BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of Union Electric Company, d/b/a AmerenUE's Tariff to Increase Its Annual Revenues for Electric Service.	)))	**Case No. ER-2011-0028** Tariff No. YE-2011-0116

Staff's Initial Brief

Respectfully submitted,

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Staff's Initial Brief

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its Initial Brief, states as follows:

INTRODUCTION

In this general rate case, the Commission exercises its delegated, quasi-legislative authority to set prospective rates for Ameren Missouri, a major public utility. This decision will affect the lives of thousands of Missourians who live and work within Ameren Missouri's service area. It will affect the profitability – indeed, the viability – of numerous businesses and determine, in part, how much of the family budget will be available for other needs and wants; it will determine whether or not St. Louis will attract new business enterprises. The Commission's lodestar is the "just and reasonable" rate, which is one that covers Ameren Missouri's costs in providing electric service, allows its shareholders an opportunity to earn a fair return on their investment, and yet is as inexpensive as possible for the rate-paying public.[1] Much turns on this decision.

[1] AmMo offered testimony that its rates are 35% below the national average and that its rates are the lowest among Missouri public utilities. Ex. 100, *Baxter Direct,* pp. 8-9.

The Company:

Ameren Missouri ("AmMo") is a traditional, integrated electric utility serving approximately 1,245,711 customers, of which about 1,036,905 are residential customers.[2] AmMo's service territory includes 59 Missouri counties and 508 towns and cities.[3] To serve its customers, AmMo owns and operates four large base load coal-fired generating plants with a combined capacity of approximately 5,500 megawatts ("MW"); one nuclear-fueled generating plant with a capacity of 1,200 MW; 46 oil-fired or natural-gas-fired combustion turbine generating units ("CTGs") with a combined capacity of about 3,000 MW; and three hydroelectric generating plants with a combined capacity of about 810 MW.[4] AmMo operates and maintains 33,000 miles of distribution lines, 630 distribution substations, and 2,900 miles of transmission lines.[5] The Company employs some 4,400 persons and over 1,000 contract employees.[6] AmMo is a wholly-owned subsidiary of Ameren Corporation, a publicly-traded, public utility holding company headquartered in St. Louis, Missouri.

The Issues:

This rate case began on September 3, 2010, when AmMo filed proposed tariff changes implementing a general rate increase. AmMo stated in its initial

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[2] Minimum filing requirements, Sch. 3. Ameren Missouri also provides natural gas service to 126,000 customers.

[3] Ex. 100, *Direct Testimony of Werner Baxter,* p. 4.

[4] *Id.*

[5] *Id.,* p. 5.

[6] *Id.*

filing that it sought to recover an additional $263.3 million per year in rate revenues, a 10.8% increase.[7] This figure includes some $72.6 million in anticipated increases in normalized net fuel costs above the net fuel costs included in base rates in AmMo's last general rate case.[8] About $200 million of the requested rate increase reflects infrastructure investment and related costs and about $70 million relates to rebasing net fuel costs.[9]

Staff's revised reconciliation values the Company's case at $211.2 million and Staff's at about $92.8 million, a difference of approximately $118.4 million.[10] Most of this difference – some $110.9 million of it – reflects the differing calculations of the cost of capital. About $4.7 million of the difference reflects Staff's proposed disallowance of a portion of the costs of the Sioux Scrubbers project. That project reflected about $110 million of AmMo's original rate increase request.[11] Another $2.3 million of the difference reflects Staff's different view of the amount to "bake into rates" for storm costs.

The remaining issues either have no revenue requirement impact or have an undetermined impact.

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[7] Cover letter accompanying Ameren Missouri's minimum filing requirements, September 3, 2010, p. 2; *Baxter Direct,* p. 5.

[8] Cover letter accompanying Ameren Missouri's proposed tariffs, September 3, 2010. Increased revenue figures are net of gross receipts tax.

[9] Ex. 100, *Baxter Direct,* p. 6.

[10] *Staff's Revised Reconciliation,* May 16, 2011. In other words, Staff concedes that the Company is entitled to a rate increase of $92.8 million. The reduction of the Company's case from $263.3 million to $211.2 million is the net result of numerous numerical changes as the case has unfolded.

[11] Ex. 100, *Baxter Direct,* p. 6.

ARGUMENT

1. Overview and Policy:

A. What "cost of service" and/or regulatory policy considerations, if any, should guide the Commission's decision of the issues in this case?

The Commission's statutory duty is to set "just and reasonable" rates.[12] A "just and reasonable" rate is one that balances the interests of the various stakeholders in the light of the public interest.[13] A just and reasonable rate is fair to both the utility and its customers[14] and is no more than is necessary to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."[15] A just and reasonable rate is not one penny more than is required to cover the utility's necessary and prudent operation and maintenance expenses and to allow a reasonable opportunity of earning a profit.

The Commission sets just and reasonable rates via a two-step process using traditional cost-of-service ratemaking.[16] The two steps are (1) determining the "revenue requirement," that is, the amount of income the utility needs on an annual basis and (2) designing rates that, given the usage characteristics of the

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[12] Sections 393.130 and 393.140, RSMo.

[13] *See* ***State ex rel. Union Electric Co. v. Public Service Commission,*** 765 S.W.2d 618, 622 (Mo. App., W.D. 1988) ("Ratemaking is a balancing process").

[14] ***St. ex rel. Valley Sewage Co. v. Public Service Commission,*** 515 S.W.2d 845 (Mo. App., K.C.D. 1974).

[15] ***St. ex rel. Washington University et al. v. Public Service Commission,*** 308 Mo. 328, 344-45, 272 S.W. 971, 973 (banc 1925).

[16] Also known as "rate-of-return" ratemaking. *See* L.E. Alt, ***Energy Utility Rate Setting,*** 18 (2006).

utility's customers, will produce the necessary revenue. "Under cost-of-service ratemaking, rates are designed based on a [utility's] cost of providing service including an opportunity for the [utility] to earn a reasonable return on its investment."[17] The Missouri Court of Appeals has described cost-of-service ratemaking as follows: "The Commission [considers the] expenses and revenues, to establish a rate that will allow the company to recover its cost of service from its customers."[18] Elsewhere, the court noted:

> The determination of utility rates focuses on four factors. These factors include: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. The revenue allowed a utility is the total of approved operating expenses plus a reasonable rate of return on the rate base. The rate of return is calculated by applying a rate of return to the cost of property less depreciation. The utility property upon which a rate of return can be earned must be utilized to provide service to its customers. That is, it must be used and useful. This used and useful concept provides a well-defined standard for determining what properties of a utility can be included in its rate base.[19]

This ratemaking recipe is often expressed by the following formula:

$$RR = C + (V - D) R$$

where:
- RR = Revenue Requirement;
- C = Prudent Operating Costs, including Depreciation Expense and Taxes;
- V = Gross Value of Utility Plant in Service;
- D = Accumulated Depreciation; and

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[17] FERC, ***Cost-of-Service Rates Manual,*** 1 (1999) [available electronically at www.ferc.gov].

[18] ***State ex rel. Laclede Gas Company v. Public Service Commission,*** ___ S.W.3d ___, ___, 2010 WL 4065407, *1 (Mo. App., W.D. 2010).

[19] ***Union Electric Co.,*** *supra,* 765 S.W.2d at 622.

R = Overall Rate of Return or Weighted Average Cost of Capital (WACC).

To summarize, cost-of-service ratemaking establishes the utility's cost of providing service on an annual basis based upon annualized and normalized test year expenses and adds to that amount a reasonable allowance for a profit to the shareholders on the value of their investment. The profit allowance, in turn, is calculated by multiplying the value of the utility's plant-in-service less accumulated depreciation by a rate of return. This sum is the revenue requirement, that is, the amount of money the company must earn annually to cover its cost of service and provide a reasonable return to its investors. Determining the revenue requirement is the first half of the ratemaking process.

In considering the Company's test year expenditures in determining the revenue requirement, the Commission should consider whether they are reasonable, necessary and of benefit to ratepayers. Unreasonable and unnecessary expenditures should be excluded from rates and charged to the shareholders. An expenditure is reasonable if the value received is commensurate to the amount paid. An expenditure is necessary if, without it, the utility's ability to provide safe and adequate services to its customers would be impaired. Likewise, expenditures that provide no benefits to the ratepayers should be excluded from rates and charged to the shareholders.

The second half of the ratemaking process is rate design, that is, the development of rate schedules designed to produce the target revenue requirement. The two steps of rate design are, first, determining the revenue

requirement responsibility of each customer class and, second, adjusting or designing the class rate schedules to produce the necessary revenue requirement. Customers, large and small, are classified based on their usage characteristics and on the cost of serving them.

Rate design may be driven by considerations in addition to recovering the necessary revenue requirement in a fair and equitable manner. Learned commentators on the rate design process refer to "objectives."[20] These include fairness, simplicity, stability, avoidance of undue discrimination or preferences, efficiency, and conservation.[21]

Fair rates match costs and cost causers, so that similarly-situated customers will pay the same rate. Simple rates are easy to understand and administer. Stable rates will generate revenue that tracks costs, so that as costs go up, revenues will too. Discrimination and preferences are the two sides of the subsidization coin. All utility rates involve some degree of subsidization because the actual cost of serving each customer is necessarily slightly different based on unique circumstances, such as the distance of each customer from the utility plant. An important goal in rate design is keeping these subsidies as limited as possible. Efficiency and conservation mean that prices are sufficient to safeguard society's scarce resources and to avoid waste.

In summary, Staff urges the Commission to set just and reasonable rates

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[20] Alt, *supra,* 58-60; J.C. Bonbright *et al.,* ***Principles of Public Utility Rates,*** 85-179 (PUR: Arlington, VA, 2nd ed. 1988).

[21] Alt, *supra.*

in consideration of all relevant factors, by adopting Staff's recommendations.

B. Can the Commission consider and rely on the testimony of ratepayers at local public hearings in determining just and reasonable rates? If so, how should the Commission take this testimony into account, if at all?

The Staff did not take a formal position on this issue but will do so now.

Local Public Hearings are a traditional feature of general rate cases. They are held within the utility's service area, at convenient times and places, and are publicized in advance via bill insert and otherwise. After an informational presentation and question-and-answer session, the Presiding Officer calls the assembly to order, opens the hearing with an explanation of the matter before the Commission and the nature and purpose of the hearing and its ground rules, and proceeds to take entries of appearance from counsel and sworn testimony from members of the public.

Unmistakably, a Local Public Hearing is an evidentiary proceeding. It is part of the evidentiary proceedings in the general rate case. Consequently, the testimony adduced is substantial and competent evidence of record. The Commission may rely on it for what it is worth. Often, such testimony consists entirely of the protestations of an individual customer that he or she can't afford a rate increase. Affordability and "rate shock" are proper matters for the Commission to consider and public testimony bears on these. Public testimony also frequently highlights quality of service and customer service issues.

In summary, it is Staff's view that the Commission can and must consider the sworn testimony of customers, adduced at Local Public Hearings in

determining the issues in this case.

2. Storm Costs/Vegetation-Infrastructure Trackers

A. Vegetation-Infrastructure:

(1) Should the Commission authorize Ameren Missouri to continue the current tracking mechanism for vegetation management and infrastructure inspections?

The Commission should continue the vegetation management and infrastructure inspection trackers. After the implementation of Commission Chapter 23 Rules, the Commission granted to Ameren Missouri, in Case No. ER-2008-0318, the authority to track costs associated with complying with the vegetation management and infrastructure inspection rules.[22] The Commission again authorized the use of the vegetation management and infrastructure inspection tracker devices in Ameren Missouri's next general rate case, Case No. ER-2010-0036.[23] Since the Commission has already considered and rejected Staff's evidence that the trackers are unnecessary, in Case Nos. ER-2008-0318 and ER-2010-0036, Staff does not oppose the continuation of the vegetation management and infrastructure inspection tracking mechanisms in this case.[24]

B. Storm Costs:

(1) How should the Commission calculate Ameren Missouri's normalized, non-labor storm costs to be included in the revenue requirement for ratemaking purposes?

(2) Should the difference between the amount of non-labor storm

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[22] *See* 4 CSR 240—23.030. Ex. 201, Staff Cost-of-Service Report, p. 89, lines 6-9.

[23] Ex. 201, Staff Cost-of-Service Report, p. 89, lines 7-9.

[24] Tr. Vol. 16, p. 269, lines. 2-9.

costs that Ameren Missouri incurred during the true-up period and the normalized level of non-labor storm costs included in the revenue requirement for ratemaking purposes be amortized over five (5) years or should that difference be included in the normalized costs used for ratemaking purposes?

There are two items of contention between the parties on this issue, (1) what is the appropriate normalized level of expense, and (2) whether an amortization is proper in this case. The Commission should set the level of storm expense at $4.8 million and deny Ameren Missouri's proposed amortization of any storm expense over any amount of time.

Staff recommends that a $4.8 million normalized level of expense be included in Ameren Missouri's rates for storm costs.[25] This number was developed by taking an average of all storm costs from April 1, 2007, through the true-up date of February 28, 2011.[26] The Staff then subtracted $4,857,000, which represents the amortization put into rates in Case No. ER-2008-0318, and $3,977,675, which is the amortization put into rates in ER-2010-0036.[27] The Staff removed these storms from the calculation of the normal level of expense because they are out-of-the-ordinary storm expenses and therefore those costs should not be reflected in the normalized level of storm costs included in rates.[28] Also, since the Company is currently recovering storm cost through the

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[25] Ex. 207, *John Cassidy Surrebuttal Testimony*, ER-2011-0028, p. 12.

[26] *Id*.

[27] *Id*. at 8.

[28] *Id*. at 12, lines 22-23. It is important to note that Staff is not recommending these amortizations be ended; rather, the Staff is proposing that all current amortizations of prior storm costs be maintained through their end date.

amortizations established in Case Nos. ER-2008-0318 and ER-2010-0036, recognizing that cost recovery again by including it in the normalized level is an attempt by the Company to double recover these costs.[29]

The remaining $4.8 million is the amount Staff has recommended be put into rates as the normalized level of non-labor storm cost expense.[30]

Helpful to understanding Staff's position that the storms associated with these amortizations are extraordinary is to look at the way an amortization is calculated. For example, in Case No. ER-2010-0036, AmMo recorded approximately $10.4 million of O&M, non-labor related storm costs during the test year ending March 31, 2009.[31] Staff's proposal, ultimately accepted and ordered by the Commission, was to include a four-year average of $6.4 million as the normal ongoing level.[32] The normal ongoing level reflected an adjustment to the $10.4 million test year amount of $4 million.[33] The remaining $4 million in test year storm restoration costs was then ordered to be amortized and recovered over 5 years.[34]

As those test year costs were found by the Commission to be above and beyond the normalized level of expense in Case No. ER-2010-0036, the Staff's position in this case is that inclusion of those costs in the normalized level in this

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[29] Ex. 207, p. 7, lines 10-14, and p. 8, lines 10-15.

[30] *Id*.

[31] *Staff Revenue Requirement Report,* p. 95, lines 1-5. "O&M" is Operations & Maintenance.

[32] *Id*. lines 4-6.

[33] *Id*.

[34] *Id*.

case would not be reflective of the historic level of ordinary storm costs.[35] Again, Staff is recommending that AmMo recover, dollar-for-dollar, the costs associated with those storms as amortized as part of its cost-of-service calculation.[36] Staff simply finds it is incongruous to on the one hand consider these storms extraordinary (in the sense that they are afforded amortization treatment) while refusing to recognize the same costs as not reflective of an ordinary level of storm expense, on the other.

Furthermore, Staff opposes AmMo's request that the $1 million difference between their requested normal level of expense and the storm preparation costs experienced during the true-up period be amortized over five years for two reasons. The first reason for opposing this request is that by extending the averaging period out two months to grab the true-up period, from 45-months to 47-months, Staff is including those $8.1 million of storm costs in AmMo's normalized level of expense.[37] Second, by including all those costs in the normal level of expense, there is no ratemaking purpose for an amortization.[38] As mentioned above, an amortization may be appropriate where the test-year level of expense is greater than the normalized level of expense. In this case, Case No. ER-2011-0028, the test year level of non-labor storm costs experienced by

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[35] *Id.*

[36] *Cassidy Surrebuttal, supra.,* p. 12.

[37] *Id.,* pp. 12-13.

[38] *Id*.

Ameren Missouri was $1.2 million.[39] The normalized level of expense proposed by Staff is $4.8 million, therefore no amortization for abnormal test year costs is required, and Ameren Missouri's requested $1 million amortization is not proper. To include the $8.1 million of storm cost that occurred during the true-up in the 47-month average used to determine the normalized level and then also include an additional amortization between the normalized level and the $8.1 million is an attempt by the Company to double recover these costs.[40]

The reality of storm costs is that they vary greatly; some years' storm costs may fall well below what has been included in rates, and other years' costs may exceed the amount included in rates.[41] AmMo's goal is to utilize the regulatory framework to recover its costs, and its request will allow it to have more money on hand in case a storm occurs.[42] But it will also allow the Company to retain a great deal of money should no storms occur.[43] Should 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.[44] But padding the normalized level of expense is not proper and should not be allowed.

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[39] *Id*.

[40] Ex. 207, p. 12, line 22-p. 13, line 5.

[41] Tr. Vol 18, p. 340.

[42] Tr. Vol 18, p. 341, lines 15-18.

[43] Tr. Vol 18, p. 342, lines 21-25.

[44] Tr. Vol. 18 pp 340-341.

In conclusion, Staff recommends that the Commission deny Ameren Missouri's request for an amortization in this case. Further, the Commission should set the base level for storm costs at $4.8 million.

3. Sioux Scrubbers:

Should the Commission allow in rate base $31 million in cost increases ($18 million in construction costs and $13 million in AFUDC) that were incurred as a result of Ameren Missouri's decision to temporarily suspend construction of the Sioux Plant Wet Flue Gas Desulfurization Project due to the Company's concerns about conditions in the financial markets during the period commencing in late 2008 and continuing into early 2009?

> **Staff's Position:** Staff concludes that Ameren Missouri had sufficient access to its credit facilities and the capital market in late 2008 and into 2009, and that Ameren Missouri should have continued the Sioux Plant Wet Flue Gas Desulfurization (WFGD) Project rather than delay the Project, thereby incurring an additional $31 million in projects costs ($18 million in construction costs and $13 million AFUDC), which Ameren Missouri now seeks to pass on to its Missouri ratepayers. Staff concludes that Ameren Missouri's liquidity concerns about conditions in the financial markets during the period commencing in late 2008 and continuing into early 2009 did not warrant the incurrence of the additional cost of $31 million to the Project.

Introduction

The Staff does not contend that a financial crisis did not exist in late 2008 and into 2009. The Staff does contend, however, that Ameren Missouri had sufficient access to its credit facilities and the capital market in late 2008 and into 2009, and therefore should have continued the Sioux Plant Wet Flue Gas Desulfurization (WFGD or scrubber) Project rather than delay the Project, thereby incurring an additional $31 million in project costs ($18 million in construction costs and $13 million AFUDC), which Ameren Missouri now seeks to pass on to its Missouri ratepayers. Ameren Missouri's liquidity concerns about

conditions in the financial markets during the period commencing in late 2008 and continuing into early 2009 did not warrant Ameren Missouri incurring the additional $31 million cost to the Project.

The Staff's analysis is not a hindsight / rearview mirror analysis. The Staff raised serious doubt about the prudence, reasonableness, appropriateness, and benefit to ratepayers of Ameren Missouri's actions, and Ameren Missouri has not carried its burden of proof. On November 4, 2008, Ameren reported its third quarter 2008 earnings and its solid liquidity position.[45] As of December 31, 2008 Ameren, Ameren Missouri, and Ameren Energy Generating Company had approximately ** [redacted] ** available to the three of them under the credit facility dedicated to their needs.[46] On January 16, 2009, Ameren Missouri filed an application, File No. EF-2009-0266, to issue $350 million in 30-year First Mortgage Bonds, which it did in March 2009 at 8.45%, to refinance short-term capital. The Staff's proposed rate base disallowance of $31 million is shown on the Reconciliation as having a revenue requirement effect of $4,634,408.[47]

Two members of the Staff filed on this issue, Roberta Grissum and David Murray. Ms. Grissum is a Staff auditor. She previously filed testimony in a Staff construction audit and prudence review, respecting the Empire Energy Center

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[45] Staff Ex. 233, p. 3.

[46] Staff Ex. 200P, Staff's Construction Audit And Prudence Review of Sioux Wet Flue Gas Desulfurization (WFGD) Project For Costs Reported As Of September 30, 2010 Sioux Report (Staff Report), Grissum, p. 42, lns. 7-11; Vol. 19, Tr. 578, lns. 18-24; Staff Ex. 213HC, Grissum Sur., Schedule 1.

[47] Staff Ex. 213, Grissum Sur., p. 13, lns. 12-27; p. 15, lns. 15-20; p. 21, lns. 1-34; Staff Ex. 230, Reconciliation.

Units 3 and 4, in an Empire District Electric Company rate case, Case No. ER-2004-0570. She was employed in the Commission's Financial Analysis Department from 1998 to 2002 where she performed rate of return analysis.[48]

Staff's Direct case filing on February 8, 2011 indicated that the Staff had not completed its cost analysis of the Sioux Plant scrubbers Project respecting particular matters, including certain work packages exceeding cost baselines, unresolved backcharge amounts, unexplained invoices, and the compounding of AFUDC, and left place holders for the completion of that analysis.[49] The surrebuttal testimony of Ms. Grissum relates that the Staff proposes no further adjustments based on the completion of that analysis.[50]

Mr. Mark C. Birk, Ameren Missouri Vice President of Power Operations, submitted direct testimony on Ameren Missouri's Sioux Plant scrubbers Project. Mr. Birk also provided rebuttal testimony in response to the Staff's proposed adjustment. Mr. Jerre Birdsong, an employee of Ameren Services Company and Vice President and Treasurer for Ameren Missouri, did not submit any direct testimony for Ameren Missouri, but did provide rebuttal testimony in response to the Staff's proposed adjustment.[51]

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[48] Staff Ex. 201, App. 1, pp. 31-34.

[49] Staff Ex. 200, Staff Report – Grissum, pp. 40-47.

[50] Staff Ex. 213, Grissum Sur., p. 23, ln. 16 – p. 25, ln. 6.

[51] Ameren Missouri Ex. 109, Birdsong Reb., p. 1, lns. 5-10.

Legal Standard:

The Commission is not limited to "prudence" determinations and "prudence" disallowances and even when the Commission considers matters of "prudence," certain stakeholders tell the Commission it must think more narrowly than the law requires when considering its own authority. The Commission is authorized to determine the value of utility plant and to determine rate elements, such as rate base, in consideration of all relevant factors. As part of determining where costs are on a continuum from appropriate to inappropriate, i.e., the Commission may determine if costs are mischarged, unnecessary, wasteful, criminal, not of benefit to ratepayers, etc., the Commission determines whether the costs are prudent or imprudent. In order for the Commission to disallow costs, no showing of bad faith or an abuse of discretion is required.[52] The term "prudence" does not appear in the "public service commission act" adopted by the Missouri General Assembly in 1913, but other terms such as "just and reasonable rates," "safe and adequate service," "public welfare," and "efficient facilities" do.[53]

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[52] ***State ex rel. Laclede Gas Co. v. Public Serv. Comm'n***, 600 S.W.2d 222, 228-29 (Mo. App., W.D. 1980), appeal dismissed, 449 U.S. 1072, 101 S.Ct. 848, 66 L.Ed.2d 795 (1981); ***State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n***, 645 S.W.2d 44, 55-56 (Mo. App., W.D. 1982).

[53] In Kansas there is a specific statutory provision regarding factors which the Kansas Corporation Commission (KCC) is to consider in making the determination of prudence or lack thereof in determining the reasonable value of electric generating property: K.S.A. 66-128g (Laws 1984). A review of that statutory provision as compared to the lack of a similar Missouri statutory provision is instructive. K.S.A. 66-128g(a) lists 12 factors that the KCC is to consider in making that determination, including, among others, (i) a comparison of the original cost estimates made by the owners of the facility under consideration with the final cost of such facility; (ii) inappropriate or poor management decisions in construction or operation of the facility being considered; (iii) whether the utility acted in the general public interest in management decisions in

The term “prudence” does not appear in Chapter 393 until 2003 with the adoption of Infrastructure System Replacement Surcharge For Water And Gas Corporations, H.B. 208, by the General Assembly, and the legislation becoming law. Sections 393.1006.8 and .9 and Sections 393.1015.8 and .10 provide for

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the acquisition, construction or operation of the facility; (iv) whether the utility accepted risks in the construction of the facility which were inappropriate to the general public interest to Kansas; and (v) any other fact, factor or relationship which may indicate prudence or lack thereof as that term is commonly used.

The portion of the cost of a plant or facility which exceeds 200% of the original cost estimate is presumed to have been incurred due to a lack of prudence. The commission may include any or all of the portion of cost in excess of 200% of the original cost estimate if the commission finds by a preponderance of the evidence that such costs were prudently incurred.

In Kansas before the KCC, the term and concept “prudence” is not literally limited to the single word “prudence” itself. Among the factors to be considered in making the determination of prudence or lack thereof, are “inappropriate or poor management decisions.”

KCC Docket No. 10-KCPE-415-RTS: November 22, 2010 Order: 1) Addressing Prudence; 2) Approving Application, In Part; & 3) Ruling On Pending Requests, pages 13-14, respecting “Issue **III**. What party bears the burden of proof – Staff to prove imprudency or KCPL to prove prudence – and is either party entitled any presumptions or permitted to shift the burden?” (KCC November 22, 2010 Order, p. 11.) states at pages 13 to 14:

> As to Issue **III,** burden of proof, only Staff and CURB filed testimony challenging the prudence of KCPL's construction expenditures. Neither disputed an Order placing the burden of proving imprudence on them, and neither alleged that the presumption in 66-128g(b) applies. That presumption is triggered when costs exceed 200% of the "original cost estimate." In its post-hearing brief, Staff claims in error that it only carries a seemingly lesser burden of persuasion and not the burden of proof. However, Kansas law provides no distinction between those two burdens; it also provides that the requisite level of proof to satisfy the burden of proof is a preponderance of the evidence. Therefore, the Commission concludes that Staff and CURB must prove, by the preponderance of the evidence, that KCPL, under K.S.A. 66-128g, imprudently incurred costs that should be excluded from the rate base. In other words, Staff’s evidence of KCPL's imprudent actions must be of greater weight or more convincing than KCPL's evidence that it acted prudently, and Staff must show that its alleged facts of imprudent actions by KCPL are more probably true than not true. [Footnotes omitted.]

Another Kansas statutory provision, K.S.A. 66-128c (Laws 1984), states in part: “The state corporation commission, in determining the reasonable value of property under K.S.A. 66-128, and amendments thereto, shall have the power to evaluate the efficiency or prudence of acquisition, construction or operating practices of that utility. . . .”

the Commission's review of the prudence of eligible infrastructure system replacement costs for water and gas corporations.

The words "prudently" and "imprudently" and the term "prudence reviews" do not appear in Chapter 386 until the General Assembly in 2005 adopted legislation (S.B. 179) addressing single-issue ratemaking for fuel and purchased-power costs and environmental costs (Section 386.266), and the legislation became law. Until S.B. 179, pursuant to ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*****,** 585 S.W.2d 41, 56 (Mo. banc 1979), the Commission had to consider all relevant factors. The Commission recently made its first fuel adjustment clause prudence adjustment in its April 27, 2011, Report and Order in Case No. EO-2010-0255. The Commission stated at page 2 of its Report and Order as follows:

> This order determines that Union Electric Company d/b/a Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from power sales agreements with AEP and Wabash from off-system sales revenue when calculating the rates charged under its fuel adjustment clause.

The Commission at page 22 of its Report and Order in identifying Ameren Missouri's conduct used as a synonym for the word "imprudently," the word "inappropriately," stating that ". . . Ameren Missouri acted contrary to the requirements of its tariff and therefore acted inappropriately."

The phrases "reasonable and prudent costs" and "beneficial to all customers in the customer class" appear as a result of the General Assembly adopting legislation in 2009 (S.B. 376) addressing energy efficiency and demand-side management programs (Section 393.1075) and the legislation

became law. The Proposition C, initiative petition, Section 393.1030, contains the phrases “prudently incurred costs” and “benefits to customers,” voted by the electorate in November 2008, respecting renewable energy resources.

In Section 393.135, the no electric construction work in progress in rate base statute, the words “unjust” and “unreasonable” appear regarding such costs in rate base before property is “fully operational and used for service,” but the word “imprudent” does not appear, which statute was adopted by initiative petition in 1976.

The statute permitting the phase-in of an “unusually large increase” in an electrical corporation’s rate base enacted by the General Assembly in 1984 and amended in 1986, Section 393.155, does not contain the word “prudent,” but contains the words “just” and “reasonable.”

The statute permitting single issue ratemaking for nuclear power decommissioning costs, Section 393.292, enacted by the General Assembly in 1989, contains the phrase “considering all facts relevant to such funding level or accrual rate,” but does not contain the word “prudent.”

An example of a Staff adjustment in a rate case resulting in a finding of imprudence by the Commission involved securities fraud litigation brought against Union Electric Company (UE) by a class of bondholders. This was the “Harris” litigation issue in ***Re Union Electric Company*****,** Case Nos. EC-87-114 and EC-87-115, ***Report and Order,*** 29 Mo.P.S.C.(N.S.) 313, 327-28 (December 21, 1987). (Ameren Missouri Witness Mr. Jerre Birdsong indicated that he was

involved with the Harris litigation at the time.[54]) The Harris litigation itself involved a securities fraud action brought against UE by a class of bondholders resulting from UE attempting to call certain first mortgage bonds. It was alleged that UE had violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 of the Securities and Exchange Commission (SEC). A jury verdict of $2.7 million was rendered in Federal District Court and was upheld on appeal to the Eighth Circuit Court of Appeals, ***Harris v. Union Electric Co.***, 787 F.2d 355 (8th Cir. 1986). The Commission in its decision noted that the Eighth Circuit Court of Appeals, which affirmed the Federal District Court, held that:

> ... the evidence is sufficient for the jury to have found that UE's entire conduct from March, 1975 to April, 1978 concerning the Series 2005 Bonds constituted a course of business and scheme or artifice which operated as a fraud on the bondholders. ***Harris v. Union Electric Co.***, 787 F.2d 355, 362 (8th Cir. 1986).[55]

The Staff proposed to reduce UE's expenses by $3.8 million related to the judgment and plaintiffs' and UE's attorneys' fees. UE argued before the Commission that the litigation costs were a reasonable business expense and that its attempts to call the bonds was intended to reduce UE's cost of money which would benefit its ratepayers. A letter in opposition to the UE transaction was written to a UE executive by one of the members of the UE Board of Directors. The Commission stated that "[i]t is apparent that a serious doubt existed as to the legality of the redemption attempt."[56] The Commission held

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[54] Vol. 19, Tr. 499, lns. 4-18.

[55] 29 Mo.P.S.C.(N.S.) at 328.

[56] *Id*.

that UE had not shown that its action underlying the litigation was prudent, and, therefore, had not shown that inclusion of these litigation expenses in UE's cost of service was justified. The Commission adopted the Staff's adjustment.[57]

Prudent is defined in the Webster's Third New International Dictionary of the English Language Unabridged, Copyright © 1976 by G. & C. Merriam Co. as follows:

> . . . the quality or state of being prudent: as **a**: wisdom shown in the exercise of reason, forethought, and self-control . . . **b**: sagacity or shrewdness shown in the management of affairs (as of government or business) shown in the skillful selection of, adaptation and use of means to a desired end: DISCRETION . . . : **c**: providence in the use of resources; ECONOMY, FRUGALITY . . . : **d**: attentiveness to possible hazard or disadvantage: CIRCUMSPECTION, CAUTION . . .

Prudent is defined in The American Heritage® Dictionary of the English Language, Fourth Edition, Copyright © 2009 by Houghton Mifflin Company, as follows:

> 1. Wise in handling practical matters; exercising good judgment or common sense.
>
> 2. Careful in regard to one's own interests; provident.
>
> 3. Careful about one's conduct; circumspect.

With respect to prudence, the Commission assumes utilities act prudently until that assumption is challenged. In its Report and Order in ***Re Union Electric Co.***, Case Nos. EO-85-17, et al., 27 Mo.P.S.C.(N.S.) 183, 192-93 (1985), the

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[57] ***Re Union Electric Company***, Case Nos. EC-87-114 and EC-87-115, ***Report & Order,*** 29 Mo.P.S.C.(N.S.) 313, 327-28 (December 21, 1987) ** [redacted] ** Vol. 20HC, Tr. 14, lns. 4-13.

Commission agreed with the following conclusions of the Washington, D.C. Circuit Court of Appeals in ***Anaheim, Riverside, Banning, et al. v. FERC*****,** 669 F.2d 799, 809 (D.C. Cir. 1981):

> The Federal Power Act imposes on the Company the "burden of proof to show that the increased rate of charge is just and reasonable." 16 U.S.C. s 824d(e). Edison relies on Supreme Court precedent for the proposition that a utility's costs are presumed to be prudently incurred. *See* ***Missouri ex rel. Southwestern Bell Telephone Co. v. Missouri Pub. Serv. Comm*****.,** 262 U.S. 276, 289 n.1 (1923). However, the presumption does not survive "a showing of inefficiency or improvidence." ***West Ohio Gas Co. v. Public Utilities Comm*****.,** 294 U.S. 63, 55 S.Ct. 316, 79 L.Ed. 761 (1935); see 1 A.L.G. Priest, **Principles of Public Utility Regulation** 50-51 (1969). As the Commission has explained, "utilities seeking a 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." Opinion No. 86, Minnesota Power & Light Co. Opinion and Order on Rate Increase Filing, Docket No. ER76-827, at 14, 20Fed. Power Service 5-874, 5-887 (June 24, 1980) (footnotes omitted). . . .

Further, in ***State ex rel. Associated Natural Gas v. Public Serv. Comm'n*****,** 954 S.W.2d 520 (Mo. App., W.D. 1997) (***Associated Natural Gas***) and ***State ex rel. GS Technologies Operating Co., Inc. v. Public Serv. Comm'n*****,** 116 S.W.3d 680 (Mo. App., W.D. 2003) (***GS Technologies***), the Western District Court of Appeals upheld that burden of proof standard as follows:[58]

> . . . In ***Associated Natural Gas*****,** a utility initiated a proceeding before the Commission to recover from its customers certain costs it incurred in obtaining gas from its suppliers. *Id*. at 522-23. In such a proceeding, the Commission reviews the reasonableness of the costs and, if it determines that the costs have been appropriately

[58] 116 S.W.3d at 693-94.

> incurred, the Commission allows the utility to pass the costs on to its customers. *Id*. at 523. To determine whether the costs were appropriately incurred, the Commission uses a prudence standard. *Id*. Under the prudence standard, the Commission looks at whether the utility's conduct was reasonable at the time, under all of the circumstances. *Id.* at 529. In applying this standard, the Commission presumes that the utility's costs were prudently incurred. *Id*. at 528. Where, however, another participant in the proceeding before the Commission "'creates a serious doubt as to the prudence of an expenditure, then the [utility] has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.'" *Id*. (citations omitted). . . .
>
> . . . ***Associated Natural Gas*** was a ratemaking case initiated by the utility, seeking to pass on costs to its 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*.

Ultimately the Court held in ***Associated Natural Gas*** that "in order to disallow a utility's recovery of costs from its ratepayers, a regulatory agency must find both that (1) the utility acted imprudently (2) such imprudence resulted in harm to the utility's ratepayers."[59]

> There is additional law pertinent to the issue of prudency, law addressing the burden of proof. The only reference to burden of proof in Chapter 386 is in Section 386.430 RSMo 2000, which states that in all proceedings arising under the provisions of the Public Service Commission Law or growing out of the exercise of the authority and powers granted therein to the Commission, the burden of proof is on any party adverse to the Commission or seeking to set aside any determination, requirement, direction or order of the Commission.

[59] 954 S.W.2d at 529.

The only reference to burden of proof in Chapter 393 is in Section 393.150.2 RSMo 2000, which states that at any hearing involving a rate sought to be increased, the burden of proof to show that the proposed increased rate is just and reasonable is upon the public utility. The Commission's rules indicate that in other instances the burden of proof is also on the moving party. 4 CSR 240-2.110(5)(A) states, in part, that in all proceedings, except investigation proceedings, the applicant or complainant shall open and close. Thus, the party with the burden of proof has the right to open and close at hearing.

Black's Law Dictionary 190 (7th ed. 1999) defines "burden of proof" as comprising two different concepts:

> **burden of proof. 1.** A party's duty to prove a disputed assertion or charge ● The burden of proof includes both the *burden of persuasion* and the *burden of production*
>
> **burden of persuasion.** A party's duty to convince the fact-finder to view the facts in a way that favors that party. . . .
>
> **burden of production.** A party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict. – Also termed *burden of going forward with evidence*, *burden of producing evidence . . .*

It may be argued that the party having the burden of proof must initially meet its burden of producing evidence sufficient to establish a prima facie case.[60] It further may be argued that once a prima facie case has been established the burden of going forward with the evidence shifts to the adverse party.

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[60] ***McCloskey v. Kopler*****,** 46 S.W.2d 557, 563 (Mo. banc 1932); ***Drysdale v. Estate of Drysdale*****,** 689 S.W.2d 67, 72 (Mo. App. 1985).

Nonetheless, even if the burden of going of forward with the evidence shifts, the burden of proof does not shift, absent a statutory provision to the contrary. Also, prima facie evidence does not require a verdict for the party whose contention it supports.[61]

Regardless of any asserted applicability of the above cases to the Commission, case law in Missouri is clear that where the facts relating to an issue are peculiarly within the control or knowledge of one party, the burden of production falls on that party. Possibly, the clearest statement of the law appears in ***Robinson v. Benefit Ass'n of Ry. Employees*****,** 183 S.W.2d 407, 412 (Mo. App. 1944):

> ". . . The general rule is well put by our Brother Graves in ***Swinhart v. Railroad,*** 207 Mo. loc. cit. [423] 434, 105 S.W. [1043], as follows: 'From them all,' said he (referring to the authorities in review) 'it is deduced that generally the burden is upon the plaintiff to make out his case. That if in the statement of his case negative averments are required, and the proof of such negative averments is not peculiarly within the knowledge and power of the defendant, then plaintiff must affirmatively establish such negative averments, but if, on the other hand, the proof of such negative averments lies peculiarly within the knowledge or power of the defendant, then such negative averments will be taken as true unless the defendant speaks and disproves them. Of course, if the knowledge and power to produce the evidence is possessed equally, the plaintiff must make the proof.'"[62]

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[61] ***Dehner v. City of St. Louis*****,** 688 S.W.2d 15, 18 (Mo. App. 1985). *See* ***State ex rel. Rice v. Public Serv. Comm'n*****,** 220 S.W.2d 61, 65 (Mo. banc 1949).

[62] *Cf.* ***Kenton v. Massman Construction Co.*****,** 164 S.W.2d 349, 352 (Mo. 1942) ("A plaintiff asserting a negative generally has the burden of proof as to such matter along with the other issues on which he bases his case. But there appears to be an exception to this rule where the evidence on such a matter is peculiarly within the knowledge and control of the defendant."); ***Dwyer v. Busch Properties, Inc.*****,** 624 S.W.2d 848, 851 (Mo. banc 1982). This is a particularly appropriate rule in utility cases, since generally all of the facts and documents relevant to the issues are within the utility's control. *See* ***City of Eldorado v. Public Serv. Comm'n,*** 362 S.W.2d 680, 683-84 (Ark. 1962).

The Decision To Slowdown the Sioux WFGD Retrofit Project:

Ms. Grissum testified that in Case No. ER-2008-0318, the Commission heard testimony provided by Mr. Thomas R. Voss, President and Chief Executive Officer for AmerenUE, during cross-examination, on **November 20, 2008**, where Mr. Voss stated in response to a series of questions posed by Ms. Diana Vuylsteke that a postponement of the Sioux scrubbers project was being considered:

> Q. Has UE recently announced a reduction in its capital expenditure plan?
>
> A. It hasn't actually been a reduction, but **it's been an effort to find projects that we could reduce** should the financial crisis continue.
>
> Q. Does this include a postponement in the Sioux scrubbers?
>
> A. **That is one of the projects that is being considered right now**, yes. That's correct. (Source: Case No. ER-2008-0318, Hearing Transcript No. 13 at pages 122-123).[63]

Ms. Grissum related in her surrebuttal testimony that Mr. Voss provided further testimony that AmerenUE was looking at capital projects it could delay or postpone, but no final decision on any project had been made:

> Q. Is UE cutting out or delaying capital expenditures in general?
> A. We're looking at gathering what projects that **we could delay or postpone, but no final decision has been made** on any of those projects at this point in time. (Source: Case No. ER-2008-0318, Hearing Transcript No. 13 at page 123).[64]

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[63] Staff Ex. 213, Grissum Sur., p. 9, ln.23 – p. 10, ln. 7; emphasis added.

[64] *Id*. at 10, lns. 8-17; emphasis added.

Ameren Missouri contemporaneously in another forum appeared to be saying something different regarding the Sioux scrubbers project, but that is not even clear. In a conference call with market analysts on **November 4, 2008,** respecting Ameren Corporation's third quarter 2008 earnings, Mr. Warner Baxter, Executive Vice President and Chief Financial Officer for AmerenUE, stated that the Sioux scrubbers project was being deferred:

> Q. Hey guys, I apologize if this is rehashing stuff, I just want to make sure, I understand a handful of things, first of all, what are the major projects you're deferring in 2009, if you're going forward with Duck Creek and Coffeen?
>
> A. Primarily, their plant maintenance projects that would have been done in 2009 are slipping in to 2010 and then we would expect projects that would have been in 2010 to slip a year in to 2011 kind of just moving out the planned maintenance that we have on all of our large co-units. And then on the regulated business side, in addition the Sioux plant, because CARE [sic] was vacated, we no longer had a requirement to complete that project, so **we are going to defer the Sioux plant scrubber project for sometime.**
>
> [NOTE: Staff believes the above referenced quotes contain a transcription error in that CARE should be CAIR, which stands for Clean Air Interstate Rule.][65]

But, unlike Mr. Baxter, Gary L. Rainwater, Chairman, President, and Chief Executive Officer of Ameren Corporation in his introductory comments in the conference call with market analysts on November 4, 2008, was not clear about the plan for Ameren's regulated generators:

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[65] *Id*. at 6, ln.23 – p. 7, ln. 3; emphasis added.

> To navigate through these markets, we are proactively managing our finances while remaining sharply focused on continuing to provide our customers with safe and reliable electric service as well as comply with Federal and State environmental reliability and other regulations. On October 31, 2008, our available liquidity which represents our cash on hand and amounts available other our credit facilities, stood at approximately $1.45 billion, that's up about $550 million from the same time last year.
>
> Despite the solid available liquidity, we have identified opportunities and are developing contingency plans that would defer or reduce planned capital spending and operating expenses to reduce our financing needs in these uncertain markets. Specifically, we are reducing expected 2009 operating and capital expenditures and our non rate regulated generation business segment by a total of $400 million to $500 million. Other meaningful cost deferral and reduction opportunities have been identified throughout the rest of our business that we will execute in the event that capital and credit markets continue to be disrupted.
>
> **In our regulated businesses and administrative support functions, we've identified approximately $400 million to $500 million of planned 2009 expenditures which maybe deferred into future periods. These expenditures are primarily capital, primarily generation related and are discretionary.** Separately, because the Federal Clean Air Interstate and Mercury rules were vacated by the courts, we are seeking a variance from the Illinois Pollution Control Board through an environmental requirement in Illinois for our non rate regulated generation business.[66]

Mr. Rainwater's statements track his commentary in the Ameren November 4, 2008, third quarter 2008 Financial News Release, which, in addition to touting Ameren's "solid liquidity position" at October 31, 2008, speaks of reducing operating and capital expenditures for Ameren's non-regulated generation business, and notes that "[o]ther meaningful capital expenditure deferral and

[66] *Id*. at 4, ln. 19 – p. 5, ln. 26; emphasis added.

reduction opportunities are also under review throughout the rest of our business."[67]

Other than Mr. Baxter's statement on November 4, 2008, at the conference call for financial analysts, the only other contemporaneous statement that Ameren Missouri is slowing down the Sioux Plant scrubbers retrofit Project is a November 7, 2008, letter from Robert R. Meiners, Director of Power Operations Services, that Ameren Missouri provided in response to Staff Data Request No. 139 in this case. In said letter, Mr. Meiners states: "In order to reduce cash flows associated with Sioux Plant scrubbers, we are delaying the tie-in-outages approximately one year. We will begin slowing down the construction process very soon. This will result in a smaller workforce through 2009."[68]

Ameren Missouri witness in the instant proceeding, Mr. Jerre Birdsong, appears to corroborate that Mr. Voss was less than forthcoming on November 20, 2008, regarding Ameren Missouri's WFGD retrofit plan for the Sioux Plant. Mr. Birdsong indicated in the instant proceeding that a decision on the slowdown of the Sioux scrubbers retrofit had been made by the end of October 2008:

> **Commissioner Jarrett:** . . . The conference call that's referenced there, I'm trying to get a time line in my head of when this occurred. Did this occur before Ameren Missouri decided to scale down the Sioux scrubbers projects?
>
> **The Witness [Mr. Birdsong]:** I would characterize it as having occurred at the time that that decision was being addressed. The call was actually made on October 21, [2008] and Ameren Missouri had started looking at all of its projects to see which ones could be

[67] Staff Ex. 233, p. 3.

[68] Staff Ex. 213, Grissum Sur., p. 9, lns. 13-21.

> slowed down or referred [sic] back in early October, so it was making decisions kind of on a daily basis looking at every project on what could be deferred without having a safety issue or not complying with law.
>
> So that decision-making process was going on during that time, and when we had, really, a compilation of results of doing that, we had a pretty good idea by that October 21 date as to what could be slowed down.
>
> The Board actually had an emergency meeting on October 31 and really approved the actions to slow down what management had been recommending in that last period of October, so really the Sioux scrubber deferral would have occurred whether we would have been able to get that financing done or not.
>
> There was never, ever any indication that by approving this financing we would not have to slow down projects, including the Sioux scrubber.[69]

Also respecting the October 21, 2008 conference call with the Staff, Mr. Birdsong testified that Ameren Missouri would have slowed down the Sioux Plant scrubber Project whether Ameren Missouri got the financing done or not.[70]

The October 21, 2008, Ameren Missouri Conference Call With Staff:

In rebuttal testimony, Ameren Missouri witness Jerre Birdsong asserted that when Ameren Missouri sought to address the risk posed by the financial crisis in the fall of 2008, **[redacted]

[69] Vol. 19, Tr. 502, ln. 3 – Tr. 503, ln. 7.

[70] Vol. 19, Tr. 511, ln. 25 – Tr. 512, ln. 2; Tr. 530, ln. 23 – Tr. 531, ln. 8.

[redacted]**[71]

Staff Data Request No. 443 was one of the data requests that the Staff submitted to Ameren Missouri as a result of Mr. Birdsong's rebuttal testimony. Said data request inquired as to the due diligence that Ameren Services' and Ameren Missouri's employees performed in the fall of 2008 to evaluate the possibility of issuing long-term debt to provide liquidity to Ameren Missouri provided among other things. Mr. Birdsong's response states in part as follows:

* * * *

** [redacted]

[redacted]**[72]

The Ameren Missouri response also identified a number of documents in response to the Staff's data request, including a Memorandum To File of Michael G. O'Bryan, dated November 7, 2008, "RE: 10/21/08 Conference call with Staff to

[71] Ameren Missouri Ex. 109P, p. 16, ln. 10 – p. 17, ln. 13.

[72] Ameren Missouri Response to Staff Data Request No. 443 - Staff Ex. 234HC.

discuss UE financing filings." The November 7, 2008, Memorandum states in part;

[redacted][73]

Mr. Birdsong did not use Mr. O'Bryan's terminology in his rebuttal testimony to describe the Staff's reaction, but instead used the euphemism that the Staff had a "negative reaction."[74] The Staff was not aware of Mr. O'Bryan's November 7, 2008, Memorandum before receiving it in response to Staff Data Request No. 443. The Staff itself made Mr. O'Bryan's November 7, 2008, Memorandum an exhibit so as to bring the existence of that document to the Commissioners' attention.

Mr. Birdsong in his rebuttal testimony relates a telephone conference call that Ameren Missouri had with certain members of the Staff on October 21, 2008, regarding a financing that AmerenUE was planning of issuing **[redacted]** Mr.

[73] *Id*.

[74] Ameren Missouri Ex. 109P, Birdsong Reb., p. 17, ln. 10.

Birdsong noted that Ameren Missouri typically makes a courtesy call to Staff prior to filing an application for financing authority.[75] Mr. Birdsong at the ER-2011-0028 hearing on April 28, 2011, testified that the proposed financing that Ameren Missouri discussed with the Staff on October 21, 2008, would be unique because it has been the practice of the Staff to restrict financing requests for long-term debt to the amount of a utility's outstanding short-term debt. On redirect, Mr. Birdsong was asked if he has an understanding as to why the Staff restricts long-term debt requests to outstanding short-term debt, and he responded: "No, I don't particularly in light of a credit crisis where cash is really your best form of liquidity."[76] At the hearing, Mr. Murray disputed Mr. Birdsong's assertion that it has been the Staff's practice to confine the Staff's recommendation in support to long-term debt financing applications where the amount of the long-term debt authorization requested is limited to the amount of short-term debt that the utility has on its books as of the closing period before the application.[77]

Ameren Missouri also prominently mentions that telephone conference call in its detailed Position Statements filed on April 22, 2011. The recollection of the Staff members who participated in that conference call, first set out in Mr. Murray's surrebuttal testimony, is very different from what is set out in the rebuttal testimony of Mr. Birdsong. Mr. Murray explained that Ameren Missouri initiated a conference call to discuss a $1 billion financing authority for a period of

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[75] Ameren Missouri Ex. 109P, Birdsong Reb., p. 16, lns. 10-20.

[76] Vol. 19, Tr. 526, ln. 14 – Tr. 527, ln. 3.

[77] Vol. 19, Tr. 569, ln. 21 – Tr. 570, ln. 25.

three years, which the Staff viewed as a much longer period than the immediate, near term liquidity crisis then occurring and the Staff expressed its concern about such a large financing request given the lack of support that Ameren Missouri provided to the Staff in support of the need for that much financing.[78] Mr. Murray related in his surrebuttal testimony that the Staff did not think Ameren Missouri's request was fitted to the nature of the need for immediate liquidity for only Ameren Missouri, and therefore there was some Staff concern whether Ameren Missouri's debt capacity would be used for Ameren's other operations.[79]

In explaining the Staff's reaction to Ameren Missouri's proposal, Mr. Murray related that Ameren Missouri's proposal was very general, no documents were provided to the Staff in advance of the conference call, no documents were provided to the Staff subsequent to the conference call, and that it was the Staff's understanding that as a result of the conference call, Ameren Missouri was "going to go back to the drawing board."[80] Mr. Murray further explained that the unusual size and duration of the proposed financing along with the credit facilities being shared among Ameren, Ameren Energy Generating Company, and Ameren Missouri, and the experience in Illinois with Ameren shared credit facilities, made it appropriate for the Staff to want to know more than Ameren

[78] Staff Ex. 220, Murray Sur., p. 27, ln. 17 – p. 28, ln. 6; p. 28, lns. 11-13.

[79] *Id*. at 28, lns. 6-11.

[80] Vol. 20HC, Tr. 10, lns. 15-21.

Missouri was telling the Staff in the October 21, 2008, telephone conference call."[81]

The bottom line is that the Staff does not bar a utility from making a financing application with the Commission. The Staff conducts analysis and makes recommendations to the Commission as a party in contested proceedings or as a participant in non-contested proceedings. A utility can ask for expedited treatment. The Commission also has procedures for treating highly sensitive financial information as highly confidential. Mr. Birdsong testified that Ameren Missouri did not provide the Staff with any documents relating to the proposed financing that was the purpose of the October 21, 2008, conference call either before or after the October 21, 2008, call. He did not know whether Ameren Missouri advised the Staff after the October 21, 2008, conference call that Ameren Missouri would not be pursuing its proposed financing.[82] As noted, Ameren Missouri did make a financing application filing on January 16, 2009, in which Ameren Missouri requested an Order from the Commission authorizing the issue and sale of up to $350,000,000 aggregate principal amount of long-term indebtedness. Ameren Missouri in its January 16, 2009, application stated that "given dynamic and rapidly changing market conditions currently being experienced in the United States and abroad, including unprecedented volatility and disruptions in the capital markets, Applicant requests that the order or orders of the Commission in this proceeding be issued with an effective date no later

[81] Vol. 20HC, Tr. 17, lns. 1-18.

[82] Vol. 19, Tr. 494, lns. 6-20.

than March 13, 2009." The Commission issued an Order Granting Financing Application on March 4, 2009, with an effective date of March 13, 2009.

In response to a question from Chairman Kevin Gunn, Staff witness David Murray stated that he did not sponsor the Staff's proposed disallowance for Ameren Missouri delaying the retrofit of the Sioux Plant scrubbers Project, but provided information regarding the financial markets at the time in question to the Staff witness who was sponsoring the Staff's proposed adjustment.[83] Commissioner Robert Kenney asked Mr. Murray if he agreed with the Staff's proposed disallowance even in the absence of a liquidity analysis by the Staff. Mr. Murray stated that he supported the Staff's adjustment. Mr. Murray also responded that he believed that there was access to credit available at the time and he relied on his knowledge that Kansas City Power & Light Company was able to access the commercial paper markets in the fall of 2008 and that Ameren CILCO and Ameren Illinois Power were able to issue long-term debt in the fall of 2008. He believed that if Ameren Missouri had filed a finance case targeted to its specific needs based on how much short-term debt it had outstanding or the amount of expenditures that Ameren Missouri expected over the next few months, Ameren Missouri would have freed up the credit facility by paying off a certain amount.[84]

Counsel for Ameren Missouri moved to have Mr. Murray's testimony in response to Commissioner Kenney's question about whether he supported the

[83] Vol. 19, Tr. 541, lns. 20-24.

[84] Vol. 19, Tr. 561, ln. 25 – Tr. 563, ln. 8; Tr. 542, ln. 25 – Tr. 543, ln. 5.

Staff's adjustment stricken. Judge Woodruff overruled the objection.[85] ,Counsel for Ameren Missouri did not object to Commissioner Kenney's request that Ameren Missouri quantify any savings that would be realized as a result of Ameren Missouri using the Stebbins tile at the Sioux Plant.[86] The Staff treated in its Staff Report the matter of the changeout of the flakeglass absorber linings as a prudent lesson learned.[87] Commissioner Kenney asked Mr. Murray about the changeout of the flakeglass absorber linings. Mr. Murray commented that Staff witness Ms. Grissum had requested from Ameren Missouri any net-present-value-type analysis that may have been performed.[88] Ameren Missouri submitted its quantification of the savings relating to the installing of the Stebbins tile as late-filed Ameren Missouri Exhibit 155 and Ameren Missouri Notice of Offer of Exhibit 155 submitted in EFIS on May 6, 2011.

In response to a prior question from Chairman Gunn, Mr. Murray stated that he assumed that Ameren Missouri's access to the credit facility was if the banking houses, minus Lehman Brothers, were able to meet their commitments.[89] Ms. Grissum noted that Ameren states at page 58 of its 2008 Annual Report, which Mr. Birdsong testified would have been released late February or early March 2009, that the Ameren Companies do not believe that the potential reduction in available capacity under the credit facilities, if Lehman

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[85] Vol. 19, Tr. 566, ln. 13 – Tr. 569, ln. 8.

[86] Vol. 19, Tr. 509, ln. 15 – Tr. 510, ln. 21.

[87] Staff Ex. 200, Staff Report – Grissum, p. 31, lns. 19-27.

[88] Vol. 19, Tr. 564, ln. 22 – Tr. 566, ln. 3.

[89] Vol. 19, Tr. 545, lns. 10-23.

Brothers Bank does not fund its commitments, will have a material impact on the liquidity of the Ameren Companies and Ameren Energy Resources Generating:

> As of December 31, 2008, Lehman Brothers Bank, FSB, a subsidiary of Lehman, had lending commitments of $100 million and $21 million under the $1.15 billion credit facility and the 2006 $500 million credit facility, respectively. At this time, we do not know if Lehman Brothers Bank, FSB will seek to assign to other parties any of its commitments under our credit facilities. Assuming Lehman Brothers Bank, FSB does not fund its pro-rata share of funding requests under these two facilities, and such participations are not assigned or otherwise transferred to other lenders, total amounts accessible by the Ameren Companies and AERG [Ameren Energy Resources Generating] will be limited to amounts not less than $1.05 billion under the $1.15 billion credit facility and $479 million under the 2006 $500 million credit facility. The Ameren Companies and AERG do not believe that the potential reduction in available capacity under the credit facilities if Lehman Brothers Bank, FSB does not fund its commitments will have a material impact on their liquidity.[90]

Laclede File No. EF-2009-0450:[91]

The Staff would further note, given the issue that Ameren Missouri has made of the October 21, 2008, conference call with the Staff, that on June 30, 2009, in File No. GF-2009-0450, Laclede Gas Company (Laclede), filed an application with the Commission for authority to issue and sell first mortgage bonds, unsecured debt and preferred stock, to issue common stock and receive capital contributions, to issue or accept private placements of preferred stock, first mortgage bonds and unsecured debt, and to enter into capital leases, all in a

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[90] Staff Ex. 213, Grissum Sur., p. 2, lns. 7-24; Vol. 19, Tr. 500, ln. 18 – Tr. 501, ln. 1.

[91] File No. GF-2009-0450, Report & Order, p. 9; Footnotes, 24 and 25: "The quantum of proof is a preponderance of the evidence, because this is an administrative action, which is civil in nature."; ***Tate v. Department of Social Serv*.,** 18 S.W.3d 3, 8 (Mo. App., E.D. 2000); ***State Bd. of Nursing v. Berry*,** 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

total amount not to exceed $600 million. The application of Laclede had some of the features of the application that Ameren Missouri discussed with the Staff on October 21, 2008, and Ameren Missouri contends it decided not to file based on that conference call. Laclede's application stated that it contemplated that the registered securities, common stock, private placement securities and/or capital leases were to be issued or entered into during a three-year period beginning on the effective date of the Commission's order approving the authority requested.[92] The Staff proposed that the Commission grant the application subject to 12 conditions. As of the date of the filing of reply briefs, the parties agreed on 10 of the Staff's proposed conditions.[93]

Respecting the $600 million requested authorization amount, Laclede identified $518 for which the Commission found one of the allowed statutory purposes existed. Citing "flexibility," Laclede asked for authorization to have $82 million on hand in case one of the allowed statutory purposes occurred. The Commission denied the application as to this $82 million stating that "flexibility is neither a purpose nor an amount."[94] The Commission found that Laclede had not shown that $82 million is, or has been, necessary or reasonably required for any of the allowed purposes.[95]

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[92] File No. GF-2009-0450, Report And Order, p. 3.

[93] *Id.*

[94] *Id*. at 10.

[95] *Id.*

In support of the two Staff conditions that Laclede would not agree to, the Staff suggested at hearing that Laclede might create a public detriment by diverting borrowed moneys to an affiliate.[96] The Commission held in its Report and Order that (a) no evidence showed that such event had occurred, was about to occur, or was more likely to occur than any other violation, and (b) such event supports neither of Staff's unaccepted proposed conditions.[97] The two conditions that Laclede would not agree to were the following:

> (1) The total amount of long-term debt issued and outstanding under such authority shall not, at any time during the period covered by this authorization exceed $100 million;
>
> (2) That in future finance cases, the Company shall be required to provide detailed evidence to the Commission showing the amounts of long-term capital investments that have not been financed under the prior financing authority, the type of long-term securities they intend to issue and when the Company intends to issue such securities.

The Commission declined to adopt the Staff's two conditions.[98]

Not only does the Staff believe that the Sioux Plant WFGD retrofit Project issue has merit warranting the Commission's attention, the Staff's position fully meets the governing legal standard. The Staff has raised serious doubt about the prudence, reasonableness, appropriateness, and benefit to ratepayers of

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[96] ** [redacted] ** Vol. 20HC, Tr. 2, lns. 24-25 and Tr. 5, lns. 18-25.

[97] File No. GF-2009-0450, Report And Order, pp. 18-19.

[98] *Id*. at 19-21.

Ameren Missouri's actions, and Ameren Missouri has not carried its burden of proof. Ameren's decision to delay construction of the Sioux WFGD retrofit Project resulted in an additional $31 million in costs ($18 million in construction costs and $13 million in AFUDC) that should not be added to Ameren Missouri's rate base.

4. Energy Efficiency/Demand Side Management (DSM):

A. Is Ameren Missouri in compliance with the Missouri Energy Efficiency Investment Act (MEEIA) regardless of whether or not proposed rules under the law are effective?

After hearing, it remains the Staff's position that AmMo is not in compliance with MEEIA. This Commission expressed its view on Missouri electric utilities' statutory requirement to be in compliance with MEEIA within the most recent Report and Order in Case No ER-2010-0355 when it stated "[u]tilities within the Commission's jurisdiction must comply with The Missouri Energy Efficiency Investment Act (MEEIA) regardless of whether or not proposed rules under the law are effective."[99] Under MEEIA, Ameren is to implement "commission-approved demand-side programs proposed pursuant to this section **with a goal of achieving all cost-effective demand-side savings."**[100] **(**emphasis added**).**

The Company's recent Chapter 22 compliance filing in EO-2011-0271 summarizes the Company's strategy for DSM as follows: "Ameren Missouri will continue to advocate for better alignment of utility financial incentives to

[99] Surrebuttal Testimony of John A. Rogers, Ex. 222, p. 5, ll.10-20.

[100] Section 393.1075.4 RSMo.

ultimately support the state's goal of achieving all cost-effective DSM. Ameren Missouri will continue pursuing a modest energy efficiency portfolio, which helps to preserve the option to switch to a more aggressive path."[101] Ameren Missouri's proposed preferred DSM portfolio achieves less than all cost-effective DSM. The preferred resource plan includes "Low Risk DSM" at an annual spending level of approximately $20 million in 2012 and in 2013, a decrease of approximately $3 million from the 2010 spending levels,[102] and a decrease of approximately $13 million from the Company's expected 2011 spending level of $33 million.[103]

Ameren's adoption of the Realistic Achievable Potential (RAP) as its preferred resource plan would put AmMo on the road to compliance with MEEIA and achieving all cost-effective demand-side savings. While the RAP resource plan has the lowest utility cost (net present value of revenue requirements) and RAP demand-side resources have a lower levelized cost of energy compared to existing or potential new supply-side resources, the Company did not choose this option. The Company opted not to choose this plan and has stated there is uncertainty on what the Company plans to spend on DSM in the coming years[104]. From the Company's own admission that it could be doing more, it is readily apparent that the Company is not in compliance with MEEIA's goal of achieving

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[101] Surrebuttal Testimony of John A. Rogers, Ex. 222, p. 9, l.19 – p. 10, l. 2.

[102] *Id.* at p. 9, ll.10-12.

[103] Tr. Vol. 26, p. 1802, ll. 16-21.

[104] Surrebuttal Testimony of John A. Rogers, Ex. 222, p. 7, ll. 27-28.

all cost effective demand side savings. The Staff recommends that the Commission find Ameren Missouri not in compliance with the MEEIA's goal of achieving all cost effective demand-side savings.

(1) What DSM programs should Ameren Missouri continue and/or implement, and at what annual expenditure level; and

As testified to at hearing, there is no reason why Ameren Missouri could not propose to continue its currently implemented DSM programs at current spending levels.[105] It remains the Staff's position that the Company should, at a minimum, deliver demand-side programs at annual expenditure levels no less than the Low Risk DSM portfolio's annual expenditure levels included in its February 23, 2011 Chapter 22 compliance filing in EO-2011-0271. This position is consistent with the treatment the Commission recently ordered for Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company in the ER-2010-0355 and 0356 rate cases, as well as the position recently agreed to in the Empire District Electric Company's *Global Settlement* in ER-2011-0004.

(2) Should Ameren Missouri continue to ramp up its demand side management programs to pursue all cost-effective demand side savings?

Yes. As discussed in the Staff witness Rogers' direct, rebuttal and surrebuttal filings, the Company has a significant scheduling opportunity before it. The Company has submitted its Chapter 22 resource filing outlining its resource plans. The parties to that case expect to file their reports by June 23, 2011. Additionally, the Commission's MEEIA Rules are now effective. With the

[105] Tr. Vol. 26, p. 1994, ll. 4-14.

necessary regulatory framework in front of AMMO, the Company could very timely prepare an application and request Commission approval of its DSM programs under the MEEIA rules, along with proposed demand-side programs incentive mechanisms (DSIM). At hearing, the Company witness testified that the Company is looking for a solution in the interim to keep the currently implemented DSM programs available.[106] But instead of looking for a solution in the interim, the Company could request relief under MEEIA as a more immediate and permanent solution to the problem. AmMo should work with the stakeholders to achieve the filing of applications under MEEIA by January 1, 2012, for approval of its realistic achievable potential (RAP) demand side programs as set forth in the Chapter 22 compliance filing in EO-2011-0271, and for approval of a DSIM under MEEIA or the rules promulgated thereunder.[107]

B. Does Ameren Missouri's request for demand-side management programs' cost recovery in this case comply with MEEIA requirements?

No. Ameren Missouri has not filed the requisite applications under MEEIA for the Commission to consider granting Ameren relief under MEEIA in this case. As indicated by the Company's attorney, MEEIA does not possess "magic words" to ask for the Commission's approval of Company programs under MEEIA. But if the Company is asking for approval there should be a clear indication that the Company is doing such, such as answering or providing all the information requested by MEEIA or the MEEIA rules.

[106] Tr. Vol. 26, p. 1921, ll. 8-18

[107] Surrebuttal Testimony of John A. Rogers, Ex. 222, p. 3, ll. 1-10.

Rule 4 CSR 240-20.094 (3) states "…Pursuant to the provisions of this rule…an electric utility may file an application with the commission for approval of demand-side programs or program plans by filing information and documentation required by 4 CSR 240-3.164(2). Rule 4 CSR 240-3.164(2) provides a long list requirements for information the Company shall provide in an application. The Company should comply with the statutory requirements of MEEIA and MEEIA rules prior to receiving a constructive regulatory treatment for its demand-side programs.[108]

AmMo's proposal for DSM regulatory treatment in this case does not comply with MEEIA for the following reasons:

1. The Company has not made an application for approval of demand-side programs which have an expectation of "achieving all cost-effective demand-side savings" as required by Section 393.1075.4[109];
2. The Company's proposal allows for recovery of lost revenues due to DSM programs through an adjustment of billing units before energy or demand savings have occurred. Section 393.1075.4 states that recovery for such programs shall not be permitted unless the programs result in energy or demand savings;
3. The Company's proposal does not include estimates of the total resource cost (TRC) test for each of its DSM programs as required by Section

[108] Supplemental Testimony of John A. Rogers, Ex. 246, p. 7, ll.3-4.

[109] Ameren Missouri has presented no plans to expand its energy efficiency programs or to implement any demand response programs as part of its request in this case.

393.1075.4, which states that the Commission shall consider the TRC test a preferred cost-effectiveness test;

4. The Company's proposal does not detail how it will deal with customers invoking their right to "opt-out" as required by Section 393.1075.7;
5. The Company has not provided how it would identify DSM charges on customer's bills; and
6. The Company's proposal for adjustment of billing units would have the effect of embedding "lost revenues" due to DSM programs in rates and would not clearly show charges as a separate line item on customers' bills as required by Section 393.1075.13.[110]

Therefore, the Company's filing in this case is lacking.

(1) Should the Commission approve a cost recovery mechanism for Ameren Missouri DSM programs as part of this case? If so,

No. As mentioned above in (B), Ameren Missouri has not filed an application for approval of its demand-side programs under MEEIA or under the MEEIA rules as part of this case. Therefore, the Commission cannot approve demand-side programs or a demand-side programs investment mechanism that will comply with MEEIA in this case.

The Company requested a fixed cost recovery mechanism, or FCRM, in its direct case. However, it abandoned its request in the surrebuttal testimony of its witness William Davis. Mr. Davis' testimony states that the Company is no longer supporting the adoption of the FCRM because it is "insufficient to offset

[110] Supplemental Testimony of John A. Rogers, Ex. 246, p. 7, l. 5 – p. 8, l. 5.

the throughput disincentive."[111] The Company instead proposed in rebuttal testimony, and refined in surrebuttal testimony, the billing unit adjustment alternative.[112] The Staff recommends the Commission not approve a FCRM. The Staff also recommends that the Commission not approve the billing unit adjustment, explained by the Company in surrebuttal testimony, for the reasons provided in (B)(1)(b) below.

(a) Over what period should DSM program costs incurred after December 31, 2010, be amortized?

The Staff recommends that the Commission order recovery of DSM costs incurred after December 31, 2010, over a six (6) year amortization period. The Company has withdrawn its request from its direct case to shorten the amortization period from six years to three years.[113]

(b) Should the mechanism include an adjustment to kWh billing determinants?

No. The Staff recommends that the Commission not provide the Company an adjustment to the kWh hour billing determinants. Mr. Davis' proposed billing unit adjustment mechanism is a lost revenue recovery mechanism and does not meet the requirement of the Commission's recently approved rule 4 CSR 240-20.093 Demand-Side Programs Investment Mechanism which governs a utility's lost revenue component in a DSIM. Ameren Missouri's proposal for a billing units adjustment mechanism "seeks to recover

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[111] *Id.,* at p. 2, ll. 6-19.

[112] *Id.*

[113] Tr. Vol. 26, p. 1805, ll. 6-16.

fixed costs that the utility would normally expect to recover through the sale of energy absent the implementation of energy efficiency programs."[114] The MEEIA rules allow the utility to recover lost revenue only when and to the extent that energy efficiency programs cause a drop in sales below the levels used to set the electricity prices. In contrast, Ameren Missouri's proposal for a billing unit adjustment does not take into account growth in usage. The Commission should not approve the proposal for a billing unit adjustment mechanism, since it is inconsistent with the Commission's MEEIA rules and would allow Ameren Missouri to recover all lost revenue resulting from demand-side savings, even if the Company's retail energy sales are growing.[115]

The Staff also recommends the Commission not approve the billing unit adjustment mechanism because it would increase rates to customers, with no clear indication that the Company will in fact incur the estimated kWh reductions. The Staff is not aware of any other proposal specifically like this existing for DSM portfolio management.[116] The Company is asking for what it expects future impact of energy efficiency to be. Under the Company's proposal, the customer does not receive the correct price signal. The adjustment does not provide the Company earning stability, but an earning guarantee.

The Commission should not make a billing adjustment independent of the rest of the case, because corresponding adjustments to the billing units used to

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[114] *Id.* at p. 1878, ll. 5-9; Supplemental Testimony of John A. Rogers, Ex. 246, p. 2, ll. 25-27.

[115] Supplemental Testimony of John A. Rogers, Ex. 246, p. 3, l. 27 – p. 4, l. 2.

[116] Tr. Vol. 26, p. 1987, ll. 15-22.

determine class cost-of-service allocators are necessary. Without such adjustments, the benefits will not necessarily go to the class that is paying for the demand-side programs. In addition, the customer may pay higher fuel and purchased power costs than necessary, as discussed in (B)(1)(d) below.

Even if the Commission were to give the Company the requested billing units adjustment mechanism, the Company has provided no indication that it will invest in RAP to comply with MEEIA.[117] As such, the Staff recommends that the Commission not provide the Company an adjustment to the kWh hour billing determinants and require the Company to propose a DSIM under MEEIA and the Commission's MEEIA rules.

(c) How much should the Commission reduce the billing determinants? and

See the Staff's discussion in (B)(1)(b) above.

(d) If billing units are adjusted for demand side savings, how should the NBFC rates be calculated?

The Staff strongly recommends that the Commission not approve the billing unit adjustment mechanism addressed in (B)(1)(b) above. However, if the Commission adjusts Ameren Missouri's billing units for anticipated demand side savings, then the Commission should also order a correlating reduction in billing units and fuel and purchased power costs less off-system sales revenue used for the calculation of NBFC rates.[118] Otherwise, the customer will pay higher fuel and purchased power costs than necessary.

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[117] Tr. Vol. 26, p. 1860, ll. 13-22.

[118] Supplemental Testimony of Lena M. Mantle, Ex. 247, p. 6, ll. 3-18.

C. Should a portion of the low income weatherization program funds be utilized to engage an independent third party to evaluate the program?

The Staff takes no position on this issue.

5. Taum Sauk:

What amount, if any, of Ameren Missouri's investment related to the reconstruction of Taum Sauk should be included in rate base for ratemaking purposes?

Staff recommends that the Commission include about $89 million of Ameren Missouri's expenditures on the new upper reservoir at Taum Sauk in rate base.

In setting rates in this case, the Commission must examine the evidence presented by Staff and AmMo regarding the decisions and actions to implement the construction of the new Taum Sauk upper reservoir. The Commission must determine whether the evidence in this case shows that ratepayers were harmed by any of those actions, and whether those decisions were made as the result of an unreasonable or deficient process.[119] Upon completing this exercise, the Commission must conclude, as its Staff did in February, that there is no evidence that AmMo's decisions and actions in constructing the new Taum Sauk upper reservoir were either harmful to its ratepayers or the result of an unreasonable or deficient process. Given the lack of evidence of imprudence, the Commission is obligated by Missouri law to include in AmMo's rate base these prudent expenditures.

[119] The legal standard of prudence for regulatory purposes, as well as Staff's general discussion of prudence is set out at pages 19-28, *supra,* and will not be reiterated here.

In its construction of the new upper reservoir, AmMo spent roughly $89 million dollars more than it received from insurance for the value of the old upper reservoir. AmMo presented testimony asserting that those dollars were prudently spent. Commission Staff reviewed those expenditures and the processes in place that resulted in those expenditures and did not discover any evidence of imprudence. Only one party, Public Counsel, pre-filed testimony recommending disallowance of any Taum Sauk expenditures. This testimony does not address the value of the new upper reservoir, the process employed in the construction of the new upper reservoir, or the construction of the new upper reservoir.

Staff recommends the Commission not fall for this ploy, and instead include AmMo's prudent investment in its rate base, as recommended by Staff witnesses Carle and Gilbert.

6. Municipal Lighting:

What is the appropriate ratemaking treatment for Ameren Missouri's street lighting classes in this case?

> **Staff's Position:** The Ameren Missouri street lighting customer class should receive the system average percent increase plus an approximate additional 1% increase because the current revenue responsibility of the customer class is less than Ameren Missouri's cost to serve the lighting class. (Testimony of Erin Carle and Guy Gilbert).

Staff recommends retention of existing rate elements for the lighting customers. While Staff does not recommend elimination of the pole and span charges as proposed by AmMo, if the Commission does order such charges, the revenues currently recovered from such charges should be recovered from within the lighting class.

7. Cost of Capital:

What return on equity should be used to determine Ameren Missouri's revenue requirement in this case?

Introduction:

Cost of capital is the largest single issue in this case – the difference between Staff's position and the Company's is worth nearly $111 million.[120] Cost of capital is always a large issue in terms of amount and also a contentious issue in a general rate case; this case is no exception. Four expert financial analysts testified before the Commission and offered recommendations to the Commission as set out below.[121] Staff's position on this issue is worth over $110.9 million as a reduction from the Company's requested increase in revenue requirement.[122]

RECOMMENDATIONS:		
Hevert	AmMo	10.40 to 11.25, **10.70**[123]
LaConte	MEG	9.70 to 10.00, **9.90**[124]
Gorman	MIEC	9.80 to 10.00, **9.90**[125]
Murray	Staff	8.25 to 9.25, **8.75**[126]

In addition to the Company's prudent operating and maintenance

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[120] *Staff's Revised Reconciliation,* May 16, 2011.

[121] Mr. Hevert, AmMo's cost-of-capital expert, testified that he regarded Murray, LaConte and Gorman as qualified cost-of-capital experts. Tr. 22:1113-14. All of them have MBAs and all but Ms. LaConte are Chartered Financial Analysts. *Id.*

[122] *Id.*

[123] Ex. 123 (HC), *Surrebuttal Testimony of Robert B. Hevert,* p. 68.

[124] Ex. 452, *Surrebuttal Testimony of Billie Sue LaConte,* p. 8.

[125] Ex. 409, *Surrebuttal Testimony of Michael Gorman,* pp. 18-19.

[126] Ex. 201, *Staff's Revenue Requirement Cost-of-Service Study,* p. 4.

expenses, revenue requirement includes both a return "of" and a return "on" the net current value of the shareholders' investment. The former is provided by depreciation expense; the latter by the rate of return. The rate of return is a multiplier which, applied to the net current rate base, results in the return or "profit" allowed to the investors in return for the use of their private property in serving the public. The Commission does not set the rate of return directly, but sets the return on common equity ("ROE") which is a component of the rate of return. In this way, the Commission indirectly sets the rate of return.

Staff's expert witness, David Murray, developed an estimate of Ameren Missouri's required ROE and provided examples of independent valuation analyses obtained by Ameren to provide cost-of-equity estimates on Ameren's regulated utility assets for purposes other than justifying a rate increase that are strikingly different from the cost-of-equity recommendation sponsored by Ameren Missouri's own rate of return witness, Mr. Hevert, and those of the other witnesses in this case, as well. Mr. Murray's discussion of these contradictory opinions is a matter that should be considered by the Commission when evaluating ROE recommendations for the purpose of setting an allowed ROE. The cost of equity is not driven by academicians or well-paid ROR expert witnesses, it is driven by investors and asset valuators putting real money at risk. The expert cost-of-capital witnesses are simply trying to emulate the thought processes of investors and valuators. The evidence shows that Staff has performed this task most accurately. Additionally, this case presents an overdue opportunity to urge the Commission to reconsider its approach to determining the

cost of capital. Staff will present a new approach, based firmly on the rate-of-return jurisprudence of the United States Supreme Court.

Determining the Cost of Capital:

The details of the return-on-equity determination are well known to the members of the Commission. All but one of the several numbers involved in the capital structure and its constituent securities are historical or "embedded" in regulatory speak. The only unknown is the cost to be assigned to common equity.[127] That one unknown is a matter for expert analysis and testimony. However, once that single unknown is determined by the Commission, the Weighted Average Cost of Capital – the "WACC" – can be easily calculated. Financial theory holds that the WACC is equal to a fair rate of return because it produces sufficient revenue to meet the utility's capital costs.[128]

The difficulty for the Commission lies in evaluating the expert testimony and reaching a final result. Each of the experts presents his or her results as though there is only one right answer and he or she has got it;[129] consequently, the testimony generally includes a great deal of criticism by each expert of the other experts' methodologies, inputs, assumptions, and results. This leaves the Commission the difficult task of parsing the experts' work product. The fact is that all of the experts use much the same methods and data and their varying

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[127] This "is an area of ratemaking in which agencies welcome expert testimony and yet must often make difficult choices between conflicting testimony." 1 L.S. Goodman, ***The Process of Ratemaking*** 606 (PUR, 1998).

[128] *See, e.g.,* Ex. 201, *Staff's Revenue Requirement Cost-of-Service Report,* pp. 6-7.

[129] The experts take the position that they are estimating the markets *required* return on equity. Tr. 22:1115; 1127-28; 1131; 1192; 1201; 1226; 1231; 1247.

results are driven by their varying assumptions and inputs.[130] There is not a single right answer; rather, there is a range or spectrum of answers within which the Commission is free to choose the value that meets its regulatory goals.

Much like the perfunctory recitation of the pledge of allegiance at the start of a school day, cost-of-capital briefs and testimony always give a nod to the leading Supreme Court cases, ***Bluefield*** and ***Hope.***[131] However, the analyses and arguments that follow rarely refer to those cases again. This typical scenario is wrong-headed because it is those cases and the principles announced in those cases that are the heart and soul of the cost-of-capital determination. In fact, the Supreme Court's ratemaking cases – and there are others in addition to ***Hope*** and ***Bluefield*** – describe a return-setting paradigm that, if adopted, will make the Commission's task somewhat easier.

A New Paradigm:

Although the witnesses that testify on cost of capital are expert financial analysts, the Commission is actually undertaking a quasi-legislative task, not a financial analytical task. In other words, the testifying experts and the Commission are not doing the same thing.[132] The Commission is not buying securities or selling securities or advising anyone else to do those things. The

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[130] Tr. 22:1122 (Mr. Hevert); Tr. 22:1231 (Mr. Gorman).

[131] ***Federal Power Commission v. Hope Natural Gas Company***, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1943); ***Bluefield Water Works & Improvement Company v. Public Service Commission of West Virginia***, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

[132] The experts are advising the Commission of the *required* return; the Commission is seeking the *commensurate* return, a legal concept that is approximated by the required return. Both concepts are based on the notion of investment risk. *See* Ex. 201, *Staff's Revenue Requirement Cost-of-Service Report*, p. 6.

Commission is instead determining the fair and reasonable return that the captive ratepayers will pay to the Company's shareholders over the next year for the use of their property to provide electric service. This number is important, not only to the ratepayers, but to the Company, its shareholders and its management. It is a "headline number" to the investment community.[133] ***Hope*** and ***Bluefield*** guide the Commission in this endeavor by describing the limits of the lawful. ***Hope*** and ***Bluefield*** and their progeny also provide the tools that the Commission needs to evaluate the various expert recommendations and set the cost of common equity – the "ROE" – at the appropriate point.[134]

Bluefield is the earlier of the cases. In it, the Court said:

> 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 deprives the public utility company of its property in violation of the Fourteenth Amendment.[135]

Here, the Court unmistakably describes one limit on the Commission's decision: a return that is ***too low*** is tantamount to confiscation and is thus unconstitutional. In the same case, the Court also delineated a second limit on the Commission's rate decision: "A public utility . . . has no constitutional right to profits such as are

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[133] Tr. 22:1184 *and see* Tr. 22:1218.

[134] The evaluation of expert testimony is left to the Commission, which "may adopt or reject any or all of any witness's [sic] testimony." ***State ex rel. GS Technologies Operating Company, Inc. v. Public Service Commission of Missouri,*** 116 S.W.3d 680, 690 (Mo. App., W.D. 2003); ***State ex rel. Associated Natural Gas Company v. Public Service Commission,*** 37 S.W.3d 287, 294 (Mo. App., W.D. 2000) (quoting ***State ex rel. Associated Natural Gas Company v. Public Service Commission,*** 706 S.W.2d 870, 880 (Mo. App., W.D. 1985)).

[135] ***Bluefield***, *supra,* 262 U.S. at 690, 43 S.Ct. at 678, 67 L.Ed. at 1181.

realized or anticipated in highly profitable enterprises or speculative ventures."[136] This language describes the upper limit of the rate decision. A return that is **too high** is one that produces the sort of profits realized from "highly profitable enterprises or speculative ventures."[137]

Between these limits is a "zone of reasonableness" within which the Commission is free to set the rate of return. The Supreme Court has stated, "[w]e have emphasized that courts are without authority to set aside any rate adopted by the Commission which is within a 'zone of reasonableness.'"[138] This is not, however, the analytical tool of the same name that this Commission has frequently used over the past few years. That tool, which Staff today argues the Commission should abandon, is an exercise in benchmarking in which the recommendations of the experts are compared to the average of recently-allowed ROEs reported by Regulatory Research Associates ("RRA"). Its main flaws are these: first, it inevitably pulls the ROE in any case toward the average; and second, its range of 100 basis points either side of the average is entirely

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[136] *Id.,* 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

[137] *Id.*

[138] ***In re Permian Basin Area Rate Cases,*** 390 U.S. 747, 797-798, 88 S.Ct. 1344, 1376, 20 L.Ed.2d 312, ___ (1968).

arbitrary.[139] Far better that the Commission abandon it for the approach approved by the United States Supreme Court.[140]

The Commission is free to set the return on equity anywhere within the zone of reasonableness. This is not, however, an unfettered exercise of discretion. Rather, the Commission's discretion must be guided by, and based upon, its consideration of all the evidence in the light of the public interest. As the Court has said, rate-setting agencies "are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances."[141] As the Court has also said, "[t]he Commission may, within this zone [i.e., the zone of reasonableness], employ price functionally in order to achieve relevant regulatory purposes; it may, in particular, take fully into account the probable consequences of a given price level for future programs of exploration and production."[142] In particular, it should be guided by the principle of the commensurate return described in ***Bluefield:***

> The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and

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[139] The circular reasoning inherent in regulatory agencies setting ROEs by reference to the ROEs set by other regulatory agencies is obvious. In addition, as Mr. Murray explained, *authorized* ROEs are not indicative of *required* ROEs because the market adjusts itself to cancel out the effects of regulatory action. Ex. 201, ***Staff's Revenue Requirement Cost-of-Service Report,*** pp. 27-28.

[140] Staff notes that the Commission's Zone of Reasonableness analysis has been upheld in the face of every challenge by zealous counsel. ***State ex rel. Praxair, Inc. v. Public Service Commission,*** 328 S.W.2d 329, 340-41 (Mo. App., W.D. 2010); ***State ex rel. Public Counsel v. Public Service Commission,*** 274 S.W.3d 569, 574 (Mo. App., W.D. 2009).

[141] ***Federal Power Commission v. Natural Gas Pipeline of America,*** 315 U.S. 575, 585-586, 62 S.Ct. 736, 742-743, 86 L.Ed. 1037, ___ (1942).

[142] ***Permian Basin Area Rate Cases,*** *supra,* 390 U.S. at 797-798, 88 S.Ct. at 1376, 20 L.Ed.2d at ___.

> should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.[143]

And restated in ***Hope:***

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.[144]

How does this differ from what the Commission has been doing for the past decade? In this way: the Commission's first step should be to define the limits of the zone of reasonableness. At the bottom is what the Court calls the "lowest reasonable rate," that is, the ***lowest*** rate that is not confiscatory and, consequently, is constitutionally permissible. "By long standing usage in the field of regulation the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense."[145] The important point is that the Commission's return-setting analysis should be keyed off the ***lowest reasonable rate*** rather than, as it has been, the average of recently-awarded returns.

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[143] ***Bluefield****,* supra, 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183.

[144] ***Hope***, *supra,* 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

[145] ***Federal Power Commission,*** *supra,* 315 U.S. at 585, 62 S.Ct. at 742, 86 L.Ed. at ___. The Court went on to say: "Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate, the Commission is also free . . . to decrease any rate which is not the 'lowest reasonable rate.'" *Id.* (internal citations omitted).

The Lowest Reasonable Rate and the Zone of Reasonableness:

How then should the Commission determine the Lowest Reasonable Rate? In practice, that's easy: Staff's expert witness has provided it. Consider again the several expert recommendations offered in this case. The bottom of Mr. Murray's recommendation at 8.25% is fully 300 basis points below the top of Mr. Hevert's recommendation at 11.25% and those of Ms. LaConte and Mr. Gorman fall between them, closer to – but below – the average of recently awarded ROEs.[146] Mr. Murray's recommendation is the Lowest Reasonable Rate, the bottom of the zone of reasonableness. The top of the zone is less clear; certainly, Staff believes that Mr. Hevert's recommended range is above the top of the zone of discretion.

The Commission will find the adoption of the conceptual framework urged here by Staff to be beneficial in many respects. It explains, for example, why Staff's ROE recommendation is generally the lowest of those presented -- it is because Staff seeks to accurately define the Lowest Reasonable Rate. By doing so, Staff assists the Commission by demarcating the point of confiscation and the starting value for the consideration of the other recommendations. Above Staff's recommendation, the Lowest Reasonable Rate, is the zone of reasonableness.

Within the zone of reasonableness, the Commission is free to set the return. As Missouri courts have stated repeatedly, "[i]t is not the theory or

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[146] The average, depending on how it is calculated from the available data, is just over 10.0%. Tr. 22:1254.

methodology, but the impact of the rate order which counts."[147] Nonetheless, the Commission must articulate its reasons for setting the return at a particular point within the allowable zone.[148] These reasons extend to all "relevant regulatory purposes" including a consideration of the likely impacts of the rate order.[149] Among the principles that should guide the Commission's choice of a particular point within the zone of reasonableness are those articulated in ***Hope*** and ***Bluefield,*** including the principles of the commensurate return, capital attraction and financial integrity.[150]

Evaluating the Experts:

Of the four experts who provided recommendations in this case, only Staff's expert, David Murray, did not change his recommendation after the filing of direct testimony.[151] Mr. Murray developed his recommendation by analyzing market data from a proxy group of ten publicly-traded, integrated electric utilities.[152] As is traditional with Staff, Mr. Murray relied primarily upon the Discounted Cash Flow ("DCF") model, employing both a Constant Growth

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[147] ***Praxair,*** *supra,* 328 S.W.3d at 339, *citing* ***State ex rel. Missouri Water Co. v. Public Service Commission,*** 308 S.W.2d 704, 714 (Mo.1957).

[148] Otherwise, judicial review is frustrated.

[149] ***Permian Basin Area Rate Cases,*** *supra,* 390 U.S. at 797-798, 88 S.Ct. at 1376, 20 L.Ed.2d at ___.

[150] ***Bluefield,*** *supra,* 262 U.S. at 692-93, 43 S.Ct. at 679, 67 L.Ed. at 1182-1183; ***Hope,*** *supra,* 320 U.S. at 603, 64 S.Ct. 288, 88 L.Ed. 345 (citations omitted).

[151] It is noteworthy that, while Mr. Hevert reduced his recommendation in his surrebuttal testimony, Mr. Gorman increased his. Evidently, these experts cannot agree on the direction of the adjustment required by changing conditions.

[152] Ex. 201, *Staff's Revenue Requirement Cost-of-Service Report,* pp. 15-16.

version and a Multi-Stage version.[153] He placed primary emphasis on the results of the latter.[154] Mr. Murray used a Capital Asset Pricing Model ("CAPM") analysis as a check on the reasonableness of his DCF results and also sought other corroborating evidence.[155] His result was a range, 8.25 to 9.25, mid-point 8.75.[156]

Among the corroborating evidence marshaled by Mr. Murray is a cost-of-equity estimate for Ameren Missouri performed by Duff & Phelps, LLC, dated November 3, 2010.[157] This analysis was undertaken in conjunction with required goodwill-impairment testing.[158] While the specific number developed by Duff & Phelps is Highly Confidential, it may be said that it corroborates Mr. Murray's ROE recommendation.[159] Mr. Murray also presented his review of a valuation analysis undertaken by Lazard and presented to the Finance Committee of AmMo's Board of Directors on December 11, 2009.[160] Although AmMo was unable to produce Lazard's workpapers, Mr. Murray was able to impute the cost-of-equity value used by Lazard from the presentation.[161] Again, while the specific range of numbers imputed by Mr. Murray based on the Lazard presentation is

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[153] *Id.,* pp. 16-24.

[154] *Id.,* p. 19.

[155] *Id.,* pp. 24-28.

[156] *Id.,* p. 4.

[157] Ex. 219, *Rebuttal Testimony of David Murray,* pp. 8-13.

[158] *Id.*

[159] *Id.,* p. 9.

[160] Ex. 220, *Surrebuttal Testimony of David Murray,* pp. 2-9.

[161] *Id.,* at p. 3.

Highly Confidential, it also corroborates his recommendation.[162]

This corroborative evidence is significant. It led Mr. Murray to conclude:

> [T]hat experts involved in the field of asset valuation consistently apply a much lower cost of equity to cash flows generated from regulated utility operations as compared to the estimates of the cost of equity from not only company ROR witnesses, but all ROR witnesses involved in the utility ratemaking process.[163]

This disconnect is difficult to understand in view of Mr. Murray's comment that each of the other cost-of-capital witnesses in this case had admitted that the principles and methods used for estimating cost of equity for valuation purposes are the same as those used in ratemaking.[164] At the hearing, Mr. Hevert attempted to evade the effects of his earlier admission by distinguishing between estimating the return required by all investors, as in a rate case, from estimating the return required by a single investor acquiring a controlling interest, as in asset valuation.[165] Mr. Hevert characterized these as "fundamentally different exercises."[166] However, a treatise cited by Mr. Hevert in his testimony as an authority states otherwise:

> Regardless of which of the major approaches is used to estimate the cost of capital . . . the information is derived from publicly traded stocks. Because these public market transactions represent minority ownerships, some analysts believe that the cost of capital should be adjusted upward in valuing a controlling

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[162] *Id.,* at p. 5.

[163] Ex. 219 (HC), *Murray Rebuttal.* p. 13.

[164] Ex. 220 (HC), *Murray Surrebuttal,* p. 7; *and see* Tr. 22:1224 (Mr. Gorman).

[165] Tr. 22:1128-29.

[166] *Id.,* at 1129.

ownership interest. This generally is not true![167]

Billie Sue LaConte presented a revised cost-of-equity estimate in her surrebuttal testimony.[168] Ms. LaConte developed her recommendation by analyzing market data from a proxy group of thirteen publicly-traded electric utilities.[169] Ms. LaConte relied both upon the Constant Growth DCF a Two-Stage DCF, and the Risk Premium method.[170] Ms. LaConte used CAPM and Empirical Capital Asset Pricing Model ("ECAPM") analyses as checks on reasonableness.[171] Her revised result was a range, 9.7% to 10.0%, mid-point 9.9.[172]

Michael Gorman also presented a revised cost-of-equity estimate in his surrebuttal testimony.[173] Mr. Gorman developed his recommendation by analyzing market data from a proxy group of eleven publicly-traded electric utilities – in fact, he purposefully used the same proxy group as AmMo's expert witness, Robert Hevert.[174] Mr. Gorman performed three versions of the DCF analysis -- Constant Growth, Sustainable Growth and Multi-Stage Growth -- a

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[167] Shannon P. Pratt & Roger J. Grabowski, ***Cost of Capital: Applications and Examples*** (4th ed., 2010); Tr. 22:1129-30. Note, too, that the valuations relied on by Mr. Murray as corroborations of his cost-of-equity estimate are *lower* than those proposed in this ratemaking proceeding, not higher as Pratt & Grabowski suggest. In other words, it is the minority interests that appear to have been artificially inflated, rather than the reverse.

[168] Ex. 452, *Surrebuttal of Billie Sue LaConte,* pp. 7-8.

[169] Ex. 450, *Direct Testimony of Billie Sue LaConte,* pp. 5-6.

[170] Ex. 452, *LaConte Surrebuttal,* p. 7.

[171] *Id.*

[172] *Id.,* p. 8.

[173] Ex. 409, *Surrebuttal of Michael Gorman,* pp. 7-8.

[174] Ex. 407, *Direct Testimony of Michael Gorman,* pp. 9-10. Mr. Gorman's revised recommendation is based on Mr. Hevert's revised proxy group. *Gorman Surrebuttal,* p. 18.

Risk Premium analysis, and a CAPM analysis.[175] His revised result was a range, 9.8% to 10.0%, mid-point 9.9.[176]

Robert Hevert provided expert ROE testimony for AmMo. Mr. Hevert also revised his recommendation after direct testimony was filed.[177] Mr. Hevert performed Constant Growth and Multi-Stage DCF analyses, two different Risk Premium analyses and a CAPM, using both a proxy group of eleven electric utilities and a combined proxy group including every company used as a proxy by any of the witnesses in this case.[178] His result was a range, 10.40 to 11.25, mid-point 10.70.[179]

Each of the experts criticized the methods and conclusions of the others, providing the Commission with plenty of ammunition to use in picking through each expert's recommendation. Mr. Hevert dismissed Mr. Murray's conclusions as unreasonable, stating: "ROE estimates as low as 7.04 percent have no analytical meaning,"[180] although, as Mr. showed, Ameren's third-party valuators used even lower cost-of-equity estimates in estimating the value of AmMo's assets for purposes of financial reporting and strategic investment decisions. He criticized Mr. Gorman's growth rates, his CAPM analyses, his Risk Premium analyses, and his conclusion that an authorized ROE of 9.75% would support

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[175] *Id.,* pp. 18-19.

[176] *Id.,* p. 19.

[177] Ex. 123 (HC), *Surrebuttal of Robert B. Hevert,* pp. 2-7, 68-74.

[178] *Id.*

[179] *Id.,* p. 68.

[180] Ex. 122, *Rebuttal Testimony of Robert B. Hevert,* p. 15. Mr. Hevert also had many detailed criticisms of Mr. Murray's recommendation, *Id.,* pp. 13-62.

AmMo's credit quality.[181] He judged Ms. LaConte's results to be "generally consistent" with his own, but criticized many details of her work.[182] Mr. Murray criticized Mr. Hevert's growth rates and terminal values as too high, resulting in "inflated estimates."[183] He noted that the primary reason for the different results of his Multi-Stage DCF analysis and that of Mr. Hevert was the perpetual growth rate used in stage three.[184] He criticized Ms. LaConte's and Mr. Gorman's recommendations as too high.[185] Mr. Gorman criticized Mr. Hevert's results as "overstated and unreasonable" and his growth rates as "inflated."[186] He also criticized Ms. LaConte's recommendation as "unreasonably high" and advised that it be "disregarded."[187] He criticized her reliance on Mr. Hevert's growth rate and described her ECAPM study as "flawed."[188] Ms. LaConte described Mr. Hevert's recommendation as "too high" and "based on some assumptions that are unrealistic and adjustments that are unnecessary."[189]

Conclusion:

As Staff has demonstrated herein, the United States Supreme Court has held that there is a zone of reasonableness within which the Commission has

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[181] *Id.,* pp. 62-89.

[182] *Id.,* pp. 89-112.

[183] Ex. 219 (HC), *Murray Rebuttal,* pp. 18-26.

[184] Tr. 22:1169.

[185] *Id.,* pp. 27-28.

[186] Ex. 408, *Gorman Rebuttal,* p. 2; *and see id.,* pp. 3-28.

[187] *Id.,* at p. 3.

[188] *Id.*

[189] Ex. 451, *Rebuttal Testimony of Billie Sue LaConte,* p. 2.

discretion to set the cost of common equity in order to achieve appropriate regulatory goals. These goals include those traditional ***Hope*** and ***Bluefield*** goals of assuring the utility's financial integrity and its ability to attract capital at a reasonable cost, but also encompass and extend to broader regulatory and public policy objectives. These objectives include consideration of the likely impact of the Commission's order. Regulatory commissions have used ROE awards to reward or punish company management, for example, and reference was made during the hearing to FERC candy," which describes ROE awards intended to incentivize desired behavior.

Staff urges the Commission to first define the limits of the zone of reasonableness, not by reference to the average of recent ROE awards and an arbitrary range centered thereon, but by defining the Lowest Reasonable Rate and the corresponding ceiling that we may refer to as the Highest Reasonable Rate, as described in the ratemaking jurisprudence of the United States Supreme Court. These values define the zone of reasonableness, within which the Commission has discretion to set the return on common equity to achieve permissible and appropriate regulatory and public policy goals. In this regard, Staff suggests the following:

(1) The Commission should specifically find that the recommendation offered by Staff expert witness David Murray *is* the Lowest Reasonable Rate; and

(2) The Commission should not require the ratepayers to pay a penny more than the Lowest Reasonable Rate except as may be required to achieve

permissible, clearly articulated regulatory goals.

8. Fuel Adjustment Clause Issues:

A. Should the Commission authorize Ameren Missouri to continue its current Fuel Adjustment Clause (FAC) or should the Commission discontinue or order modifications to the FAC?[190]

B. Should the sharing percentage in Ameren Missouri's FAC be changed from 95/5 percent to 85/15 percent?

C. Should the length of the recovery periods for the FAC be reduced from twelve (12) months to eight (8) months?

D. Should the Company have the ability to adjust the FPAC rate for errors in calculations that may have occurred since the FAC Rider was granted to Ameren Missouri?

E. What is the appropriate tariff language to reflect any modifications or clarifications to Ameren Missouri's FAC?

Staff supports the continuation of Ameren Missouri's Fuel Adjustment Clause ("FAC"), but the Commission should issue an order with the following modifications: implement an 85%/15% sharing mechanism and modify certain language on Tariff Sheet 98.6.

FAC History:

The Commission approved Ameren Missouri's FAC in Case NO. ER-2008-0318 and set forth a sharing mechanism at a 95% to 5% ratio.[191] In that case, the Commission found that allowing Ameren Missouri to pass 95% of its prudently incurred fuel and purchased power costs, above those included in its

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[190] The Company does not believe that this issue has properly been raised in this case, nor that it is an issue that requires resolution by the Commission in this case. Other parties disagree.

[191] ***In the Matter of Union Electric Co. d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service,*** Case No. ER-2008-0318 (***Report & Order,*** issued Jan. 1, 2009; Ex. 201, Staff's Cost-of-Service Report, p. 107, lines 3-6.

base rates, through a FAC was appropriate.[192] The Commission stated that with the 95% pass-through, Ameren Missouri should operate at optimal efficiency and take all reasonable actions to keep its fuel and purchased power costs as low as possible, and still have an opportunity to earn a fair return on its investment.[193] The Commission concluded that a 95% pass-through would not violate § 386.266.4(1) because it would still afford Ameren Missouri a sufficient opportunity to earn a fair return on equity.[194]

Shortly thereafter, Ameren Missouri filed another general rate case, Case No. ER-2010-0036.[195] During that case, the Commission expressed a concern with the sharing mechanism by issuing an order that requested:

> The Commission would like the parties in their testimony to review AmerenUE's current fuel adjustment clause and advise the Commission whether the current 95 percent pass through mechanism: 1) affords AmerenUE a sufficient opportunity to earn its authorized return on equity, and/or 2) provides AmerenUE with a sufficient financial incentive to be prudent in and take reasonable efforts to minimize its fuel and purchased power costs?[196]

Staff's response to the Commission's order was that Staff did not have enough information to provide the Commission with a meaningful analysis due to

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[192] ***In the Matter of Union Electric Co. d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service,*** Case No. ER-2008-0318 (***Report & Order,*** issued Jan. 1, 2009), p. 70-76.

[193] *Id.*

[194] *Id.,* at p. 76.

[195] Ex. 201, *Staff's Revenue Requirement Cost-of-Service Report,* p. 107, lines 7-9.

[196] ***In the Matter of Union Electric Co. d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service, Case No.*** ER-2010-0036, (***Order Directing the Parties to Submit Testimony Concerning the Appropriateness of AmerenUE's Current Fuel Adjustment Clause,*** issued Feb. 17, 2010); *see* Ex. 201, p. 107, lines 13-19.

the close proximity of rate cases.[197] In Case No. ER-2010-0036, the Commission authorized the continuation of the FAC with the same sharing mechanism,[198] specifically noting, that the Commission would review the sharing mechanism in Ameren Missouri's next general rate case.[199]

This is Ameren Missouri's next rate case; a general rate case in which 86 residential customer comments were submitted in the Commission's Electronic Filing Information System (EFIS) related to the FAC[200]

Sharing Mechanism:

Since the Ameren Missouri's last rate case, Staff has obtained data in which it was able to reach a 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.[201] When assessing data related to Ameren Missouri's FAC sharing mechanism, Staff's expert, Lena Mantle, examined the following: 1) Ameren Missouri's request in this case to rebase its FAC NBFC; 2) Ameren Missouri's request for additional revenue in its true-up filing for AP1 based on an assertion that the FAC NBFC established in the 2008 rate case are too high; 3) the results of Staff's prudence audit that included AP1 and AP2 where Staff concluded Ameren Missouri was imprudent for excluding from its FPA calculations costs

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[197] Ex. 201, Staff Cost-of-Service Report, p. 107, lines 23-28.

[198] Ex. 201, Staff Cost-of-Service Report, p. 107, lines 31-36.

[199] *Id.*

[200] Ex. 218, *Mantle Rebuttal,* p. 17, lines 11-12.

[201] *See* § 386.266.1, RSMo (Supp. 2010).

and revenues associated with its contract sales of energy to American Electric Power Operating Companies ("AEP") and to Wabash Valley Power Association, Inc. ("Wabash"); 4) information Ameren Missouri provided in its monthly FAC filings and in its filings to change its FPA information including its fuel and purchased power costs and OSS revenues; and 5) the impact on Ameren Missouri's net income of changing the sharing percentage in its FAC sharing mechanism.[202]

Based upon the data Ms. Mantle assessed, she determined that that while one cannot, with a hundred percent certainty, ascertain the most effective incentive mechanism, Ameren Missouri's incentive mechanism (sharing mechanism) was not sufficient for it to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities.[203]

There are four key events in which provide competent and substantial evidence for the Commission to determine that Ameren Missouri needs a greater incentive to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities: (1) the results of Case No. EO-2010-0255 in which the Commission determined that "Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from power sales agreements with AEP and Wabash from off-system sales revenues

[202] Ex. 201, p. 111, lines 3-16.

[203] Section 386.266 (Supp. 2010); Tr. p. 1574, lines 20-24.

when calculating the rates charged under its fuel adjustment clause";[204] (2) Ameren Missouri's true-up in Case No. ER-2010-0274, in which Ameren Missouri claims that the NBFC rates were incorrectly calculated; (3) the loss of the "coal pool" which Ameren Missouri used to purchase coal with other Ameren operating entities; and (4) Ameren Missouri not pursuing what it considers the most appropriate spot market prices in its fuel model which is used to determine the FAC net base fuel costs.

Prudence Case:

During a statutorily-mandated prudence review, the Commission found "Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from power sales agreements with AEP and Wabash from off-system sales revenues when calculating the rates charged under its fuel adjustment clause."[205]

Section 386.244.4(4), RSMo (Supp. 2009)[206] and Commission Rule 4 CSR 240-20.090(7) require prudence reviews of the costs subject to an electric utility's FAC at least every 18-months. In its prudence review, Staff evaluated and analyzed Ameren's fuel and purchased power costs for the period March 1 through September 30, 2009 – the first two accumulation periods of Ameren's

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[204] ***In the Matter of the First Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Union Electric Company, d/b/a Ameren Missouri,*** Case No. EO-2010-0255 (***Report & Order,*** issued April 27, 2011) p. 2.

[205] *Id.*

[206] All statutory references are to the Revised Statutes of Missouri 2000, as currently supplemented, unless otherwise noted.

FAC.[207] Staff's position, in which the Commission agreed, was it was imprudent, improper and unlawful for Ameren Missouri to exclude the revenues derived from the power sales agreements with AEP and Wabash in the OSSR component of the Ameren Missouri's Fuel and Purchases Power Adjustment mechanism.[208] This imprudence resulted in harm to ratepayers.[209]

By not flowing the revenues associated with the AEP and Wabash contracts through Ameren Missouri's FAC, Missouri ratepayers are harmed because Ameren has denied Missouri customers the right of having the revenues from the AEP and Wabash contracts off-set the fuel and purchased power costs, while the ratepayers are taking on the risk of increased fuel and purchased power costs.[210]

The Commission found that Ameren Missouri was imprudent for not flowing $17,169,838 of revenue associated with the AEP and Wabash contracts to its customers through its FAC.[211] Instead of appropriately applying its FAC Rider tariffs, Ameren Missouri did not flow through the revenues from these contracts to customers in attempt to "replace" the revenues that it did not receive when the load of its largest customer, Noranda, was reduced due to a ice storm in January 2009.[212] If Ameren Missouri had a greater sharing mechanism, such

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[207] ***First Prudence Review,*** Case No. EO-2010-0255, *supra.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

as an 85%/15% sharing mechanism, Ameren Missouri would have been able to keep more of the revenues from these contracts.

True-Up Case:

On December 1, 2010, Ameren Missouri filed for the true-up of its first recovery period in Case No. ER-2010-0274. As a part of its true-up, Ameren Missouri has asserted that the NBFC rate in the original tariff was incorrectly calculated and has requested the true-up amount include the amount it would have collected had the NBFC rate been correctly calculated.[213] The now known error occurred because "net system input" data (load requirement at generation) was not used to calculate the NFBC rates. Instead, the data Ameren Missouri used was "net system output" data (load requirement at transmission).[214] The use of data at the transmission level versus the generation level resulted in Ameren Missouri's NBFC rates being lower than if the net system input would have been used.[215]

In Ameren Missouri's true-up filing, it argued that the Commission has authority now to remedy this alleged error in Case No. ER-2008-0318 and, therefore, the true-up should result in additional monies being collected from its retail customers. It is Staff's position this would violate the prohibition on retroactive ratemaking.[216]

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[213] Ex. 201, Staff's Cost-of-Service Report, p. 108, lines 12-18.

[214] Ex. 218, Mantle Surrebuttal, p. 3, lines 3-9.

[215] Ex. 103, Barnes Rebuttal, p. 4, lines 8-10.

[216] *Id.*

However, if Ameren Missouri had a greater incentive mechanism, it would be more likely to be extra careful when determining and filing its NBFC rates and if Ameren Missouri had a greater sharing mechanism, such as an 85%/15% sharing mechanism, Ameren Missouri would have a greater incentive to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities.

Reduction in Incentives:

Since Ameren Missouri's last rate case, it has lost a powerful incentive to improve the efficiency and cost-effectiveness of its fuel procurement activities. In Ameren Missouri's last two rate cases, Case Nos. ER-2008-0318 and ER-2010-0036, Ameren Missouri argued, and the Commission agreed, that its "coal pool" was a powerful incentive to minimize fuel and procurement activities because the coal purchases for Ameren Missouri were pooled with the coal purchases for Ameren Genco.[217] However, this pooling agreement is no longer in place.[218] Thus, Ameren Missouri lost what the Commission considered a major incentive component in establishing the 95%/5% sharing mechanism.[219] This lack of incentive coupled with Ameren Missouri's relationship with the FAC is a prime indicator that the sharing mechanism is not great enough. The Commission

[217] Ex. 302, Kind Rebuttal, p. 15, lines 16-19. *See* Tr. p. 1418, lines 1-22; Tr. p. 1419, lines 3-23; Tr. p. 1420, lines 5-25; Tr. p. 1421, lines 1-9.

[218] Ex. 302, Kind Rebuttal, p. 15, line 19.

[219] Tr. p. 1573, lines 1-4.

should order an 85%/15% sharing mechanism to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities.

Reluctance to Properly Set FAC Net Base Fuel Costs:

In Staff's direct case, it stated that since Ameren Missouri rebased its FAC in this case, Staff's recommendation to change the sharing mechanism was not based on rebasing the FAC.[220] However, it became apparent in the rebuttal testimonies of Ameren Missouri's witnesses Jaime Haro and Lynn Barnes that the Company did not believe that the market prices in the fuel stipulation and agreement were accurate.[221] Ameren protests that it was required to follow the Commission's report and order regarding market prices from Case No. ER-2007-0002. However, the Commission in its recent report and orders in Case Nos. ER-2010-0355 and ER-2010-0356 appropriately stated that the Commission is afforded considerable discretion in determining the proper methodology for determining spot market prices.[222] If Ameren Missouri does not believe the Off System Sales prices are correct, that the sharing mechanism percentage is not great enough to provide the Company with enough incentives to get the net base fuel costs in the FAC right.

Return on Equity:

Ameren Missouri presented no evidence that Staff's proposed sharing mechanism would create financial problems. More importantly, Ameren

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[220] Ex. 201, Staff's Cost-of-Service Report, p. 111, line 31 – p. 112, line 9.

[221] Ex. 103, Barnes Rebuttal, p. 8, lines 1-13.

[222] Tr. p. 1599 line 10 – p. 1602, line 9.

Missouri's witness Lynn Barnes states "there is no reasonable opportunity for the Company to earn a fair ROE without the FAC."[223] So regardless of the sharing mechanism percentage, it appears Ameren Missouri would prefer a FAC rather than no FAC.

While other states might not require regulated electric utilities to operate under a 95%/5% or an 85%/15% sharing mechanism, that should have no bearing on how this Commission decides Ameren Missouri's FAC incentive mechanism. Section 386.266.1 specifically authorizes the Commission to create a fuel adjustment mechanism "**with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities."**

Mr. Rygh's testimony regarding the financial stability of Ameren Missouri was not persuasive. In fact, when questioned by Commission Kenney, he attempted to give an "educated guess" to the four regulatory mechanisms he claimed to make a state "investor-friendly."[224] It was not until pressured by Commission Kenney that Mr. Rygh decided to give an "expert" opinion.[225] Mr. Rygh's claims that the investment community would take a negative view of Staff's 85%/15% sharing mechanism, however, the investment community did not reward Ameren Missouri when it received a FAC. Ameren Missouri's Moody's issuer/corporate credit rating remained constant Baa2 from the years

[223] Ex. 102, Barnes Direct, p. 5, lines 22-23.

[224] Tr. p. 1524, lines 1-10.

[225] Tr. p. 1524, lines 14-20.

2008 – 2010.[226] Ameren Missouri's FAC was not effective until March 2009. If 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.

Tariff Sheet 98.6:

The Commission should adopt the language contained in Schedule DCR-1-6, of Staff expert David Roos surrebuttal testimony. Ameren Missouri attempts to add additional language under True-up of FAC; the Commission should not adopt this language. This language would result in the improper authorization of retroactive ratemaking.

Under the subheading General Rate Case/Prudence Reviews on Tariff Sheet 98.6, Staff's and Ameren Missouri's additional language is virtually identical. However, the Commission should adopt Staff's use of the "Rider" instead of Ameren Missouri's use of "Tariff" because Ameren Missouri's choice of word could be misleading. Although, Ameren Missouri's witness Ms. Barnes contends the language is only meant to be applied to the FAC Rider, it could be easily misinterpreted in the future.[227] Thus in order to avoid future problems with interpreting tariff language, the Commission should adopt the clearer word choice contained within Staff's exemplar tariff sheets located in Staff's Mr. Roos' Schedule DCR-1-6.

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[226] Tr. p. 1507, lines 2-24.

[227] Tr. p. 1411, line 7.

Conclusion:

Staff recommends the Commission modify the sharing mechanism of Ameren Missouri's FAC from 95%/5% sharing mechanism to an 85%/15% sharing mechanism. With this modification Ameren Missouri's retail customers would pay 85% of any increase in fuel and purchased power costs above the base fuel and purchased power costs included in permanent rates (Net Base Fuel Cost) and receive 85% of any decrease. At the same time Ameren Missouri would absorb 15% of any increase in fuel and purchased power costs above the base fuel and purchased power costs included in permanent rates and keep 15% of any decrease. The 85%/15% sharing mechanism will give Ameren Missouri a greater incentive to review all the calculations and assumptions in its FAC more closely. Staff strongly encourages the Commission consider the foregoing as a basis for changing the sharing mechanism from 95%/5% to 85%/15% and adopting the proposed tariff language in Schedule DCR-1-6 of David Roos Surrebuttal Testimony.[228]

9. LED Lighting:[229]

Should the Commission order Ameren Missouri, not later than twelve (12) months following the effective date of the Report & Order in this case, to complete its evaluation of LED SAL systems, and, based on the results of that evaluation, either file a proposed LED lighting tariff(s) or indicate why such tariff(s) should not be filed?

Energy efficiency is of growing concern, as evidenced not only by

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[228] Ex. 201, Staff's Cost-of Service Report, p. 111, lines 12-14.

[229] "LED" means Light Emitting Diode.

increasing customer participation levels in DSM programs,[230] but also by Missouri's legislative direction. Municipal customers within AmMo's service territory have expressed a desire to have other street and area lighting ("SAL") options available to them.[231] Currently, AmMo has approximately 212,800 SAL systems for the 1,568 public street and municipal lighting customers in its service territory, using a total of about 137,000 MWh according to its 2009 Annual Report.[232] Most of the existing lighting in the Company's service area is high pressure sodium (HPS) lamps or mercury vapor (MV) lamps, which the Company determined were most efficient available technology for the SAL at the time of installation.[233] However, the LED lighting fixtures proposed for use by the Staff in the Company's SALs are the most energy efficient fixtures available today.[234] Besides energy efficiency, studies have reported several other benefits of LED lighting over traditional lamps including: longer lamp life, improved night visibility due to higher color rendering, higher color temperature and increased luminance uniformity, reduced maintenance costs, no mercury, lead or other known disposable hazards, and the opportunity to implement programmable controls (smart technology).[235]

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[230] *Direct Testimony of John A. Rogers,* Ex. 201, p. 35, l. 18 - p. 43; Schedules JAR-1 and JAR-2.

[231] *Surrebuttal Testimony of Dr. Hojong Kang,* Ex. 215, p. 2, ll. 7-13; Sch. HK-1.

[232] *Staff Rate Design and Class COS Report,* Ex. 204, p. 33, ll. 4-7.

[233] *Id.,* at ll. 16-19.

[234] *Id.,* at p. 34, ll. 1-11.

[235] *Id.*

AmMo mentioned several times at hearing the activities of Kansas City Power & Light (KCPL) and Kansas City Power & Light – Greater Missouri Operations Company (GMO) and the Commission's Order involving the LED issue. What AmMo failed to mention for the Commission's information and consideration is that both KCPL and GMO stipulated to either file a LED Lighting Tariff by the end of 2012, or indicate when they intend to complete such filing.

Also, by the end of calendar year 2012, both KCPL and GMO will file the results of its LED study, which shall include a review of potential LED lighting health issues.[236]

The Empire District Electric Company (Empire) has also recently entered into a *Global Agreement* in its general rate case, ER-2011-0004. Paragraph ten of that public document states that "[w]ithin one year of effective dates of rates in this case, Empire agrees to file either LED lighting tariff sheets or an update on an LED pilot study and plans for filing future tariff sheets." At this point in time, AmMo is the only electric company regulated by the Commission that has not committed to filing a LED lighting tariff.

The Staff recommends that the Commission order the same treatment for AmMo as it did for KCPL and GMO, and now agreed to by Empire: requiring AmMo to complete its evaluation of LED SAL systems, and, not later than twelve months following the Commission's report and order in this case, file either a

[236] ER-2010-0355, Tr. Vol. 34, p. 3715, l. 24 – p. 3716, l. 11.

proposed LED lighting tariff or an update to the Commission on when it will file a proposed LED lighting tariff.

10. Solar Rebates Accounting Authority Order (AAO):

A. What is the appropriate method -- RESRAM or an Accounting Authority Order (AAO) -- for Ameren Missouri to recover the costs it incurs for compliance with the Missouri Renewable Energy Standard (RES) after the true-up date in this case (February 28, 2011)?

It remains the Staff's position that Section 393.1030 RSMo (Supp. 2010) and Rule 4 CSR 240-20.100(6) specifically provide for the Company's recovery of prudently incurred costs associated with the RES by way of the Renewable Energy Standard Rate Adjustment Mechanism (RESRAM).[237] Section 393.1030 states that the Commission

> …shall make whatever rules are necessary to enforce the renewable energy standard. Such rules shall include… [p]rovision for recovery outside the context of a regular rate case of prudently incurred costs and the pass-through of benefits to customers of any savings achieved by an electrical corporation in meeting the requirements of this section.

Further, the Commission rule established pursuant to the statute, 4 CSR 240-20.100 (6), provides:

> An electric utility outside or in a general rate proceeding may file an application and rate schedules with the commission to establish, continue, modify, or discontinue a Renewable Energy Standard Rate Adjustment Mechanism (RESRAM) that shall allow for the adjustment of its rate and charges to provide for recovery of prudently incurred costs or pass-through of benefits received as a result of compliance with RES requirements; provided that the RES compliance retail rate impact on average retail customer rates does not exceed one percent (1%) as determined by section (5) of this rule….

[237] Rebuttal Testimony of Michael E. Taylor, Ex. 229, p.3, ll. 1-9.

The Staff recommends that the Commission order AmMo to use the more specific method for recovery, the RESRAM, as contemplated by both the Renewable Energy Standard Statute and the Commission's rules for the recovery of RES compliance costs.[238]

Besides the specificity argument, there are potential negative rate implications for customers that flow with AmMo's proposed use of an accounting authority order ("AAO"). Use of an AAO allows the Company during the interim between rate cases to defer all costs and place them in a regulatory asset account to earn a monthly carrying charge on the balance equal to its short-term cost of borrowing until the Company's next general rate case. If the Company used the RESRAM, the Company would carry forward any costs over the one percent allowed rate impact, which would have a carrying cost applied monthly equal to the electric utility's cost of short-term borrowing rate. Put simply, AmMo's proposal is a way for the Company to earn a return on its compliance costs at a detriment to its ratepayers.

The Staff recommends that the Commission order AmMo to use the more specific method for recovery, the RESRAM, as contemplated by both the Renewable Energy Standard Statute and the Commission's rules for the recovery of RES compliance costs.

B. If the Commission determines that an AAO is appropriate, should the Company be authorized in this case to implement an AAO to

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[238] *Id.*

recover the costs it incurred for compliance with the RES before the true-up date in this case?

If the Commission determines that an AAO is appropriate overall, the Staff recommends that the Commission's order not include in the AAO the recovery of costs AmMo incurred after the effective date of rates in the last rate case and up to the true-up date in this case.

Rule 4 CSR 240-20.100 (6)(D) states that "[i]n the interim between general rate proceeding the electric utility may defer the costs in a regulatory asset account…." The idea of using an AAO is that a Company will track its cost until they can be considered in a rate case. The proper time for considering these costs is now. That is exactly what the Staff has proposed and continues to support; expense the prudently incurred RES compliance costs not exceeding the one percent (1%) retail rate cap.[239]

Therefore, AmMo should recover as expense in this case the prudently incurred RES compliance costs incurred since the effective date of rates in the last case and up to the true-up date of this rate case, not exceeding the one percent cap prescribed by Section (5). The Commission should defer recovery for any amount exceeding the one percent cap as prescribed in Section (6)(A)3, which states the "…excess cost may be carried forward to future years for cost recovery…" The Staff also recommends recovery of the cost carried forward through the use of a RESRAM, for the rate and specificity implications explained previously.

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[239] *Rebuttal Testimony of Michael E. Taylor,* Ex. 229, p.3, ll. 10-18.

C. What amount of solar rebate costs should Ameren Missouri be allowed to include in the revenue requirement used to set rates in this case?

Rule 4 CSR 240-20.100 (5) provides that a company can recover RES compliance costs up to a one percent retail rate impact per each planning year. And as discussed above, the Company may carry forward any amount over the one percent cap for future recovery using a RESRAM. The Staff recommends using the Company's actual RES expenses incurred during calendar year 2010 to calculate the level of expenses to include in this rate case.[240] The calendar year 2010 is the first full year during which the rebates were available. This results in an expense level of $487,782, reflecting a twelve-month period.[241] The Staff recommends the remaining prudently incurred compliance costs of $397,504 be carried forward and collected in future years as allowed in § (6)(A)3, which states "[i]f the electric utility incurs costs in complying with the RES requirements that exceed the one percent limit determined in accordance with section (5) of this rule for any year, those excess costs may be carried forward to future years for cost recovery under this rule…."

11. Union Issues:

A. Does the Commission have the authority to order Ameren Missouri to do the following:

(1) Institute or expand its training programs within specified time periods as a means of investing in its employee infrastructure?

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[240] *Id.*

[241] *True Up Direct Testimony of Gary S. Weiss,* Sch. GSW-TE18-110; Ex. 202, *Staff's Accounting Schedule 10,* p. 17.

(2) Hire specific additional personnel within specified time periods as a means of investing in its employee infrastructure

(3) Submit to a tracker for its energy delivery distribution system?

(4) Submit to a tracker to address the need and efforts to replace the aging workforce?

(5) Expend a substantial portion of the rate increase from this proceeding on investing and re-investing in its regular employee base in general, including hiring, training and utilizing its internal workforce to maintain its normal and sustained workload?
(6) Use a portion of the rate increase from this proceeding to replace equipment, wires and cable which have out lived their anticipated life?

B. If the Commission does have the authority, should it order Ameren Missouri to take one or more of the steps listed above?

Staff has no position on the Union Issues.

12. Property Tax:

A. What amount of property tax expense relating to the Sioux Scrubbers and the Taum Sauk additions the Company seeks to put in rate base in this case should the Commission include in Ameren Missouri's revenue requirement for ratemaking purposes?

After hearing, Staff maintains that the inclusion of **$10,787,362** in property tax expense is a reasonable amount of expense to include within the Company's revenue requirement and supported by the evidence. The Staff determined the $10 million value by using the actual 2010 property tax expense paid by the Company and adding an amount for the Company's recent plant additions at the Sioux and Taum Sauk generating plants.[242] This level of property tax expense includes an amount of expense for the January 1, 2011, assessed value of the

[242] Direct Testimony of Lisa M Ferguson, Ex. 201, pp. 90-91; Tr. Vol. 22, p. 1333, ll. 15-18.

Taum Sauk and Sioux plant additions multiplied by the 2010 tax rate for distributable property.[243] The Company's payment of 2010 property tax expense by December 31, 2010, falls within the true up period ending February 28, 2011. The Company placed the additions at Taum Sauk and Sioux "in-service" during April 2010 and November 2010, respectively.[244] The in-service dates for the additions also fall within the established true up period for this case.

The Staff based its adjustments in this case on known and measurable factors. The Staff is factoring up the level of property taxes paid in 2010 to account for additional property placed in service during the true up period of this case. The factor up also represents the increased property tax liability of the Company for the Sioux and Taum Sauk additions during the time rates established in this case remain in effect.

As such, the Commission should issue an order that includes **$10,787,362** in AMMO's revenue requirement for the property tax expense related to the Sioux and Taum Sauk generating plant additions.

B. Should the Commission order Ameren Missouri to return to its customers any reductions that the Company receives in its 2010 property taxes?

Yes. The Staff has included in its revenue requirement an amount, which is currently being appealed, for property taxes paid by the Company and thus, affecting the rates paid by ratepayers. The ratepayers should receive a "credit" in a future rate proceeding for any refunds paid and or credits to AMMO, should the

[243] *Id*.

[244] Tr. Vol. 22, p. 1322, ll. 2-7; p. 1334, ll. 10-16

Company win its appeal of the 2010 distributable property assessment and the State Tax Commission reduces the property amount used to set rates in this case. AMMO has agreed to keep track of any refunds received from the appeal and provide the amount to the parties in a later rate case. [245] As such, the Commission should order AMMO to track any tax amounts the State Tax Commission orders refunded back to the Company as part of the appeal case and provide a corresponding "credit" to the ratepayers in the next rate case.

13. Rate Design/Class Cost of Service

A. Class Cost of Service:

(1) Which of the proposed class cost of service methodologies – the 4 NCP–A&E methodology, the Base Intermediate-Peak methodology, or the 4P-P&A methodology – should the Commission use in this case to allocate Ameren Missouri's investment and costs among the Company's various rate classes?

(2) What methodology should the Commission use in this case to allocate Ameren Missouri's fixed production plant investment and operation and maintenance costs?

B. Rate Design:

(1) To what extent should the Commission rely on the results of a class cost of service study in apportioning revenue responsibility among Ameren Missouri's customer classes in this case?

(2) What amount of increase or decrease in the revenue responsibilities of Ameren Missouri's customer classes should the Commission order in this case?

(3) What is the appropriate monthly residential customer charge that should be set for Ameren Missouri in this case?

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[245] Tr. Vol. 22, p.1331 ll. 9-17.

(4) Should Ameren Missouri be required to eliminate declining block rates for the residential winter energy charge? If so, should the declining block rates be eliminated in a revenue neutral manner?

Staff's position on Rate design and Class Cost of Service is that each customer class should pay rates that are close to the Company's cost of serving that class while still maintaining rate continuity, rate stability, revenue stability, and minimizing rate shock to any one customer class as stated in its rate design and class cost of service report. However, because nearly all of Ameren Missouri's rate classes were able to agree on the allocation of the rate increases, and the evidence produced by the Municipal group was insufficient to persuade the Staff from their non-opposition, the Staff does not oppose the Non-Unanimous Stipulation and Agreement filed by the consumer groups on May 12, 2011.

CONCLUSION

In conclusion, Staff recommends that the Commission grant Ameren Missouri a general rate increase amounting to approximately $92.8 million, resolving each contested issue as Staff has recommended. In this way, just and reasonable rates will be set and all relevant factors considered, with due regard to the interests of the various parties and the public interest.

WHEREFORE, on account of all the foregoing, Staff prays that the Commission will issue its findings of fact and conclusions of law, determining just and reasonable rates and charges for Ameren Missouri as recommended by

Staff herein; and granting such other and further relief as are just in the circumstances.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **1st day of June, 2011,** on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson