases have been "severe" and resulted in "job loss and lost purchasing power of residential customers." *Id.*, pp. 2-3. MIEC does not represent the interests of residential customers and has not provided a shred of evidence that rate increases have resulted in job losses or lost purchasing power. To the contrary, MIEC admits that Ameren Missouri's rates are at or below average compared to the 25 to 30 jurisdictions in which its expert regularly testifies. Ameren Missouri's Initial Brief, p. 9, n. 11.

[64] *Jacobellis v. Ohio* (1064), 378 U.S. 184, 197 (Justice Stewart, concurring).

[65] All that Staff has to say is, "The top of the zone is less clear; certainly, Staff believes that Mr. Hevert's recommended rate is above the top of the zone of discretion." Staff's Initial Brief, p. 63.

Most Recent Authorized Electric Utility ROEs in Midwestern States[66]



All of these ROEs were authorized in 2010 or 2011. None were below 10 percent, let alone 9 percent. No rational investor would commit capital to Missouri where better returns are available elsewhere. Mr. Murray concedes that adopting his recommendation of 8.75 percent would instantly decrease the value of Ameren Corp. stock.[67] The Company would collect over a $100 million less in annual revenue compared to Mr. Hevert's recommended ROE. Credit

[66] Data is based on the following orders: *Entergy Arkansas Inc.*, D-09-084-U (May 28, 2010); *Commonwealth Edison Co.*, D-10-0467 (May 24, 2011); *Southern Indiana Gas & Elec. Co.*, Ca-43839 (Apr. 27, 2011) ; *Interstate Power & Light Co*., D-RPU-2010-0001 (Dec. 15, 2010); *Kansas City Power & Light*, D-10-KCPE-415-RTS (Nov. 22, 2010); *Kentucky Power Co*., C-2009-00459 (June 28, 2010) ;*Upper Peninsula Power Co.*, C-U-16166 (Dec. 21, 2010) ; *Otter Tail Power Co.*, D-E-017/GR-10-239 (Apr. 25, 2011); *Public Service Co. of OK*, Ca-PUD201000050 (Jan. 5, 2011); *Wisconsin Public Service Corp*., D-6690-UR-120 (Jan. 13, 2011) (10.3). All ROE awards, except for ComEd, are for integrated electric utilities. No recent ROE awards for electric utilities have been authorized in South Dakota, Nebraska or Tennessee. For Missouri, Staff's midpoint ROE is shown.

[67] Ameren Missouri's Initial Brief, p. 34.

metrics would deteriorate; borrowing costs would increase.[68] Instead of investing in Missouri, investors would invest in neighboring states, where authorized returns are up to 200 basis points higher than Mr. Murray's recommendation. Adopting Mr. Hevert's recommendation will not fully ameliorate Ameren Missouri's financial challenges.[69] But a severe reduction in available investment capital that would be caused by adopting an 8.75 percent ROE would make it even more difficult to secure financing for projects necessary to operate, maintain and improve the system. The Company's problems would become customers' problems as higher borrowing costs and an increasing (rather than decreasing) cost of equity are reflected in future rates.

Consider, too, what would likely happen as the "new paradigm" is applied to all Missouri utilities. Over time, Missouri utilities would somehow manage to fend off creditors and stay out of bankruptcy court, but would be forced to operate their systems at the razor's edge of safety and reliability. They would spend no more than absolutely necessary to meet bare minimum safety and reliability requirements. Discretionary projects would be deferred or canceled. It would take a safety or reliability crisis for ratepayers to recognize that they were sold a bill of goods. Massive investment would be required to bring utility systems back to the level of safety and reliability that customers expect and that energy-intensive businesses look for when deciding where to locate. This will not be cheap. And it will cost more to do these projects in the future than it does today. Many customers won't remember what they saved because utility rates were based on "barely legal" ROEs, but it will take them a long time to forget the rate shock hoisted

[68] *Id.*, p. 19.
[69] *See* Ex. 100, pp. 14-22 (Baxter Direct).

upon them to correct this flawed experiment. The Company does not think the "new paradigm" would be good policy, and neither should the Commission.[70]

Whether Ameren Missouri or any utility in this state must be driven virtually to the point of bankruptcy before the possibility of an unconstitutional taking can be considered is not a thought that this Commission need entertain. The Company is entitled to a return on equity "commensurate with returns on investments in other enterprises having corresponding risks…to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital."[71] An ROE that keeps the Company solvent – but no more – does not satisfy this standard and is not in anyone's best interests.

As explained in the Company's Initial Brief, the mainstream ROE witnesses all produced ROE estimates that coalesce around 10.4 percent. The record also supports Mr. Hevert's recommendation of 10.7 percent. The Commission should authorize an ROE within this range.

II. TAUM SAUK

OPC and AARP/CCM, the only parties to this case that recommend disallowance of the approximately $89 million in Taum Sauk construction costs that the Company has proposed to include in rate base, have provided absolutely no competent and substantial evidence to support their significant proposed disallowance. As the Company pointed out in its initial brief, the only witness to testify in opposition to the Company's recovery of this investment, OPC witness Ryan Kind, admitted that he did no individualized examination of the enhancements that Ameren

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[70] Consumers Council of Missouri (CCM) and AARP argue that "public testimony regarding economic impacts" of a potential rate increase should be considered when determining the Company's required return on equity. CCM's Initial Brief, pp. 3-4; AARP's Initial Brief, pp. 3-4. But these parties fail to explain why such "economic impact" testimony is relevant to determining the utility's cost of service, including the reasonable return thereon. CCM essentially argues for the Commission to ignore what costs are prudent and necessary and what return will attract capital to cover these costs. The utility is obligated to provide safe, adequate and reliable service for the areas it serves, not a level of service based solely on a particular consumer's ability to pay. The Company, however, continues to take proactive steps to reduce costs, launch efficiency programs and provide energy assistance programs to help consumers to manage their energy costs. *See generally* Ex. 100, pp. 22-25.

[71] *Hope*, 320 U.S. at 603.

Missouri identified, did no audit of the construction costs, and never even visited the Taum Sauk plant in connection with this case.[72] His testimony is nothing more than his personal view that the inclusion of any type of Taum Sauk-related costs in rates, even those associated with enhancing the facility by making it safer or more productive or longer lasting than it was prior to the dam failure, violated the Company's commitments to protect customers from the consequences of the dam's failure in 2005 and all such costs should be summarily disallowed.

A. The costs at issue in this case are "allowed costs" because they reflect the cost of enhancements.

Perhaps recognizing the weakness of Mr. Kind's position, in its initial brief OPC changed its primary argument. Now OPC primarily argues that the costs Ameren Missouri is seeking to recover are not "allowed costs" under the Consent Judgment Ameren Missouri entered into with the State of Missouri, the Missouri Department of Natural Resources (MDNR) and the Missouri Department of Conservation. Only as an after-thought does OPC's initial brief mention the argument it advanced in prefiled testimony and at the hearing—that inclusion of these costs would violate Ameren Missouri's commitment to its customers. Unfortunately for OPC, its new argument is as unsupported by the record in this case as its old argument was for numerous reasons.

First, as was mentioned in the Company's initial brief, the position OPC is now taking is the exact opposite of the position OPC attorney Lewis Mills took in his opening statement. Specifically, Mr. Mills admitted that he did not disagree that the capital investments that the Company was seeking to recover in this case constitute "allowed costs" under the Consent Judgment.[73] OPC's flip-flop on this key issue significantly diminishes the credibility of the

[72] Tr., p. 955, l. 5-11, 16-21.
[73] Tr., p. 57, l. 9-13.

argument it now advances and therefore, OPC's argument should be disregarded.[74]

Second, OPC's new position is inconsistent with any fair reading of the four corners of the Consent Judgment as a whole. Paragraph 2 of the Consent Judgment is the first place in the document where reconstruction of the upper reservoir is discussed. In that paragraph, the Consent Judgment specifies that reconstruction is to be done "according to all requirements of construction and licensing of all Federal and State regulatory agencies with jurisdiction over the rebuild." The immediately following paragraph, Paragraph 3, lists the three exclusions from the reconstruction costs which cannot be recovered, which are (1) enhancements, (2) costs incurred due to circumstances that are not reasonably foreseeable, and (3) costs that would have been incurred in the absence of the breach as allowed by law. Given that Paragraph 2 of the Consent Judgment specifies that reconstruction must be done according to state and federal standards, the "enhancements" that are excluded from those reconstruction costs in Paragraph 3 must be improvements over the old reservoir. If "enhancements" referred only to improvements beyond what was required by federal and state standards, there would be no need to exclude them from reconstruction in accordance with federal and state standards—they would already be excluded.

OPC is really asking the Commission to re-write the Consent Judgment to only allow a very limited subset of the enhancements to the upper reservoir—those beyond the requirements of federal and state standards. If the parties had intended the exclusion to be limited to that subset of enhancements, they could have, and should have specified that limitation in the

[74] While we believe that the meaning of "allowed costs" is unambiguously defined in the Consent Judgment, if it were found that the phrase is ambiguous such that the Commission has to make factual determination of what it means, Mr. Mills' admission entirely forecloses the OPC from making the argument that the costs are not allowed costs. This is because Mr. Mills' admission that the costs for which recovery are sought *are* "allowed costs" would be a judicial admission of that fact that would be binding on OPC. *See, e.g., Mills v. Redington*, 736 S.W.2d 522, 525 (Mo. App. E.D. 1987) (Judicial admissions are binding on the party in whose interest they are made); *DeArmon v. City of St. Louis*, 525 S.W.2d 795, 799 (Mo. App. St. L. 1975) (a clear, unequivocal admission of fact in an opening statement constitutes a judicial admission).

document. The document contains no such limitation however, and therefore the exclusion can only properly be read to encompass all enhancements to the upper reservoir.

Moreover, if OPC truly believed that the definition of "enhancements" was so limited, it should have provided evidence about what the minimum federal and state standards are, and which enhancements to the new upper reservoir exceed (or don't exceed) that threshold. The fact that OPC has not bothered to provide any evidence at all regarding these issues suggests that even OPC doesn't seriously believe this is the appropriate standard under the Consent Judgment.[75]

In determining the rights and obligations under an unambiguous contract, the courts seek to effectuate the intent of the parties, and in considering contract language, the courts apply the plain and ordinary meaning of the words used in reference to what a person of average intelligence, knowledge and experience would deem reasonable.[76] In determining that plain meaning, courts look to the dictionary definition of the terms at issue.[77] The plain meaning of the term "enhancement" is "to increase or improve in value, quality, desirability, or attractiveness."[78] It is obvious that rebuilding the upper reservoir to current Federal and State standards does this, so if the baseline were minimum federal and state standards all of the costs associated with the "increase or improve[ment] in value, quality, desirability, or attractiveness" inherent in building a dam in 2007 versus a 1963 dam would already be ineligible for recovery by virtue of the first 41 words in paragraph 3 (before the parenthetical). However, the parties did not stop there. The parties specifically exempted from the prohibition in those first 41 words "enhancements." They didn't exempt "enhancements *beyond minimal Federal and State*

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[75] OPC witness Kind admitted that he did no analysis of whether the costs the Company is seeking to recover qualify as allowable costs under the Consent Judgment, and he did not address that issue at all in his testimony. Tr., p. 944, l. 18 to p. 945, l. 4.
[76] *Bailey v. Federated Mutual Ins. Co.*, 152 S.W.3d 355, 357 (Mo. App. W.D. 2004).
[77] *Id.*, p. 358.
[78] Merriam-Webster's Collegiate Dictionary.

standards. Rather, they exempted *all* enhancements. Why? Because they recognized that to the extent customers were getting an upper reservoir that was better – more valuable – than they had before, customers, as the beneficiaries thereof, ought to pay for those things from which they benefitted.

The OPC's interpretation entirely fails to give effect to the exemption for enhancements. However, applying the terms of the contract as written gives effect to all of its terms, and harmonizes them with one another, as basic rules that govern a court's interpretation of a contract requires.[79]

Third, if the Commission concludes that the meaning of "enhancements" in the contract *is* ambiguous, any doubt about its meaning is completely resolved by an examination of the actions and statements of the parties to the Consent Judgment. Indeed, the prime objective of a court in construing any contract is to ascertain and render effective the mutual intent of the contracting parties.[80] Where there is ambiguity in a contract that ambiguity can be resolved based on extrinsic evidence.[81]

None of the parties to the Consent Judgment have alleged in this proceeding or any other forum that Ameren Missouri violated the Consent Judgment by seeking recovery of the costs of enhancements to the new reservoir as compared to the features of the old reservoir. Indeed, Ameren Missouri, as one of the parties to the contract, has provided evidence of its intention in seeking recovery of costs for enhancements in the new reservoir as compared to the old. The lack of any allegation by another party to the Consent Judgment that what Ameren Missouri seeks in this case is violative of the contract is also evidence of the intent of the parties. Ameren Missouri provided prior written notice to each of the parties to the Consent Judgment that it was

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[79] *See, e.g., J.H. Berra Const. Co. v. Missouri Hwy. and Transp. Dept.*, 14 S.W.3d 276, 279 (Mo. App. W.D. 2000) (An interpretation in which a*ll* terms in a contract are given effect and meaning is preferred over one that does not).
[80] *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 852 (Mo. *banc* 1960).
[81] *Thomas,* 77 S.W.3d 53, 59 (Mo. App. E.D. 2002).

seeking "allowed costs" in this proceeding, met with senior representatives of each of the parties, and provided the parties a handout, included as part of Exhibit 158 which outlined some of the primary enhancements to the upper reservoir whose costs the Company would be seeking to recover. The handout provided to the parties to the Consent Judgment is reproduced below:

This handout clearly indicates that the enhancements to the upper reservoir that the Company would be seeking recovery of are enhancements that are a part of the new, reconstructed upper reservoir as compared to the *old upper reservoir*. Nonetheless, none of the parties to the Consent Judgment have ever alleged that Ameren Missouri was violating the Consent Judgment by seeking recovery of these costs. Indeed, these parties' conduct indicates that they agree that Ameren Missouri is not violating the Consent Judgment, which means that they must agree that the costs Ameren Missouri seeks in this case are "allowed costs" as that term is used in the Consent Judgment. "In its effort to reach that objective [to ascertain the parties' intent if a contract is ambiguous] the court may consider the relationship of the parties, the subject matter of the contract, usages of the business, the surrounding facts and circumstances attending the execution of the contract, *and the practical construction which the parties themselves have placed on the contract by their acts and conduct*" (emphasis added).[82] *See also Penney v. White*, 594 S.W.2d 632, 638 (Mo. App. W.D. 1980), and *Walter v. Walter*, 544 S.W.2d 271, 273 (Mo. App. K.C. 1976).[83]

MDNR, which is an intervenor in this case, never alleged that the Company was violating the terms of the Consent Judgment by seeking recovery of these costs. Most significantly, Jennifer Frazier, an attorney from the Attorney General's office who was personally involved in the Taum Sauk litigation that resulted in the Consent Judgment and who represents MDNR in this case stated in response to questions from Commissioner Kenney that (a) she was authorized to speak on behalf of the Attorney General's office; (b) the Attorney General's office did review Ameren Missouri's request for recovery of Taum Sauk costs in this case; (c) they also consulted with the Staff, the Office of the Public Counsel and MDNR with regard to this issue; (d) the Attorney General's office has "no evidence to believe that the request is inconsistent with or in violation of the consent judgment on record in Reynold's County;" and (e) after this rate case was filed the Attorney General did not object to closing the case in Reynold's County and did not seek to charge Ameren Missouri with contempt, which they would have done if they had

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[82] *Id.*

[83] We would also note that Consent Judgments are contracts and are interpreted as such even where the contract terms have been made a part of a court's decree. *See, e.g.*, *Harvey v. Harvey*, 325 S.W.3d 495, 496-97 (Mo. App. E.D. 2010).

believed Ameren Missouri was in violation of the Consent Judgment.[84] If the intent of those parties as to what the term "allowed costs" means was different than the meaning ascribed to it by Ameren Missouri, they would have sought to hold Ameren Missouri in contempt for violating the Consent Judgment, or they would have opposed Ameren Missouri's request for recovery of allowed costs in this case, or both.

The bottom line is that in this case the applicable extrinsic evidence (the actions and statements of the parties to the Consent Judgment) clearly indicate that the Taum Sauk costs that Ameren Missouri seeks to recover are "allowed costs" as contemplated by the Consent Judgment, and that the "enhancements" referenced in the Consent Judgment refer to enhancements to the old upper reservoir. Ameren Missouri is not in breach of the Consent Judgment as OPC alleges in its initial brief.[85]

It is also noteworthy that Staff, the only party that actually audited the Taum Sauk costs, agrees that these costs constitute enhancements to the reservoir and are properly recoverable. Staff's evidence also supports the fact that Ameren Missouri has not breached the Consent Judgment by seeking costs that are not "allowed costs."

B. The costs at issue in this case are also allowed costs because they would have been incurred absent the breach.

Aside from the issues regarding enhancements, OPC also argues that Ameren Missouri has failed to prove with 100% certainty that the costs it is proposing to include in rate base would have been incurred in the absence of the breach. OPC argues that the opinion of Ameren

[84] Tr., p. 2124, l. 1 to p. 2125, l. 8.

[85] OPC indicates that the Consent Judgment does not specify who is to determine whether costs are allowed costs. OPC's Initial Brief, p. 12. The Consent Judgment need not have contained any such specification, because the law itself makes such a specification. The Commission, who in the first instance resolves questions of law and who is also the trier of fact, has the authority (subject to *de novo* review), to determine if the contract is ambiguous, and if it is, to construe its terms according to basic contract construction principles. But in making those determinations, it must be guided by the intention of the parties and to the extent contract construction occurs, it must be guided by the parties' actions and conduct.

Missouri witness Dr. Paul Rizzo, a dam safety expert with over 40 years of experience dealing with Federal Energy Regulatory Commission (FERC) licensing and inspection of dams, "falls short of certainty" and therefore should be rejected.[86]

Like its attempt to rewrite the terms of the Consent Judgment to match Mr. Kind's view that customers should get the benefit of the enhanced facility for free, OPC attempts to rewrite Missouri law. The law in Missouri is that experts are allowed to testify as to their opinions if they are qualified by reason of knowledge, skill, experience, training or education.[87] Indeed, expert testimony has been relied upon in Missouri courts and administrative tribunals for decades. And expert testimony constitutes competent and substantial evidence if it is given with a reasonable degree of certainty.[88] Experts are never required (nor could they be) to testify absolutely, 100% that something "would have occurred," because no one could ever meet such a standard. It cannot therefore be true, as OPC contends, that 100% certainty was required by the Consent Judgment.

The *Crawford* case is instructive on this point. In that case, the defendant railroad (whose train had collided with the plaintiff) claimed it was error not to give a withdrawal instruction that would have prevented the jury from considering the opinion of the plaintiff's treating physician that plaintiff would need spinal fusion surgery, and thus would have prevented the jury from awarding additional damages to cover the cost of that surgery. The defendant railroad claimed that because the physician had only stated that it was "most likely" that the surgery would be required the doctor's opinion amounted to speculation. The Supreme Court disagreed that the testimony amounted to speculation. To the contrary, the Court held that the physician's testimony was "competent, substantial evidence that plaintiff *would* in the future be

[86] *Id.*, p. 15.
[87] Section 490.065, RSMo.
[88] *See, e.g,, Crawford v. Chicago-Kansas City Freight Line, Inc.*, 443 S.W.2d 161, 167 (Mo. 1969).

required to have surgery … [and because] [t]his appears with reasonable medical certainty as required, … [it] does not amount to conjecture and speculation …" (emphasis added).[89] In fact, the conclusion that something "would have happened" based upon expert testimony that by definition cannot possibly reflect 100% certainty is routinely reached in cases.[90] There is no dispute that Dr. Rizzo is an expert with extensive knowledge, training, experience and skill relating to dam safety, FERC requirements relating to dam safety and construction, and both the FERC's former and current Potential Failure Modes Analysis (PFMA) inspection processes. Dr. Rizzo's opinions that the 2008 PFMA inspection process would have resulted in the requirement to either remediate (essentially rebuild) the old upper reservoir or entirely shut down the facility (and restore the site), in both cases at a cost far greater than the approximately $89 million the Company seeks to include in rate base in this case were not only given to a reasonable degree of engineering certainty,[91] but with about as high a level of certainty as possible. In response to questions from Chairman Gunn, Dr. Rizzo stated unequivocally that the PFMA would have required a rebuild:

> Q. Do you believe that in 2008 the PFMA or any FERC inspection would have required a complete rebuild of the dam?
> *A. I believe that the – in 2008 a PFMA would have indicated a very, severely deficient dam, one that could not withstand a repeat of the 1811, 1812 earthquakes. And that would parrot onto an analysis to say we couldn't – you can't rebuild this dam, you have to – in its present form.*[92]

Indeed, Dr. Rizzo testified that six deficiencies would have been found through the PFMA process and that in his opinion "the FERC *would have required* AmerenUE to cease

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[89] *Id.*

[90] *See, e.g., Whitnell v. State*, 129 S.W.3d 409, 416 (Mo. App. E.D. 2004) ("The law does not require absolute certainty of an opinion about future behavior. Missouri requires only that an expert's opinion be reasonably certain."); *Davolt v. Highland*, 119 S.W.3d 118, 126-27 (Mo. App. W.D. 2003) (Expert's opinion was sufficient to establish causation even though he testified that there was a chance that even if surgery had been performed non-negligently it still would not have relieved plaintiff's pain.)

[91] Ex. 118, p. 2, l. 27-30 (Rizzo Surrebuttal).

[92] Tr., p. 811, l. 11-19.

operating the Taum Sauk Plant" (emphasis added).[93] Dr. Rizzo reiterated his opinion at the hearing, where he described the general PFMA process in detail,[94] and then described what would have happened in the specific PFMA process that would have been conducted for Taum Sauk.[95] His bottom line conclusion is that the upper reservoir would have had to be rebuilt or retired.[96] Dr. Rizzo's hearing testimony was entirely consistent with his prefiled testimony on these points,[97] and his opinions were stated within a reasonable degree of engineering certainty; indeed he testified that he was "able to state [his] opinions with a high degree of confidence,"[98] which is far more than the law requires. OPC's argument that Dr. Rizzo's opinions are not 100% certain must fail because OPC's argument renders the third category of allowed costs under the Consent Decree completely meaningless and ineffectual. It would interpret the condition in a way that it would be impossible to meet. As noted earlier, in interpreting a contract the courts are required to give effect to all of its provisions, in light of the object of the contract and the intention of the parties.[99]

Dr. Rizzo's opinions do not amount to speculation, nor must they be stated with 100% certainty, as the OPC contends. In fact, Dr. Rizzo's opinions were stated with a high degree of certainty, much higher than the degree of certainty often found by the courts to constitute competent and substantial evidence.[100]

Not only does Dr. Rizzo's testimony constitute competent and substantial evidence that but for the breach, the Company would have had to essentially do what it ended up doing –

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[93] Ex. 117, p. 19, l. 7-19 (Rizzo Direct).
[94] Tr., p. 831, l. 3 to p. 833, l. 23
[95] Tr., p. 833, l. 24 to p. 835, l. 7.
[96] Tr., p. 834, l. 22 to p. 835, l. 7.
[97] Ex. 118, p. 32, l. 11 to p. 33, l. 25.
[98] Ex. 118, p. 2, l. 1-30.
[99] *J.H. Berra Const. Co.*, 14 S.W.3d at 279.
[100] *See, e.g.*, *Edgerton v. Morrison*, 280 SS.W.3d 62, 69 (Mo. *banc* 2009 (Mere reasonable degree of certainty sufficient to support causation.); *Deck v. Teasley*, 322 S.W.3d 536, 543 (Mo. *banc* 2010) (Physician's testimony that it was merely "possible" that plaintiff would need future surgery was sufficiently definite for admission as expert testimony).

rebuild the reservoir (but without any insurance proceeds) – but Dr. Rizzo's testimony is completely uncontroverted.[101] Mr. Kind's testimony reflects that he has absolutely no knowledge, training, skill, or experience that would allow him to (nor did he) opine that Dr. Rizzo's opinions are wrong. Indeed, he doesn't purport to be able to opine on this issue. He testified at the hearing that he "could only just speculate on what might have happened in the absence of the Taum Sauk disaster …."[102] It is incredible indeed that the OPC would claim that Dr. Rizzo's testimony should be ignored, but that Mr. Kind's proposal should be adopted, given that Mr. Kind was so uninformed about the new upper reservoir when he made his recommendation that he (a) didn't know what material the new upper reservoir was constructed from and (b) also didn't know what material the old upper reservoir was made of.[103]

The Consent Judgment specifically allows Ameren Missouri to recover these costs, both because there are enhancements that far exceed the approximately $89 million at issue, and because substantially more than the $89 million at issue would have had to be expended for the plant to continue to operate if the breach had never occurred. Ratepayers are currently receiving (and will for decades to come receive) significant benefits, in the form of a safer, more stable, longer lasting, more efficient upper reservoir, that without the Company's expenditure of the $89 million of investment it seeks to include in rate base, would not have existed. It was unquestionably prudent for Ameren Missouri to incur those costs; no doubt about the prudence of these costs has been raised by OPC or CCM. For these reasons, Ameren Missouri must be permitted to recover them.

[101] The best OPC can do is to point to what Staff witness Guy Gilbert admits is speculation on his part, that is, that perhaps the FERC would have granted some kind of "variance" that would have let the Company keep operating what Mr. Gilbert concedes is an old reservoir with major structural problems. Tr., p. 2337, l. 4 to p. 2338, l. 14. Mr. Gilbert also admitted that he had no evidence that a variance would be granted. Tr., p. 2339, l. 17-19. Moreover, there is no evidence that Mr. Gilbert has ever dealt with the FERC on such matters, save his involvement in the meetings relating to the failure of the Taum Sauk Plant that occurred in 2005.

[102] Tr., p. 938, l. 4-10.

[103] Tr., p. 955, l. 4 to p. 956, l. 19.

III. Costs Related to Sioux Scrubber Project Delay

The twenty-eight pages in Staff's initial brief opposing recovery by Ameren Missouri of the $31 million in capital costs arising from the decision to delay the Sioux Scrubber Project are remarkable in their failure to provide this Commission with any reason to deny Ameren Missouri recovery of those costs. The reader must make it past a meandering discussion of the applicable burden of proof and past a lengthy, but entirely irrelevant discussion of a securities case involving Union Electric in the mid-1980's—all before arriving at the twenty-third page of this section to find any discussion of the evidence Staff considers relevant to its argument against the prudency of the decision to delay the Project. The journey there ends in disappointment, however. Once there, Staff spends a scant two pages discussing testimony that it believes supports the disallowance before moving to a discussion of an unrelated financing case before the Commission involving a different utility, that occurred after the events relevant to the delay issue in this case. While Staff may have won the "battle" of pages, it has lost the "war" by failing to create any doubt—let alone a serious doubt—as to the prudency of Ameren Missouri's response to the financial crisis in delaying the Sioux Scrubber Project.

A. In opposing recovery of the additional capital costs arising from the delay, Staff bears the burden of proving "serious doubt" as to the prudency of Ameren Missouri's decision to delay the Project.

The point of Staff's survey of the law and analysis of Public Service Commission statutes is unclear. While Staff's brief appears to argue for a reduced burden of proof or, possibly, a shift of that burden to the utility, it never quite states that specific conclusion. Given the feebleness of Staff's evidence on this issue, perhaps Staff's strategy is understandable. At the end of the day, however, Staff's own brief explicitly sets out the initial burden Staff—and not Ameren

Missouri—must bear in not just challenging the presumption of prudence, but in establishing the existence of a "serious doubt" as to the prudence of the decision.[104]

At page 25 of its brief, Staff cites case law setting out the appropriate burden it must bear:

> As the Commission has explained, "utilities seeking rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent. … However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.[105]

That Staff bears the initial burden of establishing the existence of a serious doubt as to the delay costs is further confirmed by the next citation included at page 26 of Staff's brief:

> . . . *Associated Natural Gas* was a ratemaking case initiated by the utility, seeking to pass on costs to customers. *Id*. at 523. In such cases, the utility receives the benefit of the presumption of prudence with regard to its costs until a serious doubt is created with regard to the prudence of an expenditure. *Id*. at 528. When a serious doubt arises, the burden then shifts to the utility to prove prudence of the expenditure in order to succeed on its request to pass these costs on to its customers. *Id.*[106]

Why Staff relies on non-rate cases and cases from other jurisdictions is unclear when the law in Missouri is clear as to the applicable standard in rate-setting cases. Indeed, Staff itself argues at the end of the Sioux section of its brief that it has met the "governing legal standard" in raising a "serious doubt" as to the prudency of Ameren Missouri's action.[107] Frankly, whether Staff bears the burden to establish a serious doubt as to the prudency of Ameren Missouri's decision (or the reasonableness or appropriateness of that decision or whether it benefitted the ratepayer), Staff has failed to establish any doubt under any of these standards regarding Ameren Missouri's decision to delay the Sioux Scrubber Project.

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[104] Indeed, it is the same standard set out by Ameren Missouri in its post-hearing brief. Ameren Missouri Brief, p. 61. Moreover, it is the same standard the Commission applied in rejecting nearly all of the Staff's recommended disallowances of Iatan 1 and Iatan 2 costs in the recently concluded KCPL rate case, Case No. ER-2010-0355.

[105] *Anaheim, Riverside, Banning, et al. v. FERC*, 669 F.2d 799, 809 (D.C. Cir. 1981) (citations omitted).

[106] *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n*, 116 S.W.3d 680, 694 (Mo. App. W.D. 2003) (*citing State ex rel. Associated Natural Gas v. Pub. Serv. Comm'n*, 954 S.W.2d 520 (Mo. App. W.D. 1997).

[107] Staff's Initial Brief, pp. 43-44.

B. Staff's reference to the Harris litigation issue has no relevance to the prudency issue before this Commission.

Although it barely deserves mention because of the obvious lack of relevance to any issue in this case, Ameren Missouri believes it must rebut the improper inference Staff wants this Commission to draw from Staff's reliance on a case from the 1980s. The purported reason for reciting the facts of the *Harris* litigation issue in a Commission case involving Union Electric Company is as an "example of a Staff adjustment in a rate case resulting in a finding of imprudence."[108] Discussion of this convoluted case adds absolutely nothing to the understanding of prudence helpful to this Commission.

But that was not Staff's stated intent in introducing the topic at hearing (indeed, it did not reveal its intent at the time[109]), nor is it believable that this was Staff's intent in providing its more detailed discussion of the litigation in its brief. Instead of adding anything useful in applying the appropriate prudency standard, what Staff's true intent appears to be is its suggestion that Staff's belief that Ameren Missouri might act unlawfully in relation to its request for financing authority in October 2008 was somehow justified. After all, Staff points out that "Mr. Murray [a participant in the October 21, 2008 conference call] noted the *Harris* case" when asked by the Commission if he was aware of Ameren Missouri ever having done anything illegal.[110]

Not only is this an improper attempt to ascribe unlawful motives to Ameren Missouri based upon conduct occurring some 25 years ago, it is an illogical argument to make, given Mr. Murray's testimony. Mr. Murray, who did not begin work on Staff until approximately 15 years

[108] *Id*., p. 22.
[109] Tr., p. 499, l. 4-18.
[110] Staff's Initial Brief, p. 24, n. 57. The referenced conference call is the one in which the Staff stated it would opposed the Company's application to issue long-term debt.

after the *Harris* litigation began,[111] testified that his knowledge of the litigation was provided by other Staff members and that he did not have "a thorough understanding of that court case" but thought it "was something that was a securities issue that occurred in maybe the eighties."[112] At no place in his written or live testimony did Mr. Murray suggest that his vague knowledge of the *Harris* litigation played any part in Staff's response to Ameren Missouri in the October 21, 2008 conference call (indeed, the sense at the hearing was that his vague and incomplete "knowledge" of the case was quite recent). To indirectly suggest that the *Harris* litigation was a legitimate reason for Staff's belief that Ameren Missouri would unlawfully divert funds to its affiliates is to exceed the bounds of permissible argument.[113] No brush is that broad.

C. Similarly, Laclede Gas's 2009 financing application is not relevant to the prudency of Ameren Missouri's conduct in the fall of 2008.

Although Staff agrees that it opposed Ameren Missouri's request in October 2008 to raise capital by issuing long-term debt, it attempts to diffuse its opposition with the assertion that Ameren Missouri should have gone ahead and filed its application. To support this argument that Ameren Missouri was somehow imprudent for failing to proceed with its application, Staff points to Laclede Gas's success in overcoming Staff opposition to a financing application it filed on June 30, 2009—nearly eight months after Ameren Missouri's intended filing.[114] Now having the benefit of hindsight, the argument that Ameren Missouri should have divined the future is easy to make if the facts known at the time are disregarded. After all, hindsight is 20-20. But that is not the test here. Consequently, what happened to Laclede Gas eight months later when

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[111] Ex. 201 (Staff's Cost of Service Report), Appendix 1-49.
[112] Tr., p. 554, l. 4-13.
[113] Staff similarly assumed that Laclede Gas would likewise improperly divert funds derived from financing to its affiliates in 2009, although Ameren Missouri is uncertain whether the *Harris* litigation formed the basis for Staff's concern there. Staff's Initial Brief, p. 43.
[114] Staff's Initial Brief, pp. 41-43.

the financial markets had improved is irrelevant to the prudency of the decision facing Ameren Missouri in the fall of 2008.[115]

In addition, Staff's argument is equally irrelevant if Staff's position is that Ameren Missouri's access to its credit facility was sufficient to allow Ameren Missouri to continue construction of the Sioux Scrubber Project. If that was the case (it was not, as the severe concerns about that credit facility outlined in the Company's initial brief show), whether or not Ameren Missouri could or should get additional credit capacity is irrelevant. Either way, Staff's argument is irrelevant and, perhaps more telling, not flattering to itself—that Ameren Missouri should have gone ahead with its application on the bet that Staff's opposition was misguided and would be promptly disregarded by the Commission.

D. Because Staff's disallowance is based upon nothing more than general supposition rather than an evaluation of the actual evidence, Staff has failed to create any doubt as to the prudency of Ameren Missouri's decision to delay the Project in the fall of 2008.

Although Staff takes twenty-eight pages to lay out its opposition to Ameren Missouri's recovery of the delay costs due to the financial crisis, the basis for Staff's opposition amounts to nothing more than reliance on the supposition found in its original audit report rather than any evaluation of the actual facts known to Staff. At the outset, Staff states its position in fairly simple terms: even though Staff concedes there was an economic crisis of sorts, Ameren Missouri's liquidity concerns in the fall of 2008 did not justify any delay because it had access to a $540 million credit facility and was able to obtain $350 million in additional financing in March 2009.[116] Staff's summary of its argument is about as specific as it ever gets.

[115] Moreover, the Staff is "citing" to Laclede Gas's case in an attempt to prove a fact; that is, that another utility was able to obtain financing approval months later. But the Commission cannot rely on facts outside the record of this case. Those facts, including the existence or outcome of the Laclede Gas docket, do not constitute competent and substantial evidence upon which a decision in this case can be made.
[116] *Id.*, pp. 16-17; Ex. 200 HC (Staff's Construction Audit and Prudence Review of Sioux Wet Flue Gas Desulfurization Project for Costs Reported as of September 30, 2010), p. 42, l. 3-16.

And what evidence compels Staff to conclude that Ameren Missouri's liquidity concerns did not justify the delay of the Sioux Scrubber Project? The same "evidence" Staff witness Roberta Grissum relied on in proposing the disallowance—David Murray's "belief" that Ameren Missouri had sufficient credit available.[117] Rather than offering a belief based upon any analysis of the actual financial information that Ameren Missouri provided Staff, Mr. Murray (the Acting Utility Regulatory Manager of the Financial Analysis Department for Staff) relied on his *assumption* that Ameren Missouri had access to additional credit based upon the circumstances of three other utilities—that KCPL was able to access the commercial paper markets and that Ameren CILCO and Ameren Illinois Power were able to issue long-term debt in the fall of 2008.[118] Mr. Murray then extrapolates from these facts to conclude that had Ameren Missouri requested permission to issue debt based upon its outstanding short-term debt at the time or its anticipated needs for a few months, then it could have freed up its credit facility.[119]

There are some very basic problems with Mr. Murray's beliefs and assumptions in this regard—apart from the fact that his testimony at hearing represented a 180-degree turn from his initial unwillingness or inability to support the disallowance.[120] Mr. Murray's beliefs and assumptions are simply not credible for the following fundamental reasons:

1. <u>Although the financial analyses performed by Ameren Missouri were provided to Staff, Mr. Murray did not analyze a single number to support his conclusions.</u>

Despite Staff's persistent complaint that Ameren Missouri "refused" to provide a liquidity analysis (though it did provide one, as Ms. Grissum admitted[121]) and Mr. Murray's own admission that such an analysis would be the proper way to evaluate the decision to delay the

[117] *Id.*, p. 39.
[118] *Id.*
[119] *Id.*
[120] On cross-examination, Mr. Murray admitted that he had testified in his deposition less than three weeks earlier that he had no opinion as to the proposed disallowance. Tr., p. 566, l. 13 to p. 567, l. 4.
[121] Tr., p. 630, l. 9-13.

Project,[122] Mr. Murray brazenly offers the opinion—without performing even the simplest of mathematical computations—that all would have been fine had the Company acted as he suggests. His criticism of the liquidity analysis provided by Ameren Missouri was not based on any dispute with the numbers provided, but instead was simply that it was a consolidated analysis rather than one limited to Ameren Missouri.[123] Why Mr. Murray, the Staff's top financial analyst, was unable to analyze the Ameren Missouri-specific information that was transparently contained in that analysis is not explained.[124] Moreover, Mr. Murray provided no estimate as to how much additional debt would have been necessary, nor has he provided any calculation as to the cost of issuing that debt—although he admits it would come at a higher cost.[125]

Finally, Mr. Murray's supposition that a request to issue financing on terms that the Staff would support (i.e., consistent with the Staff's long-standing requirement that a request for long-term debt cannot exceed Ameren Missouri's current short-term debt level) is absolutely barren of any calculation as to what that additional financing request would look like.[126] Perhaps Mr. Murray's failure to put finger to calculator was intentional; as Company witness Jerre Birdsong testified, Ameren Missouri's short-term debt level was only $17 million—an amount that would provide little or no assistance in improving Ameren Missouri's liquidity position in light of its concerns over the potential loss of additional lender-participants in its credit facility.[127]

Testimony comprised of nothing more than generalities and assumptions and wholly lacking in any real analysis—particularly from a witness whose job it is to conduct complex

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[122] Tr., p. 539, l. 14 to p. 540, l. 7.
[123] *Id.*, p. 562, l. 1-8.
[124] Because Ameren Missouri's stock is not publicly traded, Mr. Murray analyzes consolidated financial data for Ameren Corporation and its subsidiaries as a matter of routine when he testifies on return on equity. Surely he was capable of examining Ameren Missouri's individual liquidity position, which was available within the analysis the Company provided to the Staff.
[125] *Id.*, p. 562, l. 14.
[126] *Id.*, p. 562, l. 24 to p. 563, l. 8.
[127] *Id.*, p. 505, l. 24 to p. 507, l. 1.

financial analyses for Staff—cannot be the sort of evidence upon which a serious doubt can be based. Mr. Murray's testimony is not evidence, but argument. Accordingly, it should not be relied upon.

2. **<u>Even if Ameren Missouri had access to the commercial paper market at the time, reliance on commercial paper does not improve a company's liquidity.</u>**

Mr. Murray's assertion that Ameren Missouri had access to the credit markets because KCPL accessed the commercial paper market at the same time is fundamentally flawed. As Ms. Grissum acknowledged in her surrebuttal testimony, Ameren Missouri could not access the commercial paper market in the fall of 2008.[128] Even if it could have accessed that market, the commercial paper market did not offer Ameren Missouri any additional *liquidity* beyond its existing credit agreements because any issuance of commercial paper reduces in a corresponding amount a company's available credit.[129]

If Mr. Murray's reference to KCPL was offered for the purpose of showing that another Missouri utility could access credit in the fall of 2008, it does not necessarily follow that Ameren Missouri could access the credit it needed to address the liquidity concerns it faced. Even Mr. Murray admits that all but the most solid companies had difficulty accessing credit in the fall of 2008,[130] and he offered no testimony of any specific credit source available to Ameren Missouri at the time. The bottom line is that Mr. Murray's reliance on KCPL's ability to issue commercial paper in the fall of 2008 is entirely irrelevant to whether Ameren Missouri could access additional credit at the time.

3. **<u>Mr. Murray's reliance on Ameren Illinois's ability to issue debt begs the question by assuming Ameren Missouri's ability to issue debt—in direct contradiction to the known facts.</u>**

[128] Ex. 213-HC (Grissum Surrebuttal), Schedule 1.
[129] Tr., p. 525, l. 14 to p. 526, l. 2.
[130] *Id*., p. 542, l. 13-24.

Mr. Murray asserts that Ameren Missouri should have done what Ameren Corporation's Illinois utility subsidiaries did—issue debt to increase its liquidity. The irony of Mr. Murray's proposal is apparently lost on him, given the fact that Ameren Missouri attempted to do just that in October 2008 when it approached Mr. Murray and other Staff to gain support for its application to issue long-term debt. Perhaps Mr. Murray understands somewhat the irony of his proposal, however. To differentiate his suggestion from Ameren Missouri's actual request, he proposes that Ameren Missouri should have restricted its request to a relatively small number—its $17 million in outstanding short-term debt or its anticipated expenditures "over the next few months."[131] Failing to provide even a "back-of-the-envelope" calculation to assure that such a request would have been sufficient, Mr. Murray compounds the error in his argument by overlooking the real concerns at the time which were that no one knew how long the financial crisis would continue or how bad it might get.[132] While Mr. Murray's hindsight is quite keen,[133] that is not the perspective this Commission is allowed in determining the prudence of Ameren Missouri's decision to delay the Sioux Scrubber Project in the fall of 2008. The Commission has to put itself in Ameren Missouri's shoes at that time and has to ask itself whether Ameren Missouri, given the circumstances it faced and the problem it had to solve prospectively (addressing its deteriorating liquidity position) acted as a reasonable person would act by delaying the biggest single capital project underway at the time.[134]

E. Ameren Missouri must be allowed to recover from its ratepayers the prudently-incurred costs of the Sioux Scrubber Project, including those arising from its prudent decision to delay the project to conserve cash.

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131 *Id.*, p. 505, l. 24 to p. 506, l. 1; p. 562, l. 15 to p. 563, l. 8.

132 As Mr. Birdsong points out in his rebuttal testimony, a very real concern was that "a few bank failures could have caused a domino effect of bank failures across the country." Ex. 109 (Birdsong Rebuttal), p. 12, l. 20-22.

133 Mr. Murray now concedes that a financial crisis was occurring in the fall of 2008; at the time, however, Staff's view was that there was nothing out of the ordinary going on in the capital markets and certainly nothing to justify the "extraordinary" measure proposed by Ameren Missouri. Tr., p. 507, l. 9-17.

134 *State ex rel. Associated Natural Gas v. Pub. Serv. Comm'n*, 984 S.W.2d 520, 528-29 (Mo. App. W.D. 1997).

In the fall of 2008, Ameren Missouri knew that if it continued on the path it was on, it would run out of cash in the second quarter of 2009.[135] Rather than sit idly by and wait to see if, in fact, that would happen, Ameren Missouri acted prudently and in a manner benefitting the ratepayers of Missouri when it proactively worked to increase its liquidity by reducing its expenditures, including delaying the Sioux Scrubber Project. With its customers depending on Ameren Missouri's continued delivery of electrical service, Ameren Missouri had no choice. Unlike firms in other industries, Ameren Missouri can't lay-off the third shift, idle an assembly line, or move to a four-day work week. To the contrary, Ameren Missouri has to be able to pay for its fuel, pay its other suppliers, spend money to respond to storms, and make other expenditures needed to deliver safe and adequate service. The logical conclusion to be drawn from the Staff's refusal to recognize the prudence of the Company's conduct is that the Staff is unable or unwilling to admit that it misread the severity of the situation the Company faced in the fall of 2008. While it is willing to use hindsight to examine the Company's conduct, Staff is unwilling to engage in any meaningful self-reflection.

Regardless of the reason, Staff has failed to provide any evidence to this Commission can rely to establish the existence of a serious doubt about the prudence of the Company's conduct. That failure, coupled with Ameren Missouri's affirmative (albeit unnecessary) proof that it acted prudently means that Ameren Missouri must be allowed to recover the $31 million in costs arising from its prudent decision to delay the project.

IV. FUEL ADJUSTMENT CLAUSE

In its initial brief, the Staff argues that Ameren Missouri, unlike the other Missouri electric utilities who use fuel adjustment clauses (FAC), should have its sharing percentage increased from 95%/5% to 85%/15%. Staff's initial brief goes so far as to allege that it was

[135] Ex. 109, p. 14, l. 1-4.

"able to reach the conclusion that the current 95%/5% sharing mechanism was not providing enough incentive for Ameren to improve the efficiency and cost-effectiveness of its fuel and purchased power procurement activities."[136] But that statement is false, as shown by the following testimony from the Staff's own witness who is sponsoring the change in the sharing percentage, Lena Mantle:

> Q. But as you sit here today, you don't know whether Ameren Missouri does or does not have a sufficient incentive to manage its fuel costs and make off-system sales either way. You don't know either way whether they do or don't have a sufficient incentive; isn't that fair?
> *A. That's fair.*[137]

The *evidence* in this case demonstrates that the Staff has not reached the conclusion its initial brief incorrectly asserts it has reached. To the contrary, the Staff is engaged in an exercise that amounts to nothing more than speculation about the sufficiency of the existing sharing percentage and about whether a change to an 85%/15% sharing percentage is necessary or would, in fact, induce any change in the Company's actions at all.

The Staff does attempt to support its proposed experiment on four grounds, none of which have any merit at all. First, the Staff argues that this change is justified because in Case No. EO-2010-0255 the Commission, by a 3-2 vote, found that Ameren Missouri was imprudent for not flowing revenues it had received from power sales contracts with American Electric Power Operating Companies (AEP) and Wabash Valley Power Association (Wabash) through the fuel adjustment clause. The Company had argued that these contracts constituted long-term requirements contracts that were excluded from the FAC, but the Commission found that they were not subject to that exclusion under the tariff. Significantly, no party to that case argued that

[136] Staff's Initial Brief, p. 73.
[137] The Staff's initial brief also claims that Ms. Mantle herself "determined that that [sic] . . . Ameren Missouri's incentive mechanism (sharing percentage) was not sufficient …." *Id*., p. 74. Ms. Mantle's admission that she simply doesn't know if that is the case proves that this claim is also false. Notably, the Staff's initial brief reflects no citation to the record to back-up these statements, because there is none available.

the Company's decision to enter into those contracts in the wake of its loss of the load of its largest customer, Noranda Aluminum, following an ice storm was in any way imprudent. Rather, the parties argued, and the Commission ultimately found, that the Company was "imprudent" in the way that it classified those contracts. The Staff alleges that this "imprudence" resulted in harm to ratepayers, but that allegation is not true. Unless the Commission's order is reversed on appeal, ratepayers will receive all of the margin from these prudent transactions, plus interest, through the FAC.[138] They will not be harmed at all, and in fact they will get a large windfall that they would not have received in the absence of the ice storm.

The Staff argues that if Ameren Missouri had had a greater sharing mechanism "Ameren Missouri would have been able to keep more of the revenues from these contracts."[139] Staff implies that a greater sharing percentage might have encouraged the Company to classify those contracts as off-system sales, rather than long-term requirements contracts, in the first instance. There is absolutely no evidence that this allegation is true, and in fact, there is competent and substantial evidence that it is not true. First, Ameren Missouri classified these contracts as long-term requirements contracts because it truly believed that is what they were—as did 2 out of the 5 Commissioners. As Company witness Lynn Barnes testified, the Company's actions would not have been any different no matter what the sharing percentage might have been.[140] Even if the Company's actions were motivated only by financial considerations (which they were not) Ms. Mantle's math simply does not work.[141] As Ms. Mantle conceded during the hearing, at virtually any sharing percentage, the Company is better off financially if these contracts are in

[138] And if that decision is reversed on appeal, it will mean that the Company properly applied the FAC tariff. A proper application of the FAC tariff could not possibly support a change to the sharing percentage.
[139] Staff's Initial Brief, p. 77.
[140] Ex.103, p. 5, l. 6-21 (Barnes Rebuttal).
[141] *Id.*

fact long-term requirements contracts, as the Company contends.[142] At Ms. Mantle's experimental 85%/15% sharing percentage, if the revenues under the contracts are flowed through the FAC, the Company's share would only be $6.3 million, not close to the $42 million the Company would be entitled to if the contracts are long-term requirements contracts. Moreover, Ms. Mantle doesn't even contend that the Company's behavior would have been different at her recommended sharing percentage. To the contrary, she testified that she has "no idea" whether the Company's behavior would be different or not.[143]

In short, Ameren Missouri's initial classification of the AEP and Wabash contracts as long-term requirements contracts did not involve any imprudent transaction, did not harm customers in any way, would not have been different if there had been a different sharing percentage, and provides absolutely no basis for the Commission to change the sharing percentage in the Company's FAC.

The second justification the Staff offers for changing the sharing percentage is the existence of Case No. ER-2010-0274, the Company's pending FAC true-up case. The issue being litigated in this case arose because a mistake was made in calculating the Company's net base fuel cost (NBFC) factors used in the formula in the FAC tariff when the FAC was originally adopted. The NBFC is a cents-per-kilowatt-hour amount which is supposed to reflect the fuel costs embedded in the Company's base rates. It is the base against which changes in fuel costs that are reflected in FAC charges must be measured. Pursuant to the Company's FAC tariff, the NBFC must be calculated using volumes (kWh sales) at the generation level. This is important because adjustments under the FAC are also calculated using volumes at the generation level. Unfortunately, due to a mutual mistake on the part of the Company and the Staff, the NBFC in

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[142] Tr., p. 1620, l. 18 to p. 1622, l. 13.
[143] Tr., p. 1622, l. 14-23.

the Company's original FAC tariff was set too high (reflecting a level of fuel costs which was higher than the fuel costs actually being recovered through base rates) because it was calculated using volumes at the transmission level. Because of this mistake, the difference between the higher fuel costs reflected in the NBFC and the lower fuel costs actually embedded in base rates never flowed through the FAC as they should have.

In Case No. ER-2010-0274, the Company is arguing that this mistake should be corrected, and the Staff is arguing that the mistake cannot be corrected. Staff argues in this case that "if Ameren Missouri had a greater incentive mechanism, it would be more likely to be extra careful when determining and filing its FAC rates…"[144] and presumably Staff is suggesting that this mistake might have been avoided. However, the fact is that the Company's has a greater financial incentive to discover this type of mistake the larger the Company's share of changes in the FAC is; that is, the Company's incentive to discover this mistake is greater if the sharing percentage is 95% rather than if it is 85%. Why? Because the mistake resulted in actual fuel costs not flowing through the FAC; i.e., the fuel costs that flowed through the FAC were *lower* than if the mistake had not been made. If the Company can recover 95% of the costs that flow through the FAC it has a greater incentive to make sure that every dollar of fuel costs flows through the FAC and avoid this kind of mistake than if it can only recover 85% of those costs. In other words Staff's point about Case No. ER-2010-0274 is exactly wrong. The higher the sharing percentage is, the more incentive the Company has to avoid this type of mistake.

Third, the Staff argues that elimination of the Ameren Corporation coal pool suggests that a higher sharing percentage is needed. Pursuant to the terms of the coal pool, Ameren Missouri's coal had been pooled with coal purchased by its unregulated affiliate. However, changes in FERC regulations required Ameren Missouri to eliminate its coal pool recently, and separate its

[144] Staff's Initial Brief, p. 78.

coal purchases from those of its unregulated affiliate.[145] Staff's argument that having a coal pool is a necessary prerequisite to a 95%/5% sharing mechanism is completely meritless. None of the other electric utilities in Missouri with FACs have a coal pool, but they all have 95%/5% sharing. In fact, none of the other electric utilities in the country have a coal pool (since they are now prohibited), and the vast majority of them have no sharing percentage at all.[146] Having a coal pool should not be a prerequisite for a 95%/5% sharing mechanism and Staff's argument in this regard should be rejected.

Fourth, the Staff argues that since Ameren Missouri does not believe that the off-system sales prices used to rebase NBFC in this case are correct, the sharing percentage is not great enough to provide the Company with enough incentives to get the net base fuel costs right. The Staff is correct that the Company believes it would be better to use projected power prices than historical power prices to set NBFC. However, the Commission has made it clear that historical power prices must be used because otherwise the Commission would be setting rates using a mixture of historical and projected data.[147] Moreover, the Staff has made it crystal clear that they will oppose the use of projected power price data,[148] and indeed the Staff disagrees with the Company's concern about its ability to actually realize the power prices used to determine NBFC in this case when it later makes off-system sales.[149] Moreover, there is evidence that the Company does all that it can to rebase its net base fuel costs as accurately as possible, within the constraints imposed on it by the historical data used to set rates in Missouri. For example, in the Company's prior rate case it was the Staff (and MIEC) that opposed including $11 million of known and measurable nuclear fuel cost increases that were to be paid by the Company before

[145] Tr., p. 1459, l. 20 to p. 1460, l. 20.
[146] Ex. 126, p. 16, l. 14-15 (Rygh Rebuttal).
[147] Tr., p. 1599, l. 21 to p. 1600, l. 19.
[148] Tr., p. 1600, l. 20-22.
[149] Tr., p. 1598, l. 18-23.

rates set in that rate case took effect.[150] In other words, the Staff knew that nuclear fuel costs would be $11 million higher when rates were in effect from that case, and thus knew including that $11 million would more accurately rebase the fuel costs, but opposed doing so. The Company, however, fought to include those costs (and is still fighting to include them in the Cole County Circuit Court) even though the financial impact of including or excluding them would ultimately have been just $550,000 annually since 95% of the higher costs would ultimately be recovered through the FAC.[151]

The fact that the Company does not continue to fight the Commission's unwillingness to allow net base fuel costs to be based on forward power prices and does not continue to fight the Staff's consistent opposition to doing so is no reason to change the sharing percentage. However, the Company's point in this case is valid: in an environment where power prices have been declining, the use of historic power prices will tend to overstate off-system sales revenues used to calculate NBFC. As a consequence it is more likely that net fuel costs will be higher than the net fuel costs embedded in base rates. This is another reason the Commission should keep the sharing percentage at 95%/5%; it is certainly not a justification for increasing the sharing percentage, as Staff has suggested.

In addition to the four "justifications" it cites for increasing the sharing percentage, the Staff also argues that there is evidence on this issue that the Commission should ignore. Specifically, the Staff argues that the fact that other states might not require regulated electric utilities to operate with sharing mechanisms "should have no bearing on how this Commission decides Ameren Missouri's FAC incentive mechanism."[152] The Company respectfully disagrees. Ameren Missouri must compete for capital with other electric utilities across the country.

[150] Tr., p. 1594, l. 8 to p. 1595, l. 14.
[151] Tr., p. 1595, l. 3-8.
[152] Staff's Initial Brief, p. 80.

Although this Commission should not blindly follow regulation in other jurisdictions, how other electric utilities are regulated is a relevant consideration, as this Commission has found in numerous other contexts. The fact that nearly all utilities across the country have an FAC, and less than 20 percent of them have any sharing at all,[153] is highly relevant to whether the Commission should increase the sharing percentage, and how such a change would impact the Company's ability to compete with those other utilities for the huge sums of capital it needs to deliver service.

Staff also suggests that the Commission should ignore Ameren Missouri witness Gary Rygh's uncontroverted testimony that the investment community would take a negative view of increasing the sharing percentage as Staff has proposed. Staff argues that Mr. Rygh's testimony is not persuasive, because "[i]f the approval of a FAC for Ameren Missouri did not change Ameren Missouri's credit rating then a change in the sharing mechanism should have no bearing on the financial status of Ameren Missouri."[154] In fact, Mr. Rygh has a great deal of knowledge and experience concerning capital markets, and as recently as this May, in addressing the sharing percentage in the KCPL-GMO rate case, the Commission found Mr. Rygh's "background and experience relevant to this issue, and…that his opinions are authoritative and credible."[155] The Staff witnesses, in contrast to Mr. Rygh, have no background and experience relevant to this issue, and their opinions about capital markets are neither authoritative nor credible. Indeed, Ms. Mantle, the Staff witness who purports to rebut Mr. Rygh's expert opinions, conceded that she has absolutely no experience with credit rating agencies, with lenders, with institutional investors, with how those groups upon whom the Company depends for capital evaluate what

[153] Ex. 126, p. 8, l. 22 to p. 9, l. 1; p. 16, l. 14-22.
[154] Staff's Initial Brief, p. 81.
[155] KCPL-GMO *Report and Order*, p. 211.

state regulatory commissions do, or with how they evaluate regulatory risk.[156] In fact, none of Ms. Mantle's testimony on these issues is competent and substantial because she admitted that she is "not qualified to give an opinion about the impact on the Company's cost of capital either in the short or long-term if the sharing mechanism were changed."[157]

In addition to the Commission's discussion of Mr. Rygh's credentials, the KCPL-GMO order is relevant for another reason. Staff has admitted that there is more reason to increase the sharing percentage for KCPL-GMO than there is to increase it for Ameren Missouri.[158] Since the Commission has decided not to increase the sharing percentage in that case, there is certainly no reason to do so in this case. In fact, if Ameren Missouri's sharing percentage were to be less favorable than sharing percentages for other Missouri utilities, the investors on whom the Company depends for its large capital needs would be very concerned, their perception of Ameren Missouri's risk would be changed, ultimately leading to higher capital costs, which in turn lead to higher customer rates.[159]

There is neither a cogent justification nor any competent and substantial evidence that would justify the Commission engaging in the very expensive experiment the Staff proposes. Accepting that proposal will only create an FAC that is not reasonably designed to give the Company a sufficient opportunity to earn a fair return, which will make the already very, very difficult task of earning the return allowed by this Commission even more difficult , despite the Company's diligent efforts to manage its costs. Consequently, the Staff's experimental sharing percentage proposal should be rejected.

[156] Tr., p. 1623, l. 4-24.
[157] Tr., p. 1623, l. 25 to p. 1624, l. 4.
[158] Tr., p. 1705, l. 17 to p. 1706, l. 23.
[159] Ex. 126, p. 9, l. 13 to p. 10, l. 15; p. 14, l. 9 to p. 18, l. 2.

V. PROPERTY TAXES

The initial briefs of only two parties – MIEC and the Missouri Retailers Association (MRA) – addressed the issue of whether the Commission should allow in the cost of service used to set rates in this case any property tax expense for the Sioux scrubbers or the Taum Sauk additions. Although the positions by these parties share at least one argument in common, they are sufficiently different to warrant responding to them individually.

A. MIEC

MIEC's initial brief mainly restates the position taken by its witness on this issue, Greg Meyer: Ameren Missouri's 2011 property tax expense related to the Sioux scrubbers and the Taum Sauk additions are not "known and measurable" and therefore should not be included in the costs used to set rates in this case. The facts supporting that argument are stated as follows on page 22 of MIEC's brief:

> First, the Company does not know the amount at which the taxing authorities have assessed Ameren Missouri's real estate and personal property for 2011. Second, Ameren Missouri does not know the tax rates applicable to the assessed value of its real and personal property for 2011. As such, Ameren Missouri does not know how much it will owe in taxes in 2011.

Certainly, each of the statements cited above is true for both the Sioux scrubbers and the Taum Sauk additions; but those statements are equally true for all other items of real estate and personal property that will be used to determine Ameren Missouri's 2011 property tax expense. As noted in its initial brief, the Company does not currently know either the assessed value or the tax rate that will be used by the various taxing authorities to determine 2011 taxes for any of Ameren Missouri's real and personal property. Under procedures routinely followed by both state and local taxing authorities, those two pieces of information will not be available until later this year. Therefore, if, as MIEC claims, the Commission must know both the assessed value of the Company's property and the 2011 tax rates in order for property tax expense to be considered "known and measurable" for ratemaking purposes, then based on that standard the amount of that expense the Commission should recognize in this case logically would be zero.

But such a result would be absurd, and even MIEC knows it. That is why Mr. Meyer did not advocate excluding property tax expense altogether. It also explains why MIEC was a signatory party to the "First Nonunanimous Stipulation and Agreement – Miscellaneous Revenue Requirement Items," which states, in relevant part, that "the Company's revenue requirement will reflect a $119.0 million level of property taxes, excluding property taxes related to the Sioux and Taum Sauk Plant."[160] Despite all that, MIEC still asks the Commission to selectively apply Mr. Meyer's "known and measureable" standard to only that portion of Ameren Missouri's 2011 property tax expense that relates to the Sioux scrubbers and the Taum Sauk additions. But such a request is both inconsistent and unreasonable. If estimates of the Company's 2011 assessed valuation and tax rates are sufficient to warrant the inclusion of $119 million of property tax expense in the revenue requirement used to set rates in this case, then surely reasonable estimates are also sufficient to warrant the inclusion of an additional $10.8 million of expense related to the Sioux scrubbers and the Taum Sauk additions, particularly given the fact that the cost of the property additions and the tax rates applicable in 2010, which form the basis for the estimates, are known. MIEC's position is effectively an estimate that zero property tax will be owed for 2011 for the Sioux scrubbers and Taum Sauk additions, which is just as absurd as assuming zero property taxes for all the rest of the Company's property.

MIEC's initial brief adds a new argument for disallowing property taxes associated with the Sioux scrubbers and Taum Sauk, an argument that was not raised in the pre-filed testimony of any witness appearing in this case. At page 23 of its brief, MIEC states that "the Commission should deny Ameren's request for millions in additional property tax recovery, because Ameren

[160] First Nonunanimous Stipulation and Agreement – Miscellaneous Revenue Requirement Items, ¶ 13.

Missouri is likely to pay *less* in property taxes in 2011 that it was required to pay in 2010." (emphasis original) MIEC bases this argument on (i) the fact that Ameren Missouri has appealed a portion of the property taxes it paid in 2010 and (ii) the Company's belief that it will prevail in its appeal.[161] But, as explained below, these facts, both individually and jointly, provide an insufficient basis for the Commission to deny the property tax expense that is at issue in this case. Moreover, in light of the Company's promise to keep records that reflect the result of the tax appeal so that it can be dealt with in a future rate case,[162] any arguments related to the outcome of the pending tax appeal are premature and unfounded.

The only record evidence regarding Ameren Missouri's anticipated overall 2011 property tax expense was provided by the Company's witness, Gary Weiss. During cross-examination by MIEC's counsel, Mr. Weiss stated, "[w]e're also projecting that our 2011 taxes will be higher than the [sic.] 2010 due to the addition of the Sioux Scrubbers and the Taum Sauk enhancements plus some normal increases in the various tax rates of all the counties."[163] Although Mr. Weiss acknowledged that Ameren Missouri has filed an appeal contesting approximately $28 million of the property taxes it paid in 2010, he was careful to point out that because the outcome of that appeal is unknown, the amount of reimbursement, if any, that the Company will receive also is unknown. Consequently, the appeal could produce a refund anywhere within a range between $28 million, the full amount of the appeal, and zero.[164]

There are numerous reasons why the outcome of Ameren Missouri's tax appeal is unknown – and unknowable – at this time. For one thing, the initial hearing of the appeal before the State Tax Commission of Missouri has not yet been scheduled, but likely will not occur until

[161] MIEC's Initial Brief, p. 23.
[162] Tr., p. 1309, l. 20-21.
[163] Tr., p. 1319, l. 4-7.
[164] Tr., p. 1309, l. 8 to p. 1310, l. 5.

sometime this summer.[165] In addition, any party aggrieved by the decision of the tax commission can appeal that decision in much the same manner as a Commission decision can be appealed: an initial appeal is filed in the circuit court, followed by appeals to the court of appeals and ultimately the Missouri Supreme Court.[166] It is the Company's opinion that "there is just as much likelihood that it will be appealed as not with the amount of money that's involved";[167] consequently, it will be many months – and probably years – before the outcome of Ameren Missouri's appeal, and its effect on total 2010 property tax liability, will be known. Meanwhile, Ameren Missouri was required to pay the full amount assessed for 2010. Thus, at this point there is nothing about that appeal that provides any basis for the Commission to question the Company's 2010 or 2011 property tax expense.

B. MRA

Although MRA advocates the same result as MIEC – that the Commission should limit the amount of property tax expense included for ratemaking purposes to $119 million – MRA reaches that conclusion in an unconventional manner. Rather than filing any testimony at all to support its position, MRA attempts to make its case through exhibits introduced at the hearing and information and arguments presented for the first time in its initial brief. Ultimately, however, MRA fails to successfully connect the dots – assuming that could be done – which renders its effort to exclude property tax expense related to the Sioux scrubbers and the Taum Sauk additions both inconclusive and unpersuasive.

The hodge-podge of facts, unsupported by any witness' testimony, statutory citations, and other information that MRA relies on are presented at pages 3 and 4 of its initial brief. However, it is far from clear why much of this information is either relevant or material to the property tax

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[165] Tr., p. 1277, l. 22-24.
[166] Tr., p. 1278, l. 4-9.
[167] *Id.*, l. 9-12.

issue that is presented to the Commission for decision in this case. For example, does the Commission really need, or care, to know that "[t]he assessed value of the Taum Sauk plant in Reynolds County increased 50% . . . between 2009 and 2010" or that "[t]he Taum Sauk Reservoir in property tax year 2009 was assessed at $53,585,250, based on an original cost of $321,450,269"? Similarly, is the Commission surprised to learn that Ameren Missouri paid property taxes in Reynolds County based on "assessments in 2009 and 2010" or that the Company "paid property taxes in 2010 in Missouri, Illinois and Iowa"? The appropriate response to those meaningless and/or obvious statements can best be summed up with a single question: So what?

Other references presented in MRA's brief are either confusing or contradictory. For example, at page 3 of its brief MRA states that "the total tax bill for Ameren Missouri in 2010 was $119 million"; however, the brief later states that "Ameren . . . has not provided the Commission with the dollar amount of those taxes." And, although at page 6 of its brief MRA argues that "a single line of rough estimate is not sufficient to extract $130,000,000 from ratepayers," later, on that same page, MRA argues that the Commission should allow for ratemaking purposes $119 million in property tax expense that is based on the same "rough estimate."

MRA also cites, at length, Section 137.073, RSMo, then argues that if the assessed value of Taum Sauk increases in 2011 "it appears that a levy rollback will be in order" in Reynolds County.[168] But although Section 137.073.2, RSMo, requires counties and other political subdivisions to reduce tax levies in the wake of an aggregate increase in total assessed valuation, the statute specifically excludes increases in valuation that are attributable "new construction and improvements." During cross-examination, MRA's counsel sought to obtain testimony

[168] MRA's Initial Brief, p. 5.

supporting his theory, but Mr. Weiss testified that the Company's tax levies in Reynolds County would not be subject to any rate rollback because the additions to Taum Sauk were considered to be new construction or rehabilitation.[169] So MRA's argument that Ameren Missouri is due for a rate rollback for property taxes associated with Taum Sauk is contrary to both the plain meaning of the statute and the evidence on the record in this case.

In addition, MRA argues that because of its pending tax appeal the Company's 2011 tax bill will be "at or below the 2010 level."[170] But for all of the reasons described earlier with respect to the position taken by MIEC, this argument, too, must be rejected. A final decision on the pending tax appeal will not be rendered for many months or years, so that appeal should have no bearing on the Commission's decision regarding the appropriate amount of property tax expense to use for ratemaking purposes in this case. Moreover, the Commission should not discourage utilities from pursuing property tax appeals by using them to reduce recovery of property taxes that actually must be paid.

Finally, at page 6 of its brief MRA cites two cases as support for the proposition that a party whose position leaves a decision maker in "the nebulous twilight of speculation and conjecture" should not prevail. Yet that is precisely the position in which MRA's brief places the Commission. Obviously, therefore, MRA's position should not prevail.

No party to this case disputes that the Sioux scrubbers and the Taum Sauk additions are in service or that those plant additions will be part of the assessed value used to determine Ameren Missouri's 2011 property tax liability. In addition, no party disputes that the Company currently is accruing 2011 property tax expense that includes taxes associated with both the Sioux scrubbers and Taum Sauk, as it is required to do under FERC accounting rules. The only

[169] Tr., p. 1293, l. 7-21.
[170] MRA's Initial Brief, p. 6.

dispute is whether property taxes associated with those plant additions – taxes everyone agrees the Company will be obligated to pay during the period rates set in this case are in effect – will be included in the cost of service used to set rates in this case. For all of the reasons stated here as well as in Ameren Missouri's initial brief, the Commission should adopt the property tax calculation supported by the Company and the Staff, which would allow in rates approximately $10.8 million of property tax expense associated with the Sioux scrubbers and the Taum Sauk additions. The alternative position advocated by MIEC and MRA would allow zero tax expense for those two plant additions. Such a position is unrealistic, unfair, contrary to the evidence presented in this case, and contrary to sound regulatory practice.

VI. Energy Efficiency / Demand Side Management

A. Required Energy Efficiency Expenditures.

OPC's position in its Post-Hearing Brief is that the Commission should order Ameren Missouri to spend a specific amount on energy efficiency without resolving any of the barriers to pursuing more energy efficiency as identified by the Company in this case.[171] To support its proposal, OPC points to the Commission's recent order in the KCPL rate case.[172]

Presuming for a moment that OPC's recommendation were an option available to the Commission, it fails to recognize the very different evidentiary records in the two cases. For example, KCPL submitted no testimony about the throughput disincentive and only asked the Commission to order program cost recovery. The Company cannot comment on whether the KCPL record supported the order that was ultimately issued, but Ameren Missouri is confident that the record in the instant case does not support OPC's request.

[171] OPC's Initial Brief, pp. 10-11.
[172] Case No. ER-2010-0355.

In addition, there is no legal authority which would allow the Commission to order the Company to spend any specific amount on energy efficiency, any more than the Commission could order the Company to buy a particular truck, build a line, or construct a power plant. The Missouri Energy Efficiency Investment Act (MEEIA) does not contain any language that requires utilities, or allows the Commission to require utilities, to spend any particular level of dollars on energy efficiency, or to achieve any particular amount of MWh savings through energy efficiency. The closest it comes is the sentence, "The commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to this section with a goal of achieving all cost-effective demand-side savings."[173] There may be an argument as to what "all cost-effective" means, but achieving "all cost-effective" demand-side savings is a goal and not a mandate. Further, the word "permit" clearly indicates that the Commission's discretion ends at the point of allowing (permitting) the utility to implement programs, far short of requiring the utility to implement programs.

The only mandates in MEEIA apply to the Commission. The MEEIA statute states that the Commission:

> "…*shall* (1) Provide timely cost recovery for utilities; (2) Ensure that utility financial incentives are aligned with helping customers use energy more efficiently and in a manner that sustains or enhances utility customers' incentives to use energy more efficiently; and (3) Provide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings."[174]

Note that the legislature chose to use the word "shall" in this section rather than calling it a "goal," which was their word choice in the "all cost-effective" section cited above. This word selection has significance. It means the Commission must take action to deal with the

[173] Section 393.1075.4, RSMo.
[174] Section 393.1075.3, RSMo. Emphasis added.

throughput disincentive, because that is the most significant barrier to the alignment of interests of the Company and its customers.

The decision of whether and how much to invest in energy efficiency is a decision to be made by the management of the Company and one over which the Commission does not have authority.

> "…it must be kept in mind that the commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business. The company has a lawful right to manage its own affairs and conduct it business in any way it may choose, provided that in so doing, it does not injuriously affect the public. The customers of a public utility have a right to demand efficient service at a reasonable rate, but they have no right to dictate the methods which the utility must employ in rendition of that service."[175]

Ameren Missouri recognizes that the Commission has broad authority to regulate utilities.[176] However, the Commission is purely a creature of statute and its powers are limited to those conferred by statutes, either expressly or by clear implication as necessary to carry out the powers specifically granted.[177] Additionally, the courts have held that "… neither convenience, expediency, or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by statute."[178] The MEEIA statute does not expressly or by clear implication grant the Commission the ability to order Ameren Missouri to invest any particular amount in energy efficiency. "These powers [of regulation] do not, however, clothe the Commission with the general power of management incident to ownership."[179] The Commission has recognized this limitation, such as in Ameren Missouri's previous rate case where it held that while the Commission has the authority to regulate Ameren Missouri and to

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[175] *St. Joseph v. PSC*, 30 S.W.2d 8, 14 (1930).
[176] Section 385.040 RSMo.
[177] *Utility Consumers Council*, 585 S.W.2d at 49; *City of West Plains v. PSC*, 310 S.W.2d 925, 928 (Mo. Banc. 1958).
[178] *Utility Consumers Council*, 585 S.W.2d at 49 (citing *State ex rel. Kansas City v. PSC*, 257 S.W.2d (Mo. Banc. 1923.))
[179] *PSC v. Bonacker*, 906 S.W.2d 896 (Mo. App. 1995), citing *Harline v. PSC*, 343 S.W. 2d 177 (Mo. App. 1960.).

ensure the utility provides safe and adequate service, it does not have the authority to manage the Company by dictating to the Company regarding its use of outside contractors.[180]

Furthermore, OPC speculates that "a fair assumption is that a "meaningful reduction" from $20 million would be perhaps $3-4 million, which would put the 2012 levels fifty percent below the 2011 levels."[181] There is no evidence to support this assumption that a meaningful reduction is only $3-$4 million. Ameren Missouri has not determined what the level of its Energy Efficiency expenditures will be if the Commission rejects the billing unit proposal and it is completely unsubstantiated to assume the reduction will only be $3-$4 million. This is simply an attempt by the OPC to minimize the importance of approving the Company's billing unit proposal. The fact is that the Commission cannot ascertain what, if any, dollars the Company will likely spend on energy efficiency without the billing unit adjustment, as the Company itself has not made that determination. However, it should be clear that the Company will consider any and all options, well beyond OPC's $3-$4 million, when ultimately making that determination.

B. Cost Recovery and the Billing Unit Mechanism.

Post-hearing briefs filed by Staff, MDNR, MIEC and MEG all addressed the energy efficiency issues raised in this case. Not a single one of these briefs offered a method by which Ameren Missouri could continue its energy efficiency programs beyond September 30, 2011.

1. <u>Amortization Period.</u>

Several parties addressed the amortization period for the Company's regulatory asset. Ameren Missouri believes this recovery period should be shortened, but decided to withdraw its request to reduce the period to three years because of the desire to focus on mitigating the

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[180] Case No. ER-2008-0318, *Report and Order*, February 6, 2009, p. 112.
[181] OPC's Initial Brief, p. 9.

throughput disincentive in this case.[182] MIEC argues that the recovery period should be increased to ten years, but this suggestion is not supported by any other party in this case. MIEC further argues that the current program cost recovery treatment is superior for demand-side resources compared to supply-side resources. Ameren Missouri witness William Davis' testimony discredits the arguments made by MIEC. Mr. Davis points out that Ameren Missouri does not acquire physical assets when investing in energy efficiency; instead it makes annual expenditures on a variety of marketing strategies and incurs expenses (versus capital expenditures) with the goal of altering a customer's electric usage.[183] The cash flows for a large supply-side resource are negative during the few years of construction, and then positive for the remaining life of the asset when construction expenditures stop and the asset is depreciated. In contrast, the development of significant demand-side resources requires continuous spending over a long period of time. If the utility is capitalizing those expenditures, the cash flow will initially be negative. After many years DSM spending could level off. At that point the cash flows would be neutral. Since the spending is continuous, there is no period of positive cash flow and the unamortized regulatory asset balance does not decrease over time.[184] The longer the amortization period, the larger the asset will grow.[185]

Valuing demand-side investments equal to supply-side investments does not mean the accounting treatment must be identical, especially when that treatment does not move toward fulfilling the mandates of the statute – that is, timely cost recovery, alignment of incentives and timely earnings opportunities.

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[182] Ex. 111, p. 6, l. 1-4 (Mark Surrebuttal).
[183] Ex. 114, p. 4, l. 12-24 (Davis Direct).
[184] Ex. 115, p. 11, l. 21 to p. 12, l. 2 (Davis Rebuttal).
[185] Ex. 114, p. 4, l. 22 to p. 5, l. 2.

2. **Throughput Disincentive.**

As a methodology for addressing the throughput disincentive, Ameren Missouri has proposed a billing unit adjustment mechanism. The other parties, primarily Staff, throw up many process objections to implementing this proposal. They say the Company hasn't provided all of the information required by the Commission's new rules; that the proposal does not include the total resource cost for each program; that it does not detail how the Company will deal with customers who opt-out; that the Company has not addressed how to identify demand-side costs on customer bills, etc. Some of these objections are completely untrue, but even presuming they were accurate, as the Company stated in its Initial Brief, there is not a single objection that couldn't be overcome by the Commission, if it desires to work with the Company to implement a constructive mechanism to deal with the throughput disincentive in order to continue the Company's momentum in its energy efficiency programs. Rules can be waived – and given that they were not effective until just a couple weeks ago, the Commission would be more than justified in waiving major portions of the rule.

But some of Staff's objections are simply untrue. The Commission already knows that every one of Ameren Missouri's energy efficiency programs has a total resource cost (TRC) result above 1.0.[186] No one has disputed that in this case. The Company has a mechanism to identify demand-side costs on customer bills. It provided a sample bill which contains a specific line item so that energy efficiency costs are stated separately.[187]

Staff raises MEEIA's opt out provision as a reason to deny the Company's request, but this argument mischaracterizes the Company's proposal. The billing unit adjustment mechanism stems from costs that customers cannot opt-out of paying and is not a collection mechanism for

[186] Ex. 113, p. 4, l. 9-11 (Laurent Surrebuttal).
[187] Tr., p. 2017, l. 3-16.

energy efficiency program costs. Accordingly, whether a customer opts out of the energy efficiency costs is irrelevant to the billing unit adjustment mechanism.

Several parties attempt to paint the Company's billing unit mechanism as a Lost Revenue mechanism. This is untrue. It is designed to offset the throughput disincentive, which is different than Lost Revenue, as defined by the Commission.[188] Stated another way, the Company's proposal prevents lost revenues from occurring in the first place, rather than seeking recovery of them after they are lost.[189] This is a significant factual distinction; the billing unit adjustment proactively offsets the throughput disincentive and, accordingly, makes the definition of Lost Revenues irrelevant for the purposes of this proposal. Again, Ameren Missouri's billing unit proposal is a way to "normalize" for the effects of its energy efficiency programs, akin to weather normalizing or annualizing test year sales.

Some parties indicate that the billing unit adjustment mechanism should be rejected because it makes the adjustment prior to achieving the MWh savings which are the basis for the adjustment. These parties argue the Commission cannot make an adjustment until after the MWh savings are verified. This argument ignores several facts. First, no party disputes that Ameren Missouri's energy efficiency programs are currently resulting in MWh savings. Second, the language of the MEEIA statute only says that programs "result in energy or demand savings."[190] The statute does not say energy efficiency programs must have already "resulted" in energy or demand savings.[191] Additionally, in order to protect customers, Ameren Missouri's proposal is that there be an evaluation of the energy efficiency savings achieved compared to those that were planned and make a subsequent adjustment to billing units if there is a significant

[188] Tr., p. 1963, l. 21 to p. 1964, l. 2.
[189] Tr., p. 1839, l. 12-15.
[190] Section 393.1075.4, RSMo.
[191] Tr., p. 1969, l. 7-13.

variation.[192] The MEEIA rules may contain language which must be waived in order to adopt Ameren Missouri's proposal, but the Commission certainly has the basis to decide that waiver of those portions is justified in order to encourage the continuation of Ameren Missouri's energy efficiency programs.

Ameren Missouri's proposal will result in the Company achieving a significant percentage of what has been defined as the Realistic Achievable Potential (RAP) level of energy efficiency savings, 75% in 2012.[193] Given that the MEEIA statute sets a goal of all cost-effective energy efficiency, which means energy efficiency which is cost-effective for the utility as well as for its customers,[194] Ameren Missouri has the only proposal in this case that makes progress toward reaching MEEIA's goal.

Ameren Missouri recognizes that its billing unit proposal is unique. But the fact that it is unique should not be a reason to reject it. It is the only proposal in the record that complies with the mandate in the MEEIA statute to align the utility and customer interests. Doing nothing and having Ameren Missouri's energy efficiency tariffs expire cannot be the favored course of action. The Commission should take this opportunity to take up the MEEIA mandate and keep alive the pursuit of energy efficiency in Ameren Missouri's service territory.

3. MEEIA Filing.

Staff suggests that the Commission order Ameren Missouri to makes its first MEEIA filing by January 1, 2012. Ameren Missouri opposes this recommendation. First, if the Commission adopts the Company's billing unit adjustment mechanism and extends the Company's energy efficiency tariffs until December 31, 2013, there is no need to force the Company to make an MEEIA filing. In the alternative, if the Commission does not adopt the

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[192] Ex. 116, p. 6, l. 1-7 (Davis Surrebuttal).
[193] Ex. 111, p. 4, l. 10-13.
[194] Ex. 111, p. 4, l. 21 to p. 5, l. 1.

Company's proposal, in which case the Company does not want its current tariffs extended, the Company will need to re-evaluate the level of investment it is able to make in energy efficiency. In that scenario, the Company does not know when it will want to make a MEEIA filing, but the timing of that filing should be at the discretion of Company management and not to meet Staff's artificial schedule. Again, the decision of whether and how much to invest in energy efficiency is a decision to be made by the management of the Company and one over which the Commission does not have authority.

VII. VEGETATION-INFRASTRUCTURE TRACKERS / STORM COSTS

A. Continuation of Trackers.

Both Ameren Missouri and the Staff support continuation of the two-way tracker mechanism, which the Commission first authorized in Case No. ER-2008-0318, to deal with the costs and expenses the Company would incur to comply with rules governing infrastructure inspections and vegetation management. As the Commission pointed out in each of Ameren Missouri's last two rate cases, the tracker mechanism protects the interests of both the Company and its customers by ensuring that Ameren Missouri will neither over- nor under-recover the costs it incurs to comply with the infrastructure inspections and vegetation management rules.

MIEC is the only party to this case that opposes continuation of the tracker, but most, if not all, of the arguments that MIEC makes in support of that position were presented and rejected in one or both of the Company's last two rate cases.

For example, at page 16 of its initial brief, MIEC cites the Commission's *Report and Order* in Case No. ER-2008-0318 as support for the proposition that "[t]he Commission disfavors the overuse of trackers and will support them only where there is insufficient evidence to establish Ameren Missouri's costs."[195] What the Commission actually said in that *Report and Order* was that it "does not intend to allow the overuse of tracking mechanisms in this case or in future rate cases."[196] It went on to say that the infrastructure/vegetation management tracker proposed by the Company in that case "is appropriate."[197] It reaffirmed that judgment in the Company's last rate case, Case No. ER-2010-0036, when it rejected requests by the Staff and MIEC to discontinue the tracker and found, instead, "[b]ecause there is still a great deal of uncertainty about the amount of spending needed to comply with the rules, the Commission finds that the tracker is still needed."[198]

MIEC also argues that "the Commission's vegetation management rules are no longer 'very new', and it is no longer true that 'no one can know with any certainty how much AmerenUE will need to spend to comply with the rule's provisions.'"[199] But that argument is demonstrably false. The vegetation management and infrastructure inspection rules have been in effect for less than three years. More importantly, however, Ameren Missouri has not yet completed a full cycle of the inspections and related maintenance that the rules prescribe. As the Company pointed out in its initial brief, only about 75 percent of the initial, four-year urban cycle and slightly more than half of the initial, six-year rural cycle will have been completed as of the end of the true-up period in this case. Therefore, Ameren Missouri does not yet have sufficient data or experience to allow it to predict how much it will cost the Company to fully comply with the Commission's rules. And, as the Commission observed in its *Report and Order* in Case No. ER-2010-0036, because of that uncertainty the tracker is still needed.

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[195] MIEC's Initial Brief, p. 16.
[196] *Report and Order* in Case No. ER-2008-0318, p. 41 (January 27, 2009).
[197] *Id.*
[198] *Report and Order* in Case No. ER-2010-0036, p. 61 (May 28, 2010).
[199] MIEC's Initial Brief, p. 17.

Finally, MIEC argues that because the Company's costs of complying with the Commission's rules have not fluctuated significantly in recent years the tracker no longer is necessary.[200] But, based on the evidence presented in this case, data regarding past expenditures can be misleading as to what Ameren Missouri's future compliance costs will be. As noted in the Company's initial brief, budgeted compliance expenditures for calendar years 2011 and 2012 will significantly exceed annualized expenditures through the end of the true-up period in this case. Ameren Missouri witness David Wakeman stated that, based on the Company's budgets, compliance expenditures in 2011 will increase by more than seven percent and expenditures for 2012 will increase by more than ten percent.[201] Cost increases of this magnitude do not support MIEC's allegation that Ameren Missouri's costs of complying with the Commission's rules are no longer volatile. However, these anticipated increases do support the Company's and the Staff's proposals to continue the trackers.

Because the full cost of complying with the Commission's infrastructure inspection and vegetation management rules is not yet known and because the two-way tracker currently in effect protects the interests of both the Company and its customers by ensuring that rates reflect neither more nor less than the actual costs of compliance, the Commission should include in the Report and Order issued in this case language that authorizes Ameren Missouri to continue its vegetation management and infrastructure inspection trackers.

B. Non-Labor Storm Costs.

In its initial brief, the Staff makes a number of arguments in support of its position on the storm cost expenses that is at issue in this case. However, an analysis of these arguments finds them to be factually incorrect and/or illogical.

[200] *Id.*, pp. 17-18.
[201] Ex. 105, p. 9, l. 5-15 (Wakeman Rebuttal).

For example, the Staff claims that its proposed method for normalizing non-labor storm repair costs is consistent with the methodology that the Commission adopted in Ameren Missouri's last rate case, Case No. ER-2010-0036. But a review of the Commission's *Report and Order* in that case shows that the Staff's claim is wrong. In fact, it is the Company's proposed methodology for calculating storm costs, and not the methodology proposed by the Staff, that most closely follows the ratemaking principles that the Commission endorsed in that case.

At page 109 of its initial brief, Ameren Missouri described the two ratemaking principles that govern the recovery of storm costs by electric utilities operating in Missouri. At page 66 of its *Report and Order* in Case No. ER-2010-0036, the Commission explained those two principles as follows:

> The Commission has generally allowed an electric utility to recover the Operations and Maintenance (O&M), excluding internal labor, costs to restore service after normal storms by including an amount in the cost of service based on some multiyear average level. For the costs to restore service after an extraordinary storm, the Commission has usually allowed the utility to accumulate and defer those costs through an accounting authority order, an AAO. The accumulated and deferred costs are then considered in the utility's next rate case. Generally, the Commission allows the utility to recover those costs amortized over a five-year period.

The *Report and Order* also described the Staff's proposed method for recovering storm costs actually incurred during the test year used in that case. First, the Staff calculated "a four-year average of AmerenUE's normal O&M, non-labor related, storm restoration costs,"[202] which the Commission adopted as the normalized level of storm cost expense to be included in the cost of service used for ratemaking purposes. Because there is nothing in the *Report and Order* to suggest otherwise, the Staff's normalization adjustment appears to have been based on a simple, arithmetic average of 48 months of actual incurred storm costs without any adjustments

[202] *Report & Order* in Case No. ER-2010-0036 (May 28, 2010), p. 66.

whatsoever.[203] Next, the Staff subtracted its calculation of normalized storm cost expense from total storm cost expense actually incurred during the test year, and proposed that Ameren Missouri be authorized to amortize that remainder over five years.[204]

The Staff's methodology for calculating allowable storm costs in the current case differs materially from the methodology that the Commission approved in Case No. ER-2010-0036. For example, although the Staff bases its calculation of normalized storm costs on a 47-month historical average of actual incurred costs, it subtracts more than $8.8 million in incurred costs before it calculates that average.[205] That is more than 30 percent of the Company's actual, incurred storm costs for the 47-month period. Consequently, what results is a skewed average, which excludes certain costs that the Staff characterizes as "out-of-the-ordinary,"[206] instead of a simple, arithmetic average, as was used in the previous case. The Staff defends its action by claiming that the excluded costs, which currently are being recovered through Commission-approved amortizations, had to be left out of the historical to avoid a double-recovery of those costs.[207] But no similar adjustment was made by the Staff – or approved by the Commission – in Ameren Missouri's previous rate case even though amortizations of past storm costs were included for ratemaking purposes in that case. If double-recovery is a concern now, why wasn't it also a concern then? Of course the answer is that there is no double recovery; the 47-month average is being used to predict a normal level of storm costs for the future, not to recover past storm costs. Finally, the Staff does not recommend any amortization of storm costs that the Company incurred through the end of the true-up period that exceeded the normalized level of storm costs. Departing, yet again, from its position in the last rate case, the Staff claims specific

[203] *Id.*, p. 68.
[204] *Id.*
[205] Staff's Initial Brief, p. 12.
[206] *Id.*
[207] *Id.*, p. 13.

recovery of these costs is unnecessary because all costs incurred through the end of the true-up period were included in the average used to calculate normalized storm costs.[208]

But there are other reasons why the Commission should reject the Staff's position that go beyond the fact that it is inconsistent with the regulatory principles espoused in the *Report and Order* in Case No. ER-2010-0036. One such reason is that the Staff's position confuses and conflates the nature and purpose of two very different and distinct regulatory tools/techniques – normalization and amortization – which were discussed in Ameren Missouri's initial brief. As noted there, normalization is a forward-looking tool that regulators use to predict what an item of expense will be in the future based on incurred levels of that expense in the past. For ratemaking purposes, normalized costs are *substituted* for actual, incurred test period costs, thereby allowing the cost of service used to set rates to more closely reflect what costs will be during the future period when those rates are in effect. In contrast, amortization is a backward-looking tool that is designed for the sole purpose of allowing a utility to collect through future rates certain extraordinary costs that were incurred, but not recovered, in the past. For ratemaking purposes, amortized costs are *added* to actual, incurred test period costs because only by doing so will the utility be made whole for costs it was unable to collect in the past.

These differences between normalization and amortization make two things clear. First, the Staff should not have excluded from its historical average those storm costs currently being recovered through amortization because doing so distorted the average and thereby reduced its value as a predictor of future costs. Second, there is no basis for the Staff's concern that failing to exclude storm costs that currently are being amortized would result in double recovery of those costs. In addition, failing to include the amortizations in the historical average will result in an under-recovery of future costs that likely will require Ameren Missouri to use amounts

[208] *Id.*, p. 14.

designated as amortizations of past costs to pay for future storm costs. This negates the purpose of the amortizations, which was to reimburse the Company for past, unrecovered costs.

The Commission should also reject the Staff's position because it will deny Ameren Missouri recovery of prudently incurred non-labor storm recovery costs. A simple 47-month arithmetic average of actual, incurred storm costs yields an annualized average amount of approximately $7.1 million. From the beginning of the test year through the end of the true-up period in this case the Company incurred approximately $8.1 million in storm costs. The Staff, however, proposes to allow a total of only $4.8 million in normalized storm costs for ratemaking purposes in this case. Thus, not only is the Staff's recommended storm cost expense 48 percent less than the annualized 47-month historical average, it is 76 percent less than the amount of expense that Ameren Missouri incurred through the end of the true-up period. That leaves Ameren Missouri with no opportunity to collect the $3.5 million difference between the Staff's calculation of normalized storm costs and the $8.1 million in costs the Company actually incurred.[209]

In addition, the Commission should reject the Staff's position because it is based on a false argument. At page 15 of its initial brief the Staff notes that "[t]he reality of storm costs is that they vary greatly; some years' [sic.] storm costs may fall well below what has been included in rates, and other years' [sic.] costs may exceed the amount included in rates." Based on that observation, the Staff argues that the amount of storm cost expense proposed by Ameren Missouri, which includes a normalized level of costs plus an allowance for the amortization of extraordinary costs incurred through the end of the true-up period, will "allow the Company to

[209] Staff's Initial Brief states, at page 15, that "[s]hould Ameren Missouri need additional funds to cover the costs of extraordinary storms, there are other mechanisms more appropriate for doing so, such as an Accounting Authority Order." That statement is rendered meaningless by the Staff's opposition to the amortization of extraordinary storm costs that the Company has proposed in this case – the very same request that would be made in a separate, and redundant, application for an AAO.

retain a great deal of money should storms not occur."[210] But the Commission already has considered this phenomenon and rejected it as a legitimate concern about the way in which storm costs routinely are dealt with for ratemaking purposes. As Ameren Missouri pointed out in its initial brief, in its *Report and Order* in Case No. ER-2010-0036, the Commission acknowledged that a utility "may under recover in years when costs are high, but over recover in years when costs are low,"[211] yet the Commission concluded that its storm cost recovery methodology "has worked reasonably well."[212]

MIEC's recommended allowance for storm costs – $4.9 million – is similarly flawed and for many of the same reasons. Like the Staff, MIEC's proposed level of storm cost expense is much less than the annualized amount of expense that Ameren Missouri has actually incurred in the recent past. MIEC's recommendation is also based, in large part, on past storm costs that Ameren Missouri is being allowed to amortize. As noted earlier in this brief, this negates the purpose of the amortization – to allow recovery of past storm costs – by making the Company use funds collected through the amortization to pay for future storm costs. Finally, MIEC's opposition to an amortization that would allow the Company to recover extraordinary storm costs incurred in early 2011 will deny recovery of prudently incurred costs that Ameren Missouri has not – and will not – have an opportunity to otherwise collect from its customers. As noted in the Company's initial brief, denying such costs will have a detrimental effect on earnings and could hamper future storm restoration efforts as Ameren Missouri is forced to choose between its customers' interest in prompt restoration of service and its shareholders' interest in a reasonable rate of return.

[210] Staff's Initial Brief, p. 15.
[211] *Report and Order* in Case No. ER-2010-0036, p. 67 (May 28, 2010).
[212] *Id*., p. 68.

MIEC makes at least one argument in support of its position, however, that differs from the arguments made by the Staff. MIEC argues that Ameren Missouri has, since its last rate case, over-recovered storm costs because actual incurred costs exceeded storm costs included in rates in that case.[213] But this argument is flawed for at least two reasons. First, a portion of the storm costs allowed in Case No. ER-2010-0036 were amortizations of past storm costs that were intended to make the Company whole for costs it incurred, but had not recovered, in the past.[214] MIEC's characterization of those costs as not representing costs that Ameren Missouri actually incurred is, therefore, incorrect. Second, as pointed out in the Company's initial brief, it would be inappropriate for the Commission to look at any single item of expense from Ameren Missouri's last rate case and conclude that the Company over-recovered costs that were included in rates. As evidenced by the fact that Ameren Missouri has failed to earn its authorized rate of return since the date rates set in the last case became effective, it is clear that, on a net basis, the Company has under-recovered most costs used to set rates in that case. Moreover, as noted earlier in this brief, when it considered the storm cost issue in previous rate cases the Commission acknowledged that Ameren Missouri will over-recover normalized storm costs in some years and under-recover them in others. Consequently, even if MIEC's argument were otherwise legitimate, it does not provide a basis for the Commission to deviate in this case from the way in which it routinely determines storm cost expense for ratemaking purposes.

For all of the reasons stated here and in the Company's initial brief, the Commission should include for ratemaking purposes in this case, Ameren Missouri's recommended normalized storm costs of approximately $7.1 million, which is based on a simple, arithmetic

[213] MIEC's Initial Brief, p. 21.

[214] MIEC states that non-labor storm cost expense allowed in Ameren Missouri's last rate case totaled $10.7 million. However, the Commission's *Report and Order* in that case states, at pages 68-69 that "AmerenUE shall include $6.4 million in its cost of service for storm restoration costs." The remainder represents an amortization of costs from past storms.

average of actual storm costs incurred over the 47-month period ending at the end of the true-up period. In addition, the Commission should also authorize the Company to amortize over five years approximately $1 million in additional, extraordinary storm costs, which were incurred through the end of the true-up period.

VIII. RENEWABLE ENERGY STANDARD COMPLIANCE COSTS.

MIEC continues to argue that the solar rebates, and presumably the other Renewable Energy Standard (RES) costs incurred by Ameren Missouri, should be recovered through a ten year amortization.[215] This argument is based on the fact that customer-owned solar panels are expected to last for ten years.[216]

MIEC's arguments fail to recognize two things. First, that the Company is requesting treatment for all RES expenditures, not just for the solar rebates.[217] Rebates were the only expense incurred during the test year but will not be the only expense incurred in the future.[218] Second, MIEC fails to recognize that the solar rebates are an *expense* and are not a capital investment in customer-owned solar panels. These rebates are nothing more than payments required by Missouri law and they do not result in Ameren Missouri gaining any ownership interest or control over the solar panels.[219] Accordingly, there is no reason to amortize these expenses over ten years.

Staff continues to argue that Ameren Missouri should implement a Renewable Energy Standard Rate Adjustment Mechanism (RESRAM).[220] Staff's own witness admits that the Commission's rules allow the Company to either request a RESRAM *or* to utilize an Accounting

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[215] MIEC's Initial Brief, p. 34.
[216] *Id.*, pp. 32-33.
[217] Ex. 131, p. 16, l. 20-22 (Weiss Rebuttal).
[218] *Id.*
[219] *Id.*, p. 17, l. 6-8.
[220] Staff's Initial Brief, p. 55.

Authority Order (AAO) in between rates.[221] The Company has made its choice and prefers to include an amount in rates and set up an AAO to accrue incremental amounts it incurs in between rate cases. To do this, the Company requests the Commission include in its revenue requirement an amount equal to its annual expenditure level as of the true-up date, $885,000.[222] This is the best estimate of the likely expenditure level in the future. Staff's recommendation is to use the calendar year 2010 amount, a number for which there is no support. Ameren Missouri's cost to comply is only going to increase over the next several years, so it makes no sense to pick a number that is artificially low, such as the calendar year 2010 number proposed by Staff.[223]

As stated above, Ameren Missouri also requests that the Commission approve an AAO, which the Company would use to accrue the $885,000 spent prior to the true-up date but not collected in its current rates, amounts spent after the true-up date and prior to effective date of new rates in this case, and any amounts it spends above the $885,000 after new rates take effect in this case.[224] This treatment is necessary to ensure Ameren Missouri has an opportunity to recover expenditures which it is required to make under the RES statute, and it is consistent with the treatment the Commission has approved in the past for expenditures which were imposed upon the Company, such as those imposed by the Commission's vegetation management and infrastructure inspection rules.[225]

In its brief, Staff makes a new argument in opposition to the Company's AAO request. Staff asserts that the AAO would allow the Company to earn a return on an asset that is over the one percent cap imposed by the RES statute. There is no support in the record for this assertion

[221] Tr., p. 2189, l. 7-10.
[222] Tr., p. 2191, l. 25 to p. 2192, l. 4.
[223] Ex. 131, p. 16, l. 8-22.
[224] *Id.*
[225] *Id.*

and, of course, all costs accrued within an AAO will be reviewed in a future rate case prior to being included in rates. If Ameren Missouri attempts to violate the one percent cap, then Staff and every other party to the rate case will have the opportunity to point out that fact to the Commission and to make the appropriate adjustment to the AAO balance before it is included in rates.

The Company's management has made the decision that it desires to include the true-up amount in rates with an AAO to collect other expenditures, treatment which is specifically allowed by the Commission's RES rules. The rules allow for Ameren Missouri's management to make this decision and do not place that choice in the hands of Staff or any other party in this case. The Commission should grant Ameren Missouri the treatment it requests.

IX. MUNICIPAL LIGHTING

The initial brief of the Municipal Group repeats the unsubstantiated allegations made in its written testimony and at hearing, as well as continuing to confuse the different parts of the ratemaking process - that is, it does not appear to recognize the difference between setting the revenue requirement and designing the appropriate charges through which to collect that revenue requirement. The Municipal Group's misunderstanding is confirmed in their own post hearing brief, which states, "Nevertheless, the sole issue raised by the Municipal Group is not about rate making per se or cost of service. It is about simple mathematics and how AmerenUE proposes a methodology of applying a percentage increase in rates that unfairly burdens members of the subclass."[226] This statement has the issue entirely wrong and provides some insight as to why the Municipal Group continues to misunderstand the issues involved. The question before the Commission is this: how should the lighting class pay the revenue requirement that reflects the

[226] Municipal Group's Initial Brief, p. 1, n. 1.

cost to serve it? This is, by definition, a question of rate design and not a matter of "simple mathematics."

The Municipal Group's position is that if the Commission removes a charge, then it must remove the revenue requirement previously associated with that charge.[227] This proposal has the process backwards. In the ratemaking process, the Commission first determines the revenue requirement; it then determines how much of that revenue requirement should be collected by each rate class; and finally it determines how that revenue requirement is collected within each rate class.

The issue with which the Municipal Group takes issue is how the revenue requirement is collected from within the lighting tariffs. Ameren Missouri believes that a charge (the pole and span charge) should be discontinued. It was appropriate at one point in time, but the Company's customers have been paying this charge for over 20 years and there is nothing in the record to refute the Company's rationale to discontinue this charge. Accordingly, the evidence in this record mandates that the revenue requirement for the lighting class (which does not change when the pole and span charge is eliminated) be collected through the monthly lighting rates, which better aligns what lighting customers pay with what it costs the Company to provide that service.

X. LED LIGHTING

There are two significant defects and/or shortcomings with the Staff's initial brief on this issue. First and foremost, roughly half of the brief relies on information that, because it is not part of the competent and substantial evidence on the record in this case, cannot be considered by

[227] *Id.*, p. 7-8.

the Commission in rendering its decision.[228] Second, the Staff completely ignores the "500 pound gorilla in the room": i.e. the "Non-Unanimous Stipulation and Agreement As to Outdoor Lighting Issues" which was approved in Case No. ER-2010-0355, and which is in evidence in this case, where the Commission agreed to sponsor a workshop "regarding Outdoor Lighting Issues that would address a variety of issues including, but not limited to, LED lighting ..." These defects are so significant that they can, and should, be considered fatal to the Staff's position.

But there are other problems with the arguments regarding LED lighting that are presented in the Staff's initial brief. For example, at page 83 of its brief the Staff states that "[m]unicipal customers within AmMo's service territory have expressed a desire to have other street and area lighting (SAL) options available to them." What the brief fails to mention is that when cross-examined about that assertion, the Staff's witness on this issue, Dr. Hojong Kang, acknowledged that not one of the municipalities that intervened in this case had indicated, through testimony or otherwise, that it wants LED lighting or that it supports the Staff's position on this issue.[229] He further acknowledged that not one of the large commercial customers that had intervened in this case, and who Dr. Kang identified as another group that likely would be interested in LED lighting service, had indicated that it wants the technology or supports the Staff's position.[230]

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[228] At pages 84 and 85 of its initial brief, the Staff describes and discusses (1) an alleged stipulation by KCPL and KCPL-GMO, presumably in their respective, recently-completed rate cases, to file LED lighting tariffs by the end of 2012, and (2) an agreement by Empire, in Case No. ER-2011-0004, to provide an update on that company's LED pilot study and its plans for filing future tariff sheets. The Staff also includes a citation to the transcript in Case No. ER-2010-0355. However, none of this information was offered as evidence in the current case. Indeed, prior to the references in the Staff's initial brief, Ameren Missouri was unaware of any of this information. Insofar as the information related to Empire is concerned, there is good reason why that information was not offered as evidence in this case: Empire did not reach agreement with the Staff until well after the hearings in this case were ended.

[229] Tr., p. 2156, l. 11-22.

[230] Tr., p. 2156, l. 23 to p. 2157, l. 7.

Another example is the assertion at page 83 of the Staff's initial brief that "the LED lighting fixtures proposed for use by the Staff … are the most energy efficient fixtures available today." Perhaps that is true, but uncontroverted evidence presented by one of the Company's witnesses, Kyle Shoff, established that LED lighting facilities typically are three to five times as expensive as currently used outdoor lighting fixtures.[231] Mr. Shoff further noted that because LED fixtures provide light that is different in both amount and quality to the light produced by current fixtures, current outdoor light poles might have to be replaced or re-spaced to accommodate those differences. Because pole spacing is a key cost consideration, moving or replacing existing poles would significantly increase the cost of LED lighting beyond current estimates.[232] Mr. Shoff also testified that because LED lighting technology is in its infancy, significant technical issues remain unresolved.[233] Consequently, it is impossible at this time for the Staff, or anyone else, to know what the full cost of LED lighting will be in the future.

Because there is no evidence of a significant, pent-up demand for LED lighting within Ameren Missouri's service area, the Company recommends that the Commission reject the Staff's LED lighting proposal in this case in favor of more cautious and deliberative approach. As it agreed to do when it approved the stipulation and agreement in Case No. ER-2010-0355, the Commission should schedule one or more outdoor lighting workshops, which will give all interested parties an opportunity to consider and provide comments on a wide range of issues including LED lighting. Ameren Missouri will continue its ongoing study of LED lighting technology, and, upon completion, will share the results of that study with the Staff and other interested parties. Those results should be of significant value to the workshop participants. After the workshop is completed and the Staff has had an opportunity to consider the results of

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[231] Ex. 149, p. 2, l. 9-10 (Shoff Rebuttal).
[232] *Id.*, p. 12, l. 1-15.
[233] *Id.*, p. 5, l. 8-22.

the Company's study and the comments of interested parties, the Staff and Ameren Missouri can re-visit the issue to determine what steps should be taken to advance LED lighting and when. But to require the Company to file an LED lighting tariff before all of those preliminary steps have been completed would be both imprudent and unreasonable.

XI. UNION ISSUES

The initial brief filed on behalf of the International Brotherhood of Electrical Workers Local 1439, AFL-CIO, and various other local unions representing certain of Ameren Missouri's employees (collectively, the Union) argues that the authority to order the Company to implement two new "trackers" requested by the Union can be implied from the Commission's authority to require safe and adequate service.[234] The Union further argues that Ameren Missouri's opposition to these new "trackers" is "particularly disingenuous given the fact that the PSC has repeatedly required AmerenMo and other utilities to submit to trackers for a variety of different reasons."[235]

Both these arguments are groundless and should be rejected. As to the Union's first argument, certainly no one disputes the Commission's authority to regulate utilities, including Ameren Missouri, to ensure that they provide safe and adequate service to their customers. But, as the Commission itself observed in one of the Company's recent rate cases, the authority to ensure safe and adequate service does *not* include the authority to manage the company.

> The Commission has the authority to regulate AmerenUE, including the authority to ensure the utility provides safe and adequate service. However, the Commission does not have authority to manage the company. In the words of the Missouri Court of Appeals,
>
>> The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The

[234] Unions' Initial Brief, p. 3.
[235] *Id.*, p. 2.

> utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation, and does no harm to public welfare.[236]

As noted in Ameren Missouri's initial brief, Missouri case law consistently has held that the Commission does not have the authority to dictate how many employees a utility must hire, how and when those employees are trained, and whether, and under what conditions, a utility can use outside contractors. Yet that is precisely what the Union is asking the Commission to do.

The Union's second argument is also unfounded because it is based on a fundamental misunderstanding of the nature and purpose of trackers that the Commission has authorized in the past for utilities, including Ameren Missouri. A tracker is merely – and exclusively – a cost recovery mechanism that ensures a utility will neither over- nor under-recover an item or category of operating expense. The vegetation management/infrastructure inspection tracker that the Commission authorized in each of the Company's last two rate cases is an example of such a mechanism. Although it is unclear what "trackers" the Union is requesting in this case – due to the fact that the Commission struck an exhibit describing them[237] – one thing is clear: the proposed "trackers" have nothing to do with the recovery of any operating costs. Instead, the Union appears to ask the Commission to order the Company to accumulate data and submit periodic reports regarding (1) expenditures related to recruiting, hiring, or training its internal workforce,[238] and (2) "expenditures allowed and considered in this rate case to replace the current infrastructure" and "loads on equipment and wires and the optimal replacement of aged cable, wires, poles and equipment."[239]

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[236] *Report and Order* in Case No. ER-2008-0318, pp. 112-113 (January 27, 2009).
[237] See *Order Granting Ameren Missouri and Staff's Motions to Strike A Portion of Michael Walter's Surrebuttal Testimony*, Case No. ER-2011-0028 (May 6, 2011).
[238] Ex. 650, p. 7, l. 28-43 (Walter Direct).
[239] *Id.*, p. 8, l. 6-10.

The first "tracker" requested by the Union is unnecessary because Ameren Missouri already is accumulating information assessing the value to customers of expenditures ordered in the Company's last two rate cases, and that information will be presented to the Staff and the Public Counsel on or before December 31, 2011.[240] As for the Union's second "tracker," Ameren Missouri wonders what it is supposed to track. The Company has not requested that any amounts be included in rates for the replacement of its infrastructure. But even if it had made such a request, the Commission is prohibited by statute from granting it.[241] As for the Union's request for periodic reports regarding "loads on equipment and wires and optimal replacement of aged cable, wires, poles and equipment," Ameren Missouri believes such reports are unnecessary. There is not a shred of evidence in this case that the Company's practices and policies regarding its plant and equipment are creating current service problems or will adversely affect service in the future. Without such evidence, imposing a burden for reports regarding its infrastructure would be a waste of time, effort, and money.

In addition to the "trackers," but related to them, the Union also asks the Commission to order Ameren Missouri to (i) expend a substantial portion of any rate increase granted in this case on hiring and training additional internal employees; (ii) make a commitment to its internal workforce by ensuring that new employees will be recruited from within the Company's Missouri service area; and (iii) only hire outside contractors from Missouri. However, granting any or all of these requests would require the Commission to directly inject itself into the management of the Company, which is beyond the scope of the Commission's regulatory authority.

[240] Tr., p 2268, l. 16 to p. 2269, l. 15.
[241] Section 393.135, RSMo, prohibits the Commission from including in rates expenditures related to "owning, operating, maintaining, or financing any property before it is fully operational and used for service."

For all these reasons, as well as for the reasons discussed in Ameren Missouri's initial brief, the Commission should reject the Union's requests in this case. There is no evidence in this case that the Company is not currently providing safe and adequate service to its customers or that decisions regarding its workforce will lead to a deterioration of service quality in the future. Absent such evidence, no action on the Union's requests is necessary.

XII. TESTIMONY AT LOCAL PUBLIC HEARINGS

Several other parties addressed the issue of how testimony given at local public hearings should be taken into account in deciding this case. Staff argued that the evidence taken at local public hearings is "substantial and competent evidence of record" and that the Commission "may rely on it for what it is worth." Staff also points out that public testimony frequently highlights quality of service and customer service issues.[242] In general, the Company does not disagree with these points. There have certainly been instances where widespread or systematic billing or service issues for particular utilities have been identified through testimony of numerous witnesses at local public hearings, and the Commission has taken that testimony into account in ordering improvements. Even where there is no systematic problem with billing or service, local public hearings provide customers with a forum in which they can communicate with the Company and the Commission about individual service or billing problems they may have experienced, and in many instances they can get resolution of their problems on the spot. In the Company's view, testimony at local public hearings is most valuable in addressing these types of issues.

With regard to the setting of rates, the value of public testimony becomes a bit murkier. Although affordability and rate shock considerations can appropriately influence the Commission's consideration of allocation of costs among classes and other rate design

[242] Staff's Initial Brief, p. 10.

considerations, affordability considerations cannot be used to deprive the utility of its right to recover its prudently incurred cost of providing service, including having a reasonable opportunity to earn a fair return on its investment. The Commission itself recognizes this very basic principle of public utility ratemaking. *See, e.g.,* Case No. ER-2008-0318, *In Re: Union Electric Company*, Report and Order, p. 9, where the Commission, citing *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of the State of West Virginia, 262 U.S. 679, 690 (1923)*, stated*:*

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprive the public utility of its property in violation of the Fourteenth Amendment.

This basic principle demonstrates that it is not the Commission's role, or even within the Commission's power, to use the ratemaking process to solve the economic problems of private businesses or citizens or redistribute money from a utility to its customers. Rather, it is the Commission's duty to ensure that customers pay just and reasonable rates for the service they receive—no more and no less.

With regard to all these issues, the Staff's admonition to rely on the testimony "for what it is worth" is valid. Ameren Missouri serves 1.2 million homes and businesses in Missouri. If on average there are only two individuals at each location, Ameren Missouri serves 2.4 million people. At the 14 local public hearings, only 139 witnesses testified—less than .012 % of the 1.2 million meters, and less than .006% of the at least 2.4 million people that are served. Moreover the customers that attend local public hearings are not a random sample that can be used to determine the views of the customer base as a whole. They are a self-selected sample that is far more likely to include customers that are unhappy than customers that are happy with Ameren Missouri's rates and service. In the Company's view, there is simply not much insight to be gleaned from the fact that a very small percentage of the customer base attended local public hearings and objected to the rate increase. This testimony cannot and should not be used as justification to reduce the Company's revenue requirement.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Post-Hearing Reply Brief of Ameren Missouri was served via e-mail, to the following parties on the 13th day of June, 2011.

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