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April 14, 2004

FILED
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Missouri Public
Service Commission

HAND-DELIVERED

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65202

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

Dear Mr. Roberts:

Enclosed please find an original and eight copies of AmerenUE's Reply to Staff's List of Conditions Necessary for Staff's Recommendation that the Commission Approve Ameren's Proposed Metro East Transfer and AmerenUE's Statement Regarding Staff's Suggestion that Additional Least Cost Analyses Be Completed.

Copies of this filing have been served on all parties of record.

Should you have any questions, please contact me at the telephone number listed in the letterhead above. Thank you for your assistance.

Sincerely,

James B. Lowery

Enclosure
c w/enc: All parties of record

FILED[2]

APR 1 4 2004

Missouri Public Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company d/b/a AmerenUE for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company d/b/a AmerenCIPS, and in Connection Therewith, Certain Other Related Transactions.	)	**Case No. EO-2004-0108**

AMERENUE'S REPLY TO STAFF'S LIST OF CONDITIONS NECESSARY FOR STAFF'S RECOMMENDATION THAT THE COMMISSION APPROVE AMEREN'S PROPOSED METRO EAST TRANSFER AND AMERENUE'S STATEMENT REGARDING STAFF'S SUGGESTION THAT ADDITIONAL LEAST COST ANALYSES BE COMPLETED

COMES NOW Union Electric Company d/b/a AmerenUE, and hereby files this Reply in response to the above-referenced "List" submitted by Staff.[1] This pleading also addresses Staff's suggestion, discussed by Dr. Proctor in his testimony during the last day of hearings, with respect to the possibility of performing yet additional least cost analysis relating to the proposed transfer.

THE COMMISSION'S REQUEST FOR A LIST OF CONDITIONS

AmerenUE wants the Commission to have the information it needs to render a proper decision *under the facts that are of record in this case and consistent with the law* governing this case. That is why the Company raised no objection to Staff being given an opportunity, in the middle of the hearings in this case, to provide a summary list of conditions Staff wants the Commission to impose on the transfer. The Company understood that Staff had addressed a number of conditions throughout several pieces of

[1] Staff's "List" is Exhibit 68, a part of the record in this case. This Reply is to be a part of the record as Late-Filed Exhibit 69 pursuant to leave granted to the Company, and leave granted to Public Counsel (with Late-Filed Exhibit 70 being reserved for any reply Public Counsel may choose to file).

testimony and that it would be helpful for the Commission to have them summarized in one list.[2]

The Company believes Staff's Reply, which is in substance an in-trial legal brief full of argument, is an abuse of the opportunity the Staff was given to provide the Commission with what the Company believes the Commission clearly asked for: a simple list that the Commission could use as a ready reference or outline for asking witnesses questions about the basic conditions Staff advocates ought to be imposed in this case. In any event, Mr. Nelson answered numerous questions from Judge Thompson based on the "list," and the Company was given leave to reply to Staff's legal arguments and conditions and withdrew its objection to Staff's "list" in light of the opportunity given the Company to reply to the "list" herein.

At bottom, Staff's "list" appears to be an attempt to inject complexity and confusion into a case that is rather simple, to-wit:

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

- Should the Commission properly recognize that the Company is entitled to make decisions with regard to the disposition of its property and that it should not be deprived of its right to make those decisions based upon the future, speculative, cost, and possible ratemaking impacts reflected in Staff's "list"?

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

[2] Staff did not file Exhibit 68 by Friday, April 2, as had been initially requested by the Commission, and the hearings did not conclude on April 2 in any event. Since the hearings were scheduled to recommence on Wednesday, April 7, Staff was given more time and filed its "list" on Tuesday, April 6.

Because Staff's "list," explicitly at times and implicitly at other times, amounts to argument that the Company respectfully submits should appear more properly in the context of post-hearing briefs or oral argument, the Company believes its reply herein must address the nature of what is, and is not, before this Commission to decide in this case.

The Company also addresses, condition-by-condition, its position on Staff's proposed conditions.

The Company believes it must also address one other preliminary matter. Staff's "list" seems to be premised on its view that it has been unable to conduct a "meaningful" review of the proposed transfer. That premise is incorrect. This case was filed on August 25, 2003 – about seven months ago. Direct testimony, including Mr. Voytas's analyses, was filed on September 17, 2003. While Staff would argue that the procedural schedule was expedited, the facts are that Staff proposed an alternative procedural schedule in this case <u>and the Commission adopted Staff's schedule</u>. Most of Staff's data requests that go to the heart of key conditions[3] on its "list" were not submitted to the Company until on or around January 8, 2004 -- more than four months after the case was filed. Staff chose not to take the deposition of any Company witness at any time, which perhaps explains the cross-examination in this case by Staff Counsel who seem to be asking questions that Staff could have, and should have, asked long ago.

The Company also does not believe that Staff is nearly as "disadvantaged" as it suggests with regard to understanding the proposed transfer or with regard to its ability to provide the Commission with meaningful analysis. The Company has twice sought this

[3] Such as proposed Staff condition 3 relating to liabilities and costs.

very permission before, as the record in this case demonstrates, and had numerous detailed discussions with Staff and Public Counsel about this transfer in January of 2002. Significantly, the Commission approved the first effort to transfer these Illinois assets in the course of approving the UE-CIPSCO merger in Case No. EM-96-149. That first attempt offered no generation savings to Missouri for ten years, yet this Commission approved it (see Exhibit 37 in evidence in this case, which is this Commission's order in Case No. EM-96-149). The nature of the "issues" about which Staff indicates a lack of understanding were, or should have been, within Staff's competency to understand and, if Staff felt it necessary, to analyze further. From the publicly available 10-K information Staff now puts so much stock in, to the basics of the Company's balance sheet, Staff had the tools it needed to analyze this transaction. Staff knows (or should know), for example, that expenses that are booked as liabilities on the Company's balance sheet are *already expensed* and would not affect future rates, yet Staff continues to insist on a "transfer" of balance sheet liabilities. And Staff has, or ought to have, a reasonably good understanding of the Company's costs, liabilities, and balance sheet in any event since Staff examined those items in great detail not long ago in the course of Staff's recent complaint case (EC-2002-1). A review of Staff's testimony would lead one unfamiliar with Staff's role to conclude that Staff has never seen an AmerenUE book or record and has no understanding thereof unless the Company spends hours "laying it out" for Staff – a conclusion that, of course, would be incorrect given the long history Staff obviously has in regulating the Company.

In short, that Staff seems unwilling or unable to succinctly give the Commission a list of conditions that would address real, existing, direct, and present detriments to the public interest. That unwillingness or inability is not a function of lack of evidence from the Company. It is either a function of Staff's unwillingness or inability to do its job, or a smokescreen for Staff's attempt to obtain all of the benefits of this cheap, Company-owned, base load generation and to extract other unrelated concessions from the Company on issues Staff has been after for years, without Staff accepting any corresponding risks that an uncertain future might or might not bring.

THE COMPANY'S OVERALL RESPONSE TO STAFF'S "LIST"

As Mr. Nelson testified in response to the Commission's questions about Staff's "list," the imposition of Staff's numerous conditions on Commission approval of the Metro East transfer would likely prevent the transfer, and its benefits, from occurring. Such conditions are improper on the facts and improper under the law. The law gives the Commission certain authority, discussed below, and the Company has brought this proposal to the Commission seeking approval, within the confines of that authority. Some conditions, such as Staff's proposed condition 2 relating to a forced amendment of the JDA on transfer pricing, and proposed condition 3 relating to forcing AmerenCIPS or Ameren Corporation to "eat" generation-related liabilities despite Missouri obtaining the generation benefits outlined in the Company's case, are "non-starters." But even if there were some conditions that the Company could, in isolation, "live with," the Company is not going to be put in the position of negotiating its proposed transfer on a piecemeal basis. The Company has a right to manage its business and make decisions regarding the disposition of its property, subject only to matters within the legitimate authority of the Commission. See, e.g., State ex rel. Gen'l Tele. Co. of the Midwest v. Pub. Serv. Comm'n, 537 S.W.2d 655, 660 (Mo. App., K.C. 1976) (the state is "not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership"). The Company's firm stance in opposition to Staff's conditions is based on several factors, including the law, as discussed below. But the Company's stance is also based upon its firm belief, supported by its analyses, that there exist huge benefits to Missouri from this transfer as outlined below.

THE COMPANY'S PROPOSAL OFFERS HUGE BENEFITS FOR MISSOURI

Exhibit 34 in evidence in this case (the Company's Summary of Benefits), which has now been revised (see Exhibit 72 in evidence in this case)[4] to take into account the positive effects of the transmission analysis Dr. Proctor and Commissioner Gaw asked the Company to perform, demonstrates the huge benefits this proposal brings to Missouri. Those benefits are not something the Company has to prove under the law governing this case, but they exist nonetheless.

a. <u>The evidence indicates that the transfer provides at least approximately $2.8 million of generation- and transmission-related savings, per year.</u>

The Company's analyses indicate that transferring these Illinois assets and the associated Illinois load, while freeing up the Company's low-cost, reliable base load generation, creates an affirmative annual benefit versus the next best option (gas peaking units) of at least approximately $2.8 million per year, and that is if one considers only the conservative transmission-related benefits ($0.4 million per year) as reflected on Exhibit 71 in evidence in this case.[5] Under more likely expected conditions, third-party transmission revenues will likely go down (the Company expects this reduction to be at least 25% as reflected on page 1 of Exhibit 71), increasing the transmission-related

[4] Exhibit 72 is attached to this Reply as Schedule A.

[5] Exhibit 71 is attached to this Reply as Schedule B.

benefits of the transfer from $0.4 million to $1.5 million, per year. The expected case therefore increases the affirmative annual benefit of the transfer, aside from any changes in the JDA as discussed below, to $3.9 million per year.[6]

b. <u>If deemed necessary by the Commission, the amendment offered by the Company with regard to the JDA offers yet more benefits.</u>

The lack of any detriment on the Company's ability to properly serve its customers after the transfer, the lack of any proof of direct and present detriments that would authorize this Commission to deny the Company the permission it seeks, and the added huge benefits of the transfer outlined immediately above more than support approval of this transfer. As discussed in more detail later in this Reply (see the discussion relating to Staff's proposed condition 2), Staff is nevertheless attempting to take a second bite of the JDA apple by arguing for JDA amendments in this asset transfer case.

The Company has indicated, via sworn testimony, that if the Commission determines it must impose this condition alone, it would use its best efforts to amend the JDA to provide for the sharing of profits from off-system sales based upon generating output versus load. If that is the Commission's decision, the Company will follow-through with the transfer on that condition. If that amendment is ordered then, conservatively, an additional $7 million per year of benefit will accrue to Missouri as reflected on Exhibit 72. In fact, under more likely expected conditions based upon the Company's current estimates of future electricity prices, the additional benefit is more likely to be around $24 million per year.

[6] Generation-related savings of $2.4 million plus transmission-related savings of $1.5 million.

STAFF'S INCOMPLETE DISCUSSION OF APPLICABLE LAW

a. Future, speculative "detriments" have no place in a Section 393.190.1 case.

At every opportunity,[7] and Staff's "list" is no exception, Staff cites the State ex rel. AG Processing, Inc. v. Public Service Commission case[8] and seeks to convince the Commission that unless the Commission turns this case into a full review of the possible future cost and ratemaking impacts of the Metro East transfer, the Missouri Supreme Court will reverse the Commission's order. Staff makes that argument because it serves its purpose in this case – to extract improper conditions from the Company in exchange for support for approval of the transfer.[9] The law that this Commission must follow in deciding this case is, however, otherwise.

The controlling issue before this Commission is whether AmerenUE's transfer of title of essentially all[10] of its Illinois assets to AmerenCIPS is detrimental to the public interest. State ex rel. City of St. Louis v. Pub. Serv. Comm'n, 73 S.W.2d 393 (Mo. banc 1934). This Commission recently recognized, as it has consistently done, that "'the obvious purpose of this provision [§ 393.190.1] is to ensure the continuation of adequate service to the public served by the utility'." In the Matter of Joint Application of Missouri-American Water Company et al., Case No. WM-2004-0122 (Report and Order,

[7] Recall Mr. Dottheim's rather lengthy discussion in his opening statement and Staff's List of Issues filed in this case.

[8] 120 S.W.3d 732 (Mo. banc 2003).

[9] This has become a pattern with Staff. The Company comes to the Commission seeking approval of a matter within the Commission's authority, and as the "price" for obtaining Staff's support (or at least its non-opposition), every outstanding issue Staff may believe it has with the Company is brought up and interjected into the case, including in particular the JDA.

[10] See paragraph 7 of the Company's Application filed in this case for a description of a few Illinois assets that would not be transferred.

issued November 20, 2003, WL 22847346 (Mo.P.S.C.)), quoting State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980).[11]

This Commission applies the following factors when considering whether a Section 393.190.1 transaction meets the "not detrimental" standard: (1) the applicant's experience in the utility industry; (2) the applicant's history of service difficulties; (3) the applicant's general financial health and ability to absorb the proposed transaction; and (4) the applicant's ability to operate the assets safely and efficiently. Report and Order, Missouri-American Water Company, supra, citing In the Matter of the Joint Application of Missouri Gas Energy et al., Case No. GM-94-952 (Report and Order, issued October 12, 1994, 3 Mo. P.S.C.3rd 216, 220).

This Commission has also properly recognized that it "must be mindful that the right to transfer or encumber property is an important incident of the ownership thereof and that a property owner should be allowed to do such things unless it would be detrimental to the public." In Re Kansas City Power and Light Company, Case No. EM-2001-684 (Order Approving Stipulation and Agreement and Closing Case, issued August 2, 2001, 2001 WL 1402082 (Mo.P.S.C.)), citing State ex rel. City of St. Louis, 73 S.W.2d at 400. To deny a public utility the right to have that say (to decide whether to dispose of their property) is to deny it an incident important to its ownership of property. State ex rel. City of St. Louis, 73 S.W.2d at 400. The law is clear that in order to deny a private, investor-owned company this important incident of property ownership, there must be "compelling evidence on the record showing that a public detriment is likely to occur"

[11] Missouri-American, which was decided *after* the AG Processing decision, confirms the continuation of the long-standing legal standards that apply to Section 393.190.1 cases, despite Staff's arguments to the effect that AG Processing has turned every Section 393.190.1 case into a detailed examination of every possible future ratemaking impact that could later occur, despite how speculative such impacts might be.

(emphasis added). Id. And, the detriment must be a "direct and present detriment" (emphasis added). Id. It is noteworthy that none of the foregoing principles that guide and govern the Commission's required handling of this case contemplate or allow the Commission to deny the Company the right to dispose of these assets based upon possible, future, and speculative ratemaking impacts that might or might not ever occur. But such possible, future, and speculative ratemaking impacts are in fact the subject of most if not all of the conditions Staff asks this Commission to impose.

The burden to establish that the transfer is not detrimental, as that standard is described above, is on the Company, as the applicant. The Company is not required to demonstrate any affirmative benefit from the transfer. Re Sho-Me Power Corporation, Case No. EO-93-259 (Report and Order, issued September 17, 1993, 1993 WL 719871 (Mo.P.S.C.)). However, those who assert the existence of a detriment bear the burden of going forward with compelling[12] evidence of a likely direct and present detriment. In re Gateway Pipeline Company, Inc., Case No. GM-2001-585 (Report and Order, issued October 9, 2001, 2001 WL 1869950 (Mo.P.S.C.)); State ex rel. City of St. Louis, 73 S.W.2d at 400; §§ 386.430, .490, RSMo.; Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 30 (Mo. bank 1991) (the party asserting the affirmative of an issue [i.e., that the transfer is detrimental] bears the burden of proof on that issue).

The record in this case is devoid of any evidence that the Metro East transfer would in any way detrimentally affect the Company's ability to provide reliable, adequate, and safe utility service. That fact alone meets the Company's burden and entitles the Company to unconditional approval of the transfer. But the Company has

[12] Not suppositions, and not possible detriments that require multiple "if-then" statements before they could ever arise (e.g. "If a future liability arises, and if it falls in a test year, and if it is not reduced by

gone much further and has shown huge affirmative benefits arising from Illinois giving up, and Missouri now getting, this cheap, base load, Company-owned generation.

b. AG Processing does not require that this Commission turn this case into a ratemaking review of Staff's speculative, unquantified, future cost or ratemaking issues.

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

According to the most recent information filed with the Commission regarding Aquila and St. Joseph Power & Light (who, as the Commission knows, was merged into Aquila), Aquila's total Missouri revenue requirement was approximately $360 million, and St. Joseph Power & Light's total Missouri revenue requirement was approximately $100 million. The merger premium that was an integral part of the merger itself therefore represented not just 34% of the value of the merger, but a full 20% of the combined revenue requirement for the merged companies. Not surprisingly, the Supreme Court

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normalization, and if it is not otherwise disallowed, then rates might be impacted).

found that the Commission ought to consider this quantified, known, central issue – that the Commission ought to consider a known merger premium in, of all places, a merger case involving a merger plan reflecting a merger premium.

According to the most recent information on file with this Commission (in fact using Staff's accounting schedules (Exhibit 75 in evidence in this case) and Mr. Weiss's Surrebuttal Testimony (Exhibit 7 herein at p. 12, lines 9-10), AmerenUE's combined electric and gas Missouri revenue requirement is in excess of $2 billion dollars. AmerenUE is in a rate moratorium until 2006. There is no quantified, or quantifiable, central and essential issue before this Commission for determination. In short, AG Processing does not apply to speculative, future and unquantified issues, as this Commission has recently recognized in Missouri-American, supra, decided just a few months ago. In the Missouri-American case, decided after AG Processing, this Commission declined to determine, and decided it need not determine, the proper value of the assets being sold for ratemaking purposes (the proper value of which might range from only $53,150 to as much as $335,000). The Commission declined to determine that value for ratemaking purposes, even though the ultimate value could later affect rates, because there was not sufficient evidence before the Commission to allow it to make that determination. In its Report and Order in Missouri-American , this Commission stated as follows: "The Commission does not have sufficient evidence before it to determine if an acquisition premium exists." And, this Commission went on to state that by "considering the value of the assets in the context of a rate case [and not in this case], the Commission can be assured of considering all necessary factors in determining just and reasonable rates. The Commission will deny the request to set the rate base at the purchase price for ratemaking purposes."

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

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

At bottom, AG Processing is simply a reaffirmation of the standards set 70 years ago by the Supreme Court in State ex rel. City of St. Louis.[13] The issue in a Section 393,190.1 case was and is: has the utility made a prima facie case that the asset transfer will not negatively impact its ability to provide adequate utility service; and if so, have opponents presented compelling evidence that a direct and present detriment is likely to occur? In AG Processing, such evidence existed because Aquila sought rate approval of a huge $92 million dollar merger premium (in a $270 million merger) involving a much smaller and *financially troubled utility.* The future possibility that no more than 6% of costs that were formerly allocated to Illinois customers, in the context of a Missouri cost of service that is in excess of $2 billion for a *financially strong utility,* is not a direct or present detriment. That is particularly true when that financially strong utility is in a rate moratorium that does not end until more than two years from now.

REPLY TO STAFF'S SPECIFIC CONDITIONS

1. No Ratemaking Determinations.

The Company, on the record in this case, has been clear: The Company is not requesting ratemaking treatment or "approval" in this case because this is not a rate case. The Company assumes the Commission will include its quite standard, boilerplate language to that effect in its approval order. There are certain findings that are required relating to the nuclear decommissioning fund (regardless of whether the Commission were to seek to impose a condition requiring the Company to fund the additional $272,554 annually) that the Commission must make if Missouri is to get the benefit of the funds now held in the Illinois jurisdictional sub-account that would be transferred to

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

Missouri. Mr. Redhage's Surrebuttal Testimony (at pages 13-14) lists those required findings.

2. JDA.

As mentioned above, Staff persists in trying to take a second bite of the JDA apple. As the Company pointed out,[14] Staff has been engaged in an effort to force changes to the JDA for some time now, including the very changes that Staff wants this Commission to impose in this Section 393.190.1 asset transfer case. Dr. Proctor does not deny this. Staff Counsel elicited testimony from Dr. Proctor at the hearings showing that Staff in fact has previously adjusted, in the Staff's complaint case,[15] the Company's revenue requirement to take into account these JDA issues.

a. <u>The Company's base rates already reflect at least one of the JDA amendments Staff again seeks in this case, as evidenced by Staff's filings in the EC-2002-1 case.</u>

The testimony filed by Dr. Proctor in Case No. EC-2002-1 (excerpts from which are attached hereto as Schedules C & D) and the accounting schedules filed by Staff in Case No. EC-2002-1 and discussed by Dr. Proctor at the hearings in this case, clearly show that Staff made adjustments in its calculation of the Company's revenue requirement in that case to reflect an amendment to the JDA that Staff now, once again, advocates ought to be required as a *condition* in this case. In his Direct Testimony therein, Dr. Proctor complained about the unfairness of allocating profits from off-system sales under the JDA based on each participant's share of load requirements. Dr. Proctor argued that it was more fair to allocate off-system sales profits based on "Resource

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above.

[14] See Mr. Nelson's Surrebuttal Testimony at page 6, lines 7-18 and Schedule 1.

[15] Case No. EC-2002-1, resolved by Stipulation in 2002.

Output." (Proctor Direct, Case No. EC-2002-1, pp. 12-14.) Later on in his Case No. EC-2002-1 testimony, Dr. Proctor recommended specific adjustments to the Company's revenue requirement to impute approximately $3.5 million in additional off-system sales revenues to the Company on the basis of this argument (Proctor Direct, Case No. EC-2002-1 p. 15, lines 17-20 and Schedule 1.2 thereto). This revenue imputation is reflected in several specific adjustments contained on the accounting schedules filed by the Staff with its direct case in EC-2002-1. Dr. Proctor made specific reference to these adjustments in his live testimony in this case.

Dr. Proctor provided further support for this adjustment to the Company's actual off-system sales revenues in his Surrebuttal Testimony in Case No. EC-2002-1. Interestingly enough, in that testimony Dr. Proctor argued that it is appropriate for the Commission to make adjustments to the JDA in the context of the Company's rate complaint proceeding, since "[t]he best that regulators can do in the context of a merger case or an asset transfer case, is to review the overall benefits and costs to make a recommendation about whether or not the proposed merger or asset transfer is not detrimental to the public interest." (Proctor Surrebuttal, Case No. EC-2002-1 pp. 23-24.) In other words, based upon Dr. Proctor's testimony, it is Staff's legal position that no adjustment to the JDA is possible in this asset transfer proceeding!

Although Case No. EC-2002-1 was settled, the final revenue requirement reflected "a resolution of the concerns of all of the signatory parties," as the Staff acknowledged in its Memorandum in Support of the July 15, 2002 Stipulation and Agreement in that case. The settlement clearly resolves the revenue imputation argument raised by Dr. Proctor in that case.

Yet Staff, in the middle of the rate moratorium created by the EC-2002-1 Stipulation and under circumstances where the base rates set by the settlement of that case already reflect the financial effect of this JDA amendment, is trying to hold the Metro East transfer hostage due to possible, future rate impacts it believes may arise under the JDA. The issues Staff continues to raise regarding the JDA can be fully addressed in the Company's next rate case (whether that rate case takes the form of a complaint case or a rate case initiated by the Company). That is where those issues ought to be addressed, as was the case in Case No. EC-2002-1.

Staff, however, wants more. Staff wants this Commission to force yet another amendment to the JDA that requires a "market price" for transfers between AmerenUE and AEG. Staff's preferred "market price" would be found in the Day 2 markets that the MISO has not yet started. The Company has committed to doing a proper analysis of the transfer pricing issues under the JDA if the Commission concludes that is necessary. Staff wants that analysis done in 90 days – yet the MISO market will likely not exist until after the analysis, in Staff's view, has to be done. The Company has specifically offered to perform such an analysis, as explained by Mr. Nelson in his Surrebuttal Testimony at page 11, lines 5-23, and page 12, lines 1-2. Ninety days, however, is too short a time frame and imposing such a short time frame is not necessary in any event given the existence of the rate moratorium that continues into 2006.[16] On cross examination, Dr. Proctor himself admitted that there are other JDA-amendment options relating to transfer pricing other than simply using a MISO Day 2 market price. There are benefits to the JDA that are not calculable purely in financial terms and, before a substantial change to

[16] No rate case could be filed until January 1, 2006, and we do not know whether one will be filed at that time. Rates likely would not change until at least July 1, 2006.

the JDA is made using a pricing mechanism that does not yet exist, the Company should properly analyze all of the options and only then to implement the right changes to the JDA in light of the right option.

Ratepayers are not harmed by any of this. If the Company and Staff are unable to reach agreement on how the JDA ought to be amended, and if the Company ultimately makes a decision that Staff alleges has a negative rate impact on Missouri, then without question Staff will take appropriate action in the next rate case to address that allegation. And this Commission will, and can, act appropriately at that time. There is no need for the Commission to act now.[17]

Staff also now advocates, for the first time, that the Commission act beyond its authority to require AmerenUE to terminate the JDA. Staff also asks this Commission to exceed its authority by assuming the power to force amendments to the JDA that the Commission may later decide should be made. Respectfully, the Company does not believe this is a power the Commission has, or that it is necessarily one the Commission would want to assert if it did have it. Interestingly enough, it is authority that even Staff has acknowledged the Commission does not have in its filed testimony in prior Commission proceedings. See Proctor Surrebuttal, page 16, supra. It is, in any event, incredibly far outside any proper issue in the present asset transfer case.

3. Liabilities and Costs.

Staff's injection of complexity and confusion into this case reaches new heights in its discussion of the conditions it desires relating to liabilities and costs. The Company

[17] Commissioner Gaw noted this in his concurring opinion in Case No. EC-2002-1, at page 1 ("Whether off-system sales will be shared with ratepayers, the appropriateness of energy transactions between AmerenUE and its affiliates and other issues will not be an important issue during the period of this settlement because they cannot impact rates under this agreement.").

frankly does not understand parts of Staff's discussion, but in any event, the Company's proposed handling of "liabilities and costs" is straightforward and fair, as explained below.

a. Liabilities relating to the Business.

The Company's evidence is that liabilities relating to the "Business" being transferred will become the responsibility of AmerenCIPS and will not harm the Company or its Missouri ratepayers. As Mr. Weiss's Supplemental Surrebuttal Testimony makes clear, whether some amount on the balance sheet is or is not "transferred" has no future ratemaking impact in any event because operating expenses reflected in liability accounts on the balance sheet have already been expensed.[18]

c. Pre-close injuries, damages, or environmental liabilities (primarily generation-related).

With respect to pre-close liabilities for injuries, damages, or environmental matters, if an event or occurrence happened prior to closing that is not today known and measurable and therefore has not been reserved on the Company's balance sheet (in which case the reserved amount will have already been expensed), post-transfer payments, if any, for such liabilities will be made by AmerenUE. These are in effect unknown, contingent, and unquantifiable claims for personal injury, property damage, or environmental clean-up that are not yet filed and asserted and which cannot therefore be quantified. While it is theoretically possible that such a claim could arise from the

[18] Subject to the two exceptions discussed by Mr. Weiss at page 3 of his Supplemental Surrebuttal Testimony relating to Accounts 228 and 253 that might potentially have some future impact. This is also true regarding the Ameren Services costs that Staff, despite having agreed to a settlement of that issue, now seeks to include in its "conditions" pursuant to its "list." The Ameren Services issue has been settled (see Exhibit 33 in evidence in this case), and it is improper to now advocate additional conditions in that regard.

transmission or distribution (T & D) electric and gas operations being transferred,[19] such a presently unknown claim arising from the T & D assets being transferred is unlikely. The Company believes Staff's real concern (at times lost in the fog of Staff's arguments regarding future capital expenditures that might or might not be made years into the future, and "liabilities" that have already been expensed and therefore have no future ratemaking impact) are possible generation-related liabilities that might or might not require payments by AmerenUE in the future since those liabilities will, like the generation-related benefits, remain with AmerenUE.

At bottom, Missouri simply cannot expect to get an additional 6% of this cheap, Company-owned, base load generation and all of the benefits summarized on Exhibit 72 (Schedule A hereto), while assuming none of the risk that there might be future liabilities associated with that generation, but that is precisely the net effect of Staff's proposed condition regarding costs and liabilities. Staff apparently wants Illinois to forever bear 6% of future payments that might be made for generation Illinois gave up when the ICC approved the transfer, or Staff wants the Company to eat that 6% forever, regardless of the benefits Missouri will receive.

The law cited in this Reply above is clear: It is not the Company's burden to disprove future, speculative detriments, particularly future cost and thus future ratemaking issues that can be dealt with in later rate cases. And, if it is not the Company's burden to disprove these speculative detriments when there is no compelling evidence of direct and present detriments, then imposition of conditions that in effect unlawfully impose such a burden on the Company is improper and unlawful.

[19] The Company knows of one such claim – the clean-up obligations for the Alton Town manufactured gas site, and that liability is being transferred to AmerenCIPS.

c. **Post-close liabilities and costs.**

If a cost or liability arises from the assets being transferred based on an event occurring after the transfer, AmerenCIPS will be responsible for it.

4. **SO2 Allowances.**

The testimony in this case demonstrates that there is no evidence of any direct or present detriment arising from the Company's management of its SO2 allowance inventory. The Staff argues that the Commission should "take into its consideration of AmerenUE's proposed Metro East transfer that the least cost analysis performed by AmerenUE does not include the possible impacts of AmerenUE's current SO2 marketing strategies .... " In other words, the Staff (somewhat belatedly, since this is really an issue "championed" by Public Counsel) questions the Company's inclusion of $17 million in SO2 allowance revenues in its least-cost analysis.

a. ***Public Counsel's current position, which is the driver behind the "SO2" issue, is at odds with the testimony of its own witness in the EC-2002-1 case.***

In the present case, Public Counsel witness Ryan Kind argues that the Company is selling too many SO2 allowances. In Case No. EC-2002-1, Mr. Kind argued the Company was not selling enough! He advocated in that case that over $28 million in SO2 allowance revenues should be imputed to the Company for ratemaking purposes. (See Rebuttal Testimony of Ryan Kind, Case No. EC-2002-1, excerpts from which are attached hereto as Schedule E, pp. 27-28.) The Company's least-cost analysis in this case is entirely consistent with the Public Counsel's view of SO2 allowance revenues as expressed in Case No. EC-2002-1.

b. <u>**Staff's position is at odds with its own recommendation in the Company's SO2 allowance case (Case No. EO-98-401).**</u>

While a full recitation of the inconsistencies in Staff's current position is beyond the scope of this Reply, at least one point bears noting herein. In Exhibit 42 in evidence in this case (Staff's Suggestions in Support of the Stipulation and Agreement in Case No. EO-98-401), the Staff stated that the Stipulation "permits the Company to sell up to half of all current and future allowances without seeking specific Commission approval." The evidence in this case is clear: the Company has sold far, far less than half of its SO2 allowances. Yet, consistent with its stance throughout this case, Staff wants this Commission to impose yet another condition on this asset transfer, this time based upon speculation about what SO2 allowances might or might not be worth later or what environmental legislation might or might not later exist.

Staff wants this Commission to condition approval of the Illinois asset transfer on initiation of an "investigation" of the Company's management of its SO2 allowance bank. Such a condition is entirely improper. Respectfully, the Commission has no business imposing conditions in a Section 393.190.1 asset transfer case relating to investigations Staff wishes to pursue regarding compliance with past Commission orders relating to SO2 allowances, SO2 issues generally, or for that matter other issues Staff may want to look into. If Staff wants the Commission to investigate a matter, Staff can seek to initiate a proper case, the Company can, consistent with its due process rights, respond as appropriate, and the Commission, to the extent of its authority, can act.

5. Identification of Assets.

This has been resolved.

6. Natural Gas Issues.

The testimony on these issues at the hearing demonstrated beyond any reasonable doubt that Staff's concerns about natural gas issues defy logic, and perhaps more importantly, defy common sense. Simply stated, the evidence is that even if Staff's worst fears came true (a speculative proposition, to be sure), any impact Staff worries about would, if at all, occur in the future and would have such a tiny rate impact that it clearly cannot be said to make the proposed transfer detrimental to the public interest. The absurdity of Staff's position is illustrated by Staff's failure to recognize (or Staff's choice to ignore) that the Company has committed via its sworn testimony to using the substantial, combined negotiating strength available to Ameren to obtain the best possible gas supply package for Fisk/Lutesville. The Company's witnesses have testified that use of this leverage will probably result in a discount that is just as good as obtained by the Alton, Illinois LDC. But, worst case, if the discount is not "quite as good," the *maximum* exposure for customers in the Fisk/Lutesville area is less than 50 cents per month, as Mr. Massman explained to Judge Thompson during questioning.

The Company cannot predict the future with absolute perfect certainty. Neither can the Commission, and neither can Staff. That is precisely why conditions cannot be imposed in asset transfer cases based upon mere speculative possibilities that are unlikely to occur, and those kinds of speculative possibilities are all Staff raised with regard to virtually every condition Staff seeks, and certainly with regard to conditions relating to natural gas.

8. Affiliate Transaction Rules.

Except to the extent the Company objects, as discussed herein, to Staff's many conditions, the Company has already indicated that if the Commission believes the affiliate transaction rules apply, the Company would request a waiver of those rules.

8. Nuclear Decommissioning Funds.

The only evidence in this case on this issue is as follows: that contributing the additional $272,554 is not needed for funding adequacy; that this Commission will have to make specific findings about the assumptions underlying any decision to require that the Company increase its current annual $6.2 million Missouri contribution by $272,554; that the Company would then have to make additional IRS filings to qualify as tax deductible that $272,554; and that in any event, the Commission can review all of this again in September 2005, and if need be the funding could be increased prospectively at that time to ensure future funding adequacy. There is no detriment because there is no need at present to increase the annual funding requirement because of the Metro East transfer.

9. Transmission.

The Commission directed the Company to analyze the impact on the Company's revenue requirements arising from transferring the Illinois transmission assets to AmerenUE. The results of that analysis are reflected in Exhibit 71 in evidence in this case (attached as Schedule B to this Reply). That analysis shows a net benefit arising from the transfer of the Illinois transmission assets, meaning not only does AmerenUE get to continue to use the transmission assets it is transferring without paying for them, but AmerenUE's revenue requirement will actually go down by $0.4 million/year.[20] Staff had also criticized Mr. Voytas's least-cost analysis for omitting the effect of the transfer on the transmission assets. The Commission asked that the transmission analysis be done, and attached as Schedule F to this Reply (Exhibit 73 in evidence in this case) is an updated analysis showing how the transmission analysis affects the least-cost analysis and showing an overall greater benefit to Missouri than first thought.

The rest of Staff's 2-3 page discussion of transmission issues, as the evidence in this case shows, all relates to a future, speculative possibility that perhaps Ameren will not always and forever operate a single-control area. Staff goes on to theorize that perhaps, if there are two control areas, there might be some kind of transmission charges for transactions originating outside the AmerenUE control area but sinking within what might then be the AmerenUE-only control area. The only evidence in this case is that there very likely would not be any such charges.[21] This is hardly the compelling evidence of a direct and present detriment required to deprive the Company of its right to transfer its property when it has otherwise met its burden to establish that there is no detriment to the public interest on account of the transfer.

Staff raises two other points that bear addressing relating to its "transmission" condition.

First, Staff again advocates a condition relating to an "investigation," this time dealing with EEInc. It is improper to impose conditions in a Section 393.190.1 asset transfer case relating to "investigations" Staff wishes to pursue regarding what purchase

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[20] The $0.4 million figure being a conservative benefit, and as noted above, based upon expected decreases in third-party revenues, the number may be more like by $1.5 million per year.

[21] Staff apparently wants this Commission to believe that FERC might re-institute "pancaked" transmission rates, a step that would be 180° opposed to FERC's entire RTO initiative, and a step that no

power contracts AmerenUE may or may not have with EEInc. in the future. This proposed "investigation," certainly in the context of a condition in this case, also flatly contradicts the Cross-Surrebuttal Testimony of Dr. Proctor, who stated as follows at page 4, lines 7-10: "In my opinion, the Metro East transfer is not dependent upon the expiration of continuation of the EEI contract, and the continuation of that contract should not be a necessary condition for Commission approval of the Metro East transfer." If Staff wants the Commission to investigate a matter, Staff can seek to initiate a proper case, the Company can, consistent with its due process rights, respond as appropriate, and the Commission, to the extent of its authority, can act.

Second, Staff's "list" misstates certain facts that Staff apparently contends support its call for an investigation. In its "list," Staff states that "AmerenUE plans to replace the capacity currently provided from its contract at the Joppa plant with an additional 330 MWs of capacity to be located at Venice, when the AmerenUE contract for a portion of the Joppa purchased power expires on December 31, 2005." There is no evidence to support that statement.

The 330 MWs of new CTG capacity at Venice are to replace the 330 MW of 1940s vintage steam capacity at Venice that AmerenUE retired in 2002. That fact was reflected in the detailed analysis provided to Staff under cover letter dated August 23, 2002 (attached as Schedule G to this Reply). The additional 330 MWs being added at Venice plus the 75 MWs of CTGs that are already there will total 405 MWs, but AmerenUE has no plans, as Staff incorrectly asserts, to add additional capacity to "replace" purchased power from Joppa. Replacing the Venice steam generation with

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one logically believes FERC would take.

CTGs, and acquiring the Pinckneyville and Kinmundy CTGS are simply a part of AmerenUE's long-term resource plan.

10. Access to Books, Etc.

The Commission has affiliate transaction rules, and those rules provide the mechanism for access to AmerenUE records and affiliate records. The rules apply evenly to all Missouri utilities. It is inappropriate, not only in the context of this asset transfer case, but in any event, to condition an asset transfer on recordkeeping and record access requirements beyond those that apply to other utilities and beyond those required by Commission rules designed to address this very issue. This issue has never been raised in the seven months since this case started. A similar condition did exist in the CIPSCO merger Stipulation in 1997, but that was because the Commission, at that time, had no affiliate transaction rules. Those rules now exist, and this condition is improper.

STAFF'S SUGGESTION THAT ADDITIONAL LEAST COST ANALYSES ARE WARRANTED

In response to Judge Thompson's questions of him during the last day of the hearings in this case, Dr. Proctor suggested that he thought the Company should have performed some additional analyses. The Company indicated it would consider whether additional analyses were warranted. After giving the matter due consideration, the Company believes this is unnecessary.

The record in this case is filled with evidence showing significant benefits. There are no contrary analyses in the record. Dr. Proctor, however, suggested that there might be "more confidence" in the results if the Company performed an additional analysis relating to confirming that there will be future fuel savings (from the transfer where the Company will use its predominantly coal-fired fleet versus the non-transfer case, where the Company would use natural gas for more gas peakers). Dr. Proctor also suggests that the Company should consider further mark-to-market analyses for both the gas peaker option and the "transfer" option. Dr. Proctor suggests that these analyses use forecasting information over the next five years.

The record already indicates that if these analyses were formally done they would reveal yet additional benefits. The Company therefore does not believe it should add to an already huge record, which would likely grow even further in response to such analyses as other parties express the desire to "analyze the analysis," when such analyses are simply not necessary.

With regard to the fuel savings issue, the Company forecasts that it will continue to experience load growth at a rate of about two percent per year. See Exhibit 59 in evidence in this case, at page 68,[22] which is the Company's December 31, 2003 Form 10-K. It is quite obvious that if the Company's load grows, the incremental load will be served by low cost existing base load generating units under the transfer scenario rather than by high cost gas fired peakers under the CTG scenario. That fact itself confirms that the level of fuel savings projected in the Company's existing least-cost analysis will be maintained at the expected level, and would likely increase. As those fuel savings increase, the benefits of the transfer increase. Additional formal analyses are not needed to "prove" this rather straightforward point.

Dr. Proctor's second suggestion is that the Company analyze for the next five years potential profits from off-system sales generated by running the gas peakers that would have to be built if the transfer did not occur. Presumably, Dr. Proctor's theory is

[22] Page 68 of the actual Form 10-K, not page 68 of the "printout" obtained from the SEC website by Staff.

that the analysis could show large profits from gas peakers which in theory might make them a more attractive option relative to completing the Metro East transfer. This analysis is also unnecessary and any supposed advantage it might show for gas peakers is counterintuitive. The record reflects that gas peaking plants run only a very small percentage of the time – from one to five percent, depending on the type of machine. See Mr. Wallace's Surrebuttal Testimony at p. 6. Typically, the gas peakers are turned on not to produce energy to sell into the market, but to meet very short term peak energy and capacity needs. Thus, the percentage of time the peakers are producing energy that can be sold at a profit is even lower than the percentage of time the peakers run. Couple those facts with the Company's expectations for natural gas prices (the fuel for the peakers) in the future,[23] and it is easy to conclude that there would likely be *few times* when electricity prices are high enough to justify running the gas peakers for the purpose of producing power for resale. In other words, the relatively high cost of natural gas will keep the peakers from being "in the money" most of the time. In short, neither the Company nor the Commission needs further analysis or information to reach this reasonable conclusion.

CONCLUSION

Staff's proposed conditions are inappropriate. Staff is asking this Commission to go beyond its proper authority to attempt to address future speculation about possible impacts that may or may not ever occur. That is not the Commission's role in a Section 393.190.1 asset transfer case. The Company therefore objects to the imposition of any of

[23] See Exhibit 59 at page 68.

Staff's proposed conditions. Finally, the Company does not believe the the record in this case needs further supplementation with additional analyses.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the following parties of record by U.S. Mail on this 14th day of April, 2004, at the addresses set forth below:

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