BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company, doing business as 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, doing business as AmerenCIPS, and, in connection therewith, Certain Other Related Transactions.	))))))))	Case No. EO-2004-0108

STAFF RESPONSE TO AMERENUE'S APPLICATION FOR REHEARING AND ALTERNATIVE MOTION AND PUBLIC COUNSEL'S APPLICATION FOR REHEARING

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COMES NOW the Staff of the Missouri Public Service Commission (Staff) in response to the Missouri Public Service Commission's (Commission's) October 27, 2004 Order Directing Filing, which directed the General Counsel's Office to respond to the legal positions and theories asserted in the Union Electric Company d/b/a AmerenUE (AmerenUE) and the Office of the Public Counsel (OPC or Public Counsel) applications for rehearing and provide legal analysis, commentary and recommendations, and also directed the General Counsel's Office to provide the technical analysis, commentary and recommendations of the Staff's subject matter experts regarding the technical positions and theories asserted in the AmerenUE and Public Counsel applications for rehearing. In response to the Commission's October 27, 2004 Order directing filing, the Staff states the following:

I. INTRODUCTION

In its response to the applications for rehearing from both AmerenUE and Public Counsel, the Commission has a number of options. Under the best of all worlds, the Staff would recommend that in order for the Commission to consider the conditions that AmerenUE

proposed in its October 15, 2004 Application For Rehearing And Alternative Motion, the Commission should deny AmerenUE's Application For Rehearing And Alternative Motion, deny AmerenUE's Application For Transfer Of Assets and order AmerenUE to refile its case based on the conditions that AmerenUE now proposes, using current data (AmerenUE's existing least cost study is based on data from calendar year 2002) and include as part of its filing a study performed as the Staff has asserted in this proceeding is appropriate and should have been performed by AmerenUE. As an alternative, the Commission should, if it chooses to consider AmerenUE's newly proposed "solution", open the record for proceedings on AmerenUE's new proposal and at the same time take evidence concerning relevant developments since the record closed in this case. A third alternative is for the Commission to adopt anew its decisions in its October 6, 2004 Report And Order, but in its Order denying the applications for rehearing, respond to the points raised by AmerenUE and Public Counsel and make the clarifications suggested by the Staff in this document.

Before the Staff will respond in some detail to the applications for rehearing of AmerenUE and Public Counsel, the Staff will briefly respond to the various "bullet points" that appear on page 2 of AmerenUE's Application For Rehearing And Alternative Motion, all of which will be further addressed below:

1. The issue AmerenUE raises respecting the burden of proof is nothing unique or new; AmerenUE simply did not get the result that it wanted from the Commission's Report And Order and thus, raises the burden of proof issue again. The burden of proof in this case rests with AmerenUE as the proponent of the transfer and that burden never shifts from the proponent. AmerenUE failed to meet its burden across the board because of, among other things, its

seriously flawed least cost analysis which failed to prove that the transfer should be unconditionally approved.

2. The Commission has properly recognized that amendments to the Joint Dispatch Agreement (JDA) are essential to preventing detriment to the Missouri public from the Metro East transfer. Additionally, AmerenUE itself relies on the JDA as a major component of its claimed savings from the Metro East transfer. AmerenUE relies on the Staff's proposed first amendment to the JDA, which AmerenUE has volunteered to pursue, to economically justify the proposed transaction. In response to AmerenUE's argument that the Staff's other proposed amendment to the JDA was settled in Case No. EC-2002-01 and as a consequence cannot be raised in the context of the instant AmerenUE Application, the Staff would state that it extensively addressed this matter in its prior briefs to the Commission.

3. AmerenUE's claims of error are addressed below and have in many respects been previously addressed by the Staff, as also has been the table on page 50 of the Commission's Report And Order respecting the cost-benefit analysis.

4. Assigning what AmerenUE characterizes as the "true probability" to the transmission detriment does not result in a decrease of the detriment from $13.8 million to only $2.76 – $3.45 million. The actual situation involving AmerenUE is not one where AmerenUE's proposed mathematical calculation is appropriate.

5. The Staff agrees that the Sauget site detriment as shown in the cost-benefit analysis at page 50 of the Commission's Report And Order is a one-time cost, but that does not mean that there is not potential for future liabilities associated with the Sauget cleanup, especially since Solutia has declared bankruptcy. Thus, the six percent (6%) costs and liabilities condition adopted by the Commission is reasonable. If the Commission determines that the record should

be reopened, current developments concerning the Sauget site cleanup would be open to being further addressed.

6. The Commission correctly used in its chart/table of benefits and detriments arising from the proposed Metro East transfer the $7.0 million quantification relating to the first JDA amendment proposed by the Staff.

7. AmerenUE's position that no energy will be transferred to serve its former Metro East retail customers after the present contract between AmerenUE and EEInc. for capacity and energy from the Joppa, Illinois generating unit terminates on December 31, 2005, is simply false and there is nothing in the record in this case to support this assertion. The JDA addresses the transfer of energy, not the transfer of capacity. The JDA requires AmerenUE to provide energy to the former AmerenUE Illinois retail customers, after the proposed Metro East transfer, during hours when the generation is not needed to meet AmerenUE's Missouri retail load requirements, just as it provides energy to those customers now. The Commission properly recognized that the proposed former AmerenUE Metro East retail customers will continue to be served by AmerenUE through the JDA and the Commission reasonably and correctly ordered the JDA amendment as conditions of its authorization of the Metro East transfer.

At the beginning of its Application For Rehearing And Alternative Motion, AmerenUE raises an "issue" respecting the Pinckneyville and Kinmundy combustion turbine generators (CTGs) that is of independent significance, which the Staff will address next in this document.

The Commission states at page 7 of its Report And Order, in part, as follows: "Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider it, but indicates rather that the omitted material was not dispositive." Similarly, given the requirements of other Commission cases and business, the

Staff not responding to every argument raised in AmerenUE's Application For Rehearing And Alternative Motion, or in the Public Counsel's Application For Rehearing should not be taken as agreement on the part of the Staff with that party regarding that particular item.

II. AMERENUE'S ISSUE REGARDING PINCKNEYVILLE AND KINMUNDY COMBUSTION TURBINE GENERATORS (CTGS)

At page 1, paragraph 2, and pages 3-4, paragraph 6, of its Application For Rehearing And Alternative Motion, AmerenUE places the issue of the transfer of the Pinckneyville and Kinmundy CTGs at the forefront of its challenge to the Commission's Report And Order. AmerenUE ominously states at page 4, paragraph 6 that "the Order jeopardizes the significant benefits that the Metro East transfer and the Pinckneyville and Kinmundy transfer offer to Missouri, and it risks having those benefits either be suspended during the pendency of an appeal or be eliminated altogether if one or both of these transfers is not or cannot be completed." AmerenUE also has placed the Pinckneyville and Kinmundy CTGs further in play as a result of its recently announced agreement with Noranda Aluminum, Inc. to become a full requirements customer of AmerenUE.

At page 22, lines 12-20 of his surrebuttal testimony, which is Exhibit 6, AmerenUE witness Craig D. Nelson argues that the transfer of the Pinckneyville and Kinmundy CTGs is not an issue in this case:

> . . . The transfer of the Pinckneyville and Kinmundy plants, which is supported by this Commission itself in terms of its being consistent with the Stipulation in EC-2002-1, is not an issue in the present case because that transfer does not impact the question of whether the Metro East Transfer is detrimental to the public. To the extent then that Mr. Kind spills much ink debating issues relating to Pinckneyville and Kinmundy I would agree that I not only "prefer" those transfers not be an issue, but I would submit that they in fact are not an issue because they do not bear on whether or not the Metro East Transfer is detrimental.

At paragraph 5, page 4 of AmerenUE's November 4, 2004 Reply To Office Of The Public Counsel's Response To AmerenUE's Application For Rehearing, AmerenUE seeks to

deflect attention from Mr. Nelson's and Richard A. Voytas' testimony that the Pinckneyville and Kinmundy transfers could occur, even if the Metro East transfer did not occur, by stating in its November 4, 2004 Reply To Office Of the Public Counsel that: (1) neither of them is an attorney, (2) whether or not their opinions in this case are correct depends on the ICC's application of Illinois law and (3) their opinions about what Illinois law will or will not allow were simply wrong. Mr. Voytas' testimony was not limited to a statement respecting Illinois law. He testified that irrespective of the law, Mr. Steven R. Sullivan, Ameren Senior Vice President Governmental/Regulatory Policy, General Counsel and Secretary (Ex. 59, p. 25 of 184) "has developed other options:"

> [Mr. Micheel] Q. Is it correct, Mr. Voytas, that AmerenUE cannot complete the proposed Pinckneyville and Kinmundy transfer without approval of this application?
>
> [Mr. Voytas] A. That is incorrect.
>
> Q. And why is that incorrect?
>
> A. Mr. Nelson put that in his policy testimony and indicated that Mr. Sullivan has – has developed other options. I don't know the reasons for that, but Mr. Nelson addressed that.
>
> Q. So you don't know why it's incorrect? Somebody just – you heard something?
>
> A. I don't know why it's – I know there are other options.

(Vol. 17, Tr. 1673, ls. 22 – Tr. 1674, ls. 10, Voytas).

The development of Noranda Aluminum as a full requirements customer of AmerenUE is an additional reason for the Staff's recommendation that this record in this case be reopened and AmerenUE be directed to perform a proper least-cost analysis.

III. SUBSTITUTE CONDITIONS

A. New Approach Proposed by AmerenUE

In its Application For Rehearing And Alternative Motion, AmerenUE has proposed two conditions to the Commission as substitutes for the conditions adopted by the Commission in its October 6, 2004 Report And Order. AmerenUE is proposing no less than a new approach to processing cases, an initial indication of which was utilized by AmerenUE in its Callaway-Franks Line case, EO-2002-0351.[1] The approach is AmerenUE takes a position that does not result in settlement but causes the case to go to hearing. When it becomes clear that the Commission has not adopted the AmerenUE position or has not adopted the AmerenUE position

[1] This AmerenUE case is captioned: Application of Union Electric Company for Permission and Authority to Construct, Operate, Own and Maintain a 345 kilovolt Transmission Line in Maries, Osage and Pulaski Counties, Missouri ("Callaway-Franks Line). Reply Briefs were filed with the Commission on December 6, 2002. On May 23, 2003, AmerenUE filed with the Commission AmerenUE's Statement Of Willingness To Voluntarily Agree To The Imposition Of Conditions On Any Commission Order Approving Application. In the opening paragraph of its pleading, AmerenUE stated as follows:

> Comes Now Union Electric Company (the "Company" or "AmerenUE"), and hereby advises the Commission that the Company is willing to consent and agree to the imposition of certain conditions set forth herein as part of any Commission order granting the Company the permission and authority sought by its Application in this case, regardless of when the Commission issues an order in this case. The Company is further willing to consent and agree to certain additional conditions if the Commission issues its order approving the Company's request for a Certificate herein on or before July 15, 2003. . . .

The Staff determined that the 345 kV line was necessary for reasons of public convenience and necessity and was in the public interest, and did not oppose any of AmerenUE's proposed conditions in AmerenUE's May 23, 2003 filing. Intervenor Concerned Citizens Of Family Farms And Heritage responded to AmerenUE's May 23, 2003 filing that AmerenUE's filing constituted no statement of agreement to Intervenors' conditions and it did not satisfy AmerenUE's burden to show that the proposed transmission line was in the public interest.

The Staff would note that at pages 21-22, paragraph 43 of AmerenUE's October 15, 2004 Application For Rehearing and Alternative Motion, AmerenUE states: "[Section 393.190.1] is unlike Section 393.170 which allows the Commission to impose certain otherwise reasonable and lawful conditions on the granting of certificates of convenience and necessity under that statute." Nonetheless, AmerenUE at page 4, paragraph 15 of its May 23, 2003 filing in Case No. EO-2002-351 conditioned its proposal as follows:

> Specifically, the Company is willing to agree that all of the conditions provided for in this Statement and its Exhibits would become a part of the Commission's approval of the Company's Application. The Company's agreement to such conditions is given with the understanding, however, that such agreement in this case shall not constitute an admission by the Company that the Commission has jurisdiction to order such conditions, in the absence of the Company's consent and agreement thereto, in any future case arising from or related to permission and authority under Section 393.170, RSMo.

sufficiently acceptable to AmerenUE, AmerenUE makes an offer/proposal directly to the Commissioners in a pleading after the record has closed. Apart from the legal questions that AmerenUE's approach should raise for the Commissioners, which will be addressed below, are the questions: Has AmerenUE now made its best offer to the Commission, and if not, when might AmerenUE make its best offer, and what must occur in order for AmerenUE to make its best offer? It is not clear whether (1) Commission authorization for AmerenUE to proceed with the Metro East transfer based on the conditions set in the Commission's October 6, Report And Order and Commission rejection of the conditions proposed by AmerenUE in its October 15, 2004 Application For Rehearing And Alternative Motion For Clarification Of The Commission's Order Of October 6, 2004 (Application For Rehearing And Alternative Motion) or (2) outright Commission denial of AmerenUE's Metro East transfer proposal as filed by AmerenUE and as modified by the conditions AmerenUE proposed its Application For Rehearing And Alternative Motion would lead to AmerenUE making its true bottom line position known.

The Staff does not believe that AmerenUE, in its Application For Rehearing And Alternative Motion, has actually offered anything that would address the Staff's concerns respecting the detriments of the proposed transaction, but in footnote 31 in Appendix A to its Application For Rehearing And Alternative Motion, AmerenUE asks that it be relieved of the commitment that it made to the Commission to use its best efforts to make the first Staff proposed amendment to the JDA. Thus, AmerenUE has in reality moved back from the little it had previously offered to address the detriments identified by the Staff.

B. Procedural Issues

Putting aside these questions of tactics and strategy, the Commission must address the legal questions regarding the procedure it should/must follow if it wants to consider new

proposals from AmerenUE. The Staff raised in the pleading that it filed on October 25, 2004, various legal questions that it will now address.

The Staff stated in its October 25, 2004 Staff Notice that AmerenUE's Application For Rehearing And Alternative Motion is unique from the perspective that it seeks to engage the Commission in negotiations regarding conditions for Commission approval of AmerenUE's proposed Metro East transfer. Article V, Section 18 of the Missouri Constitution, *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 795 S.W.2d 385 (Mo. banc 1990), *State ex rel. Missouri Cable Telecommunications Ass'n. v. Public Serv. Comm'n*, 929 S.W.2d 768 (Mo.App. 1996) and *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39 (Mo.App. 1982), *cert. denied*, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983) would indicate that if the Commission has any interest in pursuing adoption of the conditions that AmerenUE raised in its Application For Rehearing And Alternative Motion, the Commission needs an evidentiary basis for doing so constituting competent and substantial evidence upon the whole record.

The Staff does not believe that the AmerenUE proposal warrants consideration, but if the Commission believes otherwise, then the Commission needs to establish a procedural schedule which should include adequate time for prefiled testimony, discovery, a hearing and briefs. The Commission should not encourage the slapdash approach that AmerenUE has taken to date to this entire transaction and especially to its least cost analysis of the proposed transaction. AmerenUE has not suggested that the record should be opened in any manner or degree to address its proposals. AmerenUE merely recommends that the Commission adopt the new AmerenUE proposals. Among other things, the Staff explains below the not inconsequential scope of work required by AmerenUE's proposals, assuming the Staff correctly understands what AmerenUE is proposing and the Commission adopts what AmerenUE is proposing. From

the start though, the Staff wants to make clear that it does not believe that which AmerenUE has proposed warrants being adopted by the Commission.

When AmerenUE proposed in its October 4, 2004 Motion For Issuance Of Preliminary Order that the Commission issue a Preliminary Report And Order, AmerenUE suggested that the responses to the Preliminary Report And Order be "limited to addressing any legal issues the parties believe the preliminary report and order may raise" (AmerenUE's Motion For Issuance Of Preliminary Order, p. 6) "rather than a re-argument of the facts" (*Id.*, p. 1). AmerenUE seeks to prevent the Commission from inquiring into anything other than what AmerenUE brings to the Commission for consideration. There have been developments in Illinois, at the Illinois Commerce Commission, involving AmerenUE's acquisition of Illinois Power Company regarding environmental matters and AmerenUE's liability for environmental costs that are relevant to the October 15, 2004 environmental proposal of AmerenUE. The Staff would seek to apprise the Commission of these, as well as other, relevant developments, if the Commission decided that AmerenUE's belated proposal warranted consideration.

IV. LEGAL ISSUES AND PRINCIPLES

A. AmerenUE's Analysis of Applicable Legal Principles Fails

At pages 8-9 of its Application For Rehearing And Alternative Motion, AmerenUE presents its legal analysis that the authority of the Commission is very limited. In making this argument, AmerenUE fails to cite *State ex rel. City of St. Joseph v. Public Serv. Comm'n*, 325 Mo. 209, 30 S.W.2d 8, 14 (Mo. banc 1930) wherein the Missouri Supreme Court stated that a company's right to conduct its business does not extend to doing so in a way that is injurious to the public:

> The holding company's ownership of the property includes the right to control and manage it, subject, of course, to state regulation through the public service commission. But it must be kept in mind that the commission's authority to

> regulate does not include the right to dictate the manner in which the company shall conduct its business. *The company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public. The customers of a public utility have a right to demand efficient service at a reasonable rate, but they have no right to dictate the methods which the utility must employ in the rendition of that service.* It is no concern of either the customers of the water company or the commission, if the water company obtains necessary material, labor, supplies etc., from the holding company, so long as the quality and price of the service rendered by the water company are what the law says they should be. . . .

Emphasis supplied; Citations omitted.

B. The Burden Of Proof Remains With AmerenUE

In paragraphs 21, 22 and 23, of its Application For Rehearing And Alternative Motion, AmerenUE improperly attempts to shift the burden of proof in this case to opposing parties. "The general rule of law is that the proponent of a particular proposition bears the burden of proving that proposition." *Central County Emergency 911 v. International Ass'n of Firefighters Local 2665*, 967 S.W.2d 696, 699 (Mo.App. 1998). Ameren UE asserts that the Commission should approve the transfer, accordingly the burden of proof is on AmerenUE as the proponent of this transaction. In this case, AmerenUE had the burden of proof and, in its Report And Order at page 43, the Commission properly determined that burden remained with AmerenUE at all times.

AmerenUE asserts that the detriments created by the potentially huge environmental liabilities are not supported by sufficient evidence, nor are these detriments likely to occur. (AmerenUE's Application For Rehearing And Alternative Motion, page 10, paragraph 22.) This is certainly not borne out by the evidence in the record. Contrary to AmerenUE's assertions at paragraph 22, as well as at paragraph 48, of its Application For Rehearing And Alternative Motion, there is competent and substantial evidence in the record sufficient to support the Commission's conclusions. For example, Ameren's own 10-K filing at the SEC indicates the

enormity of potential environmental liabilities, and on this matter, it is unquestionably substantial and competent evidence of the facts. (Ex. 59.)

Competent evidence is defined by the courts as "relevant and admissible evidence that can establish the fact at issue." *Consolidated Sch. Dist. No. 2 v. King*, 786 S.W.2d 217, 219 (Mo.App. 1990). "Substantial evidence, is evidence, which if true, has probative force; it is evidence from which the trier of fact reasonably could find the issues in harmony therewith." *Sprint Communications Co., L.P. v. Director of Revenue,* 64 S.W.3d 832, 834 (Mo. banc 2002)(citation omitted).

Ameren's own 10-K filing with the SEC for the fiscal year 2003 was admitted into the record with no objection, making it an admission against interest and competent evidence. (Tr. 1088, ls. 8-10, Vol. 11; *State ex rel. AT&T v. Public Serv. Comm'n*, 701 S.W.2d 745, 754-55 (Mo. App. 1985). Additionally, AmerenUE admits and verifies that the capital costs that Ameren has identified in its 10-K filing with the SEC could be up to a billion dollars over the next fifteen (15) to twenty (20) years. (AmerenUE Initial Brief at fn. 150.)

Not only is the evidence presented competent, it is substantial. Ameren's own estimates of future environmental related expenses, filed with a federal agency and signed by Ameren's Chairman and CEO, certainly has probative force on the issue of the existence and probability of the environmental detriments identified by the Staff. Not only does this evidence have probative value, the evidence may be considered reliable because it is Ameren's own estimates which Ameren filed in compliance with SEC regulations. The SEC requires disclosure of the impact compliance with environmental regulations may have upon capital expenditures and earnings:

> Appropriate disclosure shall be made as to the material effects that compliance with federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital

> expenditures, earnings and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such periods as the registrant may deem materials [sic].

17 CFR § 229.101 (c) (xii)(2002).

Further, Ameren indicates that its projections concerning future environmental costs are reliable in that "'forward looking' statements have been made in good faith and are based on *reasonable assumptions* . . ." (Ex. 59, p. 6 of 184; Emphasis supplied). Ameren goes on to state that potential negative events may cause results to differ materially from management expectations based on "the impact of current environmental regulations on utilities and generating companies and the expectation that more stringent requirements will be introduced over time, which could potentially have a negative financial effect." (Ex. 59, p. 7 of 184).

It is both reasonable and prudent for the Commission to rely on Ameren's SEC filing to decide that these detriments are significant likely to occur. The Commission can rely on information that the Company itself has filed with a federal agency as competent evidence of reasonable projections of future capital costs. This is particularly true since the SEC only requires Ameren to file if the potential impact is "material." 17 CFR § 229.101 (c) (xii)(2002).

AmerenUE's claim that the evidence of the detriments associated with very large environmental costs is not sufficiently definite, on page 10, paragraph 22 of AmerenUE's Application For Rehearing And Alternative Motion, has already been rebutted by the Staff. In its Reply Brief at page 14, the Staff discussed the certainty or definiteness of the evidence required by the "not detrimental to the public" standard, as determined by *State ex rel. Martigney Creek Sewer Co. v. Public Serv. Comm'n*, 537 S.W.2d 388, 396 (Mo. banc 1976) *(Martigney Creek*). In *Martigney Creek*, the Missouri Supreme Court noted in a statement of general

applicability to Commission proceedings that "'where more accurate information is unavailable estimates should be considered.'" The issue here is the magnitude of future environmental liabilities. Certainly the Commission may rely on Ameren's own 10-K filing with the SEC (Ex. 59) as a sufficiently definite, reliable and accurate, if understated, estimate of future capital expenses related to these liabilities.

AmerenUE's assertion that the costs will not become known until later, and, thus, should not be considered (paragraph 48, page 24 of AmerenUE's Application For Rehearing And Alternative Motion) is undercut by its own admission in its Initial Brief at footnote 150 that the costs may be $1.0 billion, and more assuredly disproven by Ameren's SEC 10-K filing. Not only are these costs known to the degree that they have been reduced to specific numbers, even if they were speculative as AmerenUE contends, (AmerenUE's Application For Rehearing And Alternative Motion, page 17, paragraph 27) the Courts have held that it is unacceptable for the Commission to fail to consider information, even though it may be speculative, when nothing better is available and the Commission must make an intelligent forecast with respect to the future. *State ex rel. Missouri Public Serv. Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo.App. 1981)(*Fraas*).

C. AmerenUE's Request That Missouri Commission Regulation Be Abdicated To The Illinois Commerce Commission

At paragraphs 6 and 8 of AmerenUE's Application For Rehearing And Alternative Motion, AmerenUE argues that this Commission should abdicate its Missouri statutory responsibilities and adopt whatever AmerenUE represents as necessary in Missouri due to the actions of the Illinois Commerce Commission (ICC). At the same time, AmerenUE chooses not to recognize that Ameren and its subsidiaries are responsible to some degree for what occurs in Illinois. AmerenUE proposes no less than that regulation in Missouri should be controlled by

events in Illinois as purported by AmerenUE. AmerenUE's principal base of revenues has been located in Missouri, not Illinois. The Commission should decline to abdicate this responsibility to the ICC.

D. Commission Has Authority To Condition Its Approval Of A Transfer

At pages 21-22 of its Application For Rehearing And Alternative Motion, AmerenUE, citing Section 393.190.1 RSMo 2000 and 4 CSR 240-2.060(7) (D), asserts that the Commission does not have the authority to condition its approval of a proposed transfer. The Staff addressed this matter at pages 35-37 of the Staff's Initial Brief. In its November 4, 2004 Reply To Public Counsel, AmerenUE cited *Public Serv. Comm'n v. St. Louis – San Francisco Ry. Co*., 256 S.W. 226 (Mo. 1924) (*St. Louis – San Francisco Ry. Co.*) as support for its contention that the Commission does not have implied authority under either Section 386.040 or Section 386.250(7) to adopt conditions under Section 393.190.1. The holding in *St. Louis – San Francisco Ry. Co*. is much more limited than AmerenUE asserts as the Court's own language indicates:

> It is not necessary to hold, and we do not hold, that the Commission is without power to make general rules or regulations other than those specified in the statute. It is entirely conceivable that the promulgation of others are "necessary or proper to enable it to carry out fully and effectually all the purposes" of the act. But a general rule requiring its permission before a passenger train can be withdrawn from service cannot be so characterized. . . .

256 S.W. at 228.

Subsequently, the Missouri Supreme Court in *State ex rel. Public Serv. Comm'n v. Padberg*, 145 S.W.2d 150, 151 (Mo. banc 1940) noted that "[i]n addition to certain positive powers expressly conferred upon the commission it is also vested with all others necessary and proper to carry out fully and effectively the duties delegated to it. State ex rel. Pitcairn v. Public Service Commission, 232 Mo. App. 755, 111 S.W.2d 982."

To expand upon the presentation in the Staff's Initial Brief, the Staff would note two Sections 386.040 and 386.250(7) which grant to the Commission all powers necessary or proper to enable it to carry out fully and effectually all the purposes of the Public Service Commission Law:

> 386.040. A "Public Service Commission" is hereby created and established, which said public service commission shall be vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter.
>
> 386.250. The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:
>
> . . . .
>
> (7) To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.

The Staff also cited *State ex rel. Laclede Gas Company v. Public Serv. Comm'n*, 535 S.W.2d 561, 566-67, 567 n. 1 (Mo.App. 1976) (*Laclede Gas*). Therein, the Missouri Court of Appeals, Kansas City District held as follows respecting the Commission's authority to grant interim rates for which there is no express statutory provision:

> We hold that the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.

Id. at 567.

. . . .

> A somewhat analogous question is whether the Commission has authority to grant interim test or experimental rates. The Missouri Supreme Court has long held that the Commission does have this power as a matter of necessary implication from practical necessity. [Citations omitted.]

Id. at 567 n. 1.

Amicus curiae commented in the *Laclede Gas* interim rate relief case that during the then current Legislative Session a Bill had been introduced that would have expressly empowered the

Commission to grant interim rate relief but the Bill did not pass. The Court stated that "[w]hile the amendment to a statute must be deemed to have been intended to accomplish some purpose, that purpose can be clarification rather than a change of existing law" and held that the Bill in question was "intended only to clarify and particularize existing law." 535 S.W.2d at 567. *Cf. State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 645 S.W.2d 44, 49-51 (Mo.App. 1982) (Commission authorized to adopt rule providing for use of data requests, even though there was no provision for data requests in Chapter 536).

AmerenUE's filings with the Commission fail to acknowledge any of the above legal authority respecting the Commission's power to impose conditions on a Section 393.190.1 transaction.

The Staff does not read the Commission's Report And Order as requiring AmerenUE to proceed with the proposed Metro East transfer and the conditions directed by the Commission in its October 6, 2004 Report And Order. AmerenUE can choose not to go forward with its proposed Metro East transfer if the Commission's conditions are unacceptable to AmerenUE. There is no difference if the Commission were to reject AmerenUE's proposed transfer, but indicate that if AmerenUE filed an Application with the indicated changes, the Commission would approve the Application.

E. AmerenUE's Misapplication Of Missouri Supreme Court's *AG Processing* Decision

The Commission, in considering issues relating to the proposed Metro East transfer that might lead to a subsequent rate increase for AmerenUE, is not engaging in unlawful speculation or single-issue ratemaking in violation of the applicable legal standard before or after the Missouri Supreme Court's decision in *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 730 (Mo. banc 2003) (*AG Processing*). Prior to *AG Processing*, there was, and after

AG Processing, there still is the case *Love 1979 Partners v. Public Serv. Comm'n*, 715 S.W.2d 482 (Mo. banc 1986) (*Love 1979 Partners*). In said case, UE sought, and obtained, Commission authorization, pursuant to Section 393.190.1, to sell both its Ashley generating plant and Downtown St. Louis steam loop, and to discontinue its operations in St. Louis as a regulated steam heating company.

Among other things, the Commission: (1) rejected certain steam customers' opposition to the issuance of Commission authorization on the ground that the plan of UE, Bi-State Development Agency and Thermal Resources of St. Louis, Inc. would result in unreasonable increases in rates for steam and (2) held that the fact of a resulting initial rate increase was not a lawful basis for disapproving the plan. 715 S.W.2d at 485-86. Contract documents provided for initial rate increases, with future increases to be controlled by a formula. *Id.* at 490. The Commission's charge was not limited to determining whether the entities acquiring the facilities being transferred had the financial and technical capacity to carry through on the project. *Id*.

The Missouri Supreme Court remanded with directions to sustain the order of the Commission stating, in part, as follows:

> The final suggestion is that the governing contracts will subject steam customers to unreasonable rate increases. As we have said earlier, *the customers are not entitled to a guarantee of the status quo* in the furnishing of steam. *The Commission could conclude* that the present facilities are obsolescent and uneconomic, and *that rate increases would be anticipated even if UE were to continue the operation*. It is also possible that UE would seek to discontinue the furnishing of steam, without the prospect of a successor, if it continued to lose customers. The contract documents provide for initial price increases, but with future increases to be controlled by a formula. *The users complain of a "ratchet" effect, in which the new rates may go up but not down. The Commission might well conclude, however, that the new level had to be guaranteed* in order to provide a stable project, and that the over-all plan provides the most reliable method for assuring a continued, reliable and economical supply of steam.
>
> *. . . The problems presented to the Commission involve subjective evaluations of economic factors. There is no sure method for predicting whether a project will*

> *succeed. Questions of analysis and judgment are committed by law to the decision of the Commission, which has the assistance of a technically trained staff* and is better equipped to make decisions of this kind than we are. . . .

715 S.W.2d at 490; Emphasis added.[2]

Finally, respecting AmerenUE's unsupported spin on the bounds of the *AG Processing* decision, the Staff would note the language in the last paragraph above from the Missouri Supreme Court's decision in *Love 1979 Partners* regarding the problems presented to the Commission requiring prediction based on subjective analysis and judgment by those with a technical training. 715 S.W.2d at 490.

F. Single Issue Ratemaking

Contrary to AmerenUE's assertions in its Application For Rehearing And Alternative Motion at pages 22-23, paragraphs 45-47, and at page 27, paragraph 53, neither "Ordered: 6" nor "Ordered: 4" constitute single issue ratemaking. The Staff has already addressed AmerenUE's claims of single issue ratemaking in Staff's Reply Brief at pages 42-43 and Staff's Initial Brief at pages 64 and 127. Briefly, this is not a rate case, so a change in rates will not take place. The condition in the Report And Order at "Ordered: 6," that AmerenUE not recover in rates any amount relating to a pre-closing liability directly assignable to the former AmerenUE Illinois retail consumers, and the condition in the Report And Order at "Ordered: 4," that AmerenUE modify the Joint Dispatch Agreement (JDA) are not single-issue ratemaking.

Not only are "Ordered: 6" and "Ordered: 4" not single issue ratemaking, but these determinations are necessary for the Commission to comply with the Missouri Supreme Court's directive in *AG Processing* to consider and decide all necessary and essential issues in making its determination whether the transfer as proposed by AmerenUE is detrimental to the public. 120

[2] The Missouri Supreme Court also held in *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 31-33 (Mo. banc 1975), *cert. denied*, 429 U.S. 882, 97 S. Ct. 73, 50 L.Ed.2d 84 (1976) that customers do not have a Fourteenth Amendment protected property interest in the present level of utility rates.

S.W.3d at 736-37. In *AG Processing,* among the issues was whether the acquisition premium was reasonable and whether the Commission "should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public." *Id.* at 736. In this transfer case, necessary and essential issues to a determination of whether the proposed transfer is detrimental to the public are the effect of the allocation/assignment of the pre-close generation liabilities and the effect of the operation of the JDA, both of which will cause costs to be recovered from AmerenUE's Missouri retail customers rather than from AmerenUE's Illinois retail customers transferred to AmerenCIPS. In the instance of the pre-close generation liabilities, the Illinois customers of AmerenUE continue to benefit from the generation until the effectuation of the proposed transfer. In the case of the JDA, AEG and Ameren have benefited from the operation of the JDA and will do so even more as a result of the proposed Metro East transfer. In accord with the mandate of *AG Processing*, the Commission properly determined that AmerenUE may not recoup costs from Missouri retail customers that should be paid by Illinois customers and should not be able to apply the JDA transfer pricing provision to the Illinois load transferred to AmerenCIPS as a result of the Metro East transaction. These determinations, reflected in the Report And Order at "Ordered: 6" and "Ordered: 4," mean that the responsibility for liabilities that resulted from events that occurred prior to the transfer will be shared by all parties that benefited from the generation prior to the transfer, and that AmerenUE's Missouri retail ratepayers will not additionally subsidize Ameren and AEG through the JDA as a result of the Metro East transfer. The Commission correctly decided that the transfer would be detrimental to the public interest if AmerenUE's Missouri retail customers bear these effects unaddressed by the Commission in light of *AG Processing*.

AmerenUE, once again, ignores the very language of the *AG Processing* decision. The acquisition premium question was not the only issue that the Missouri Supreme Court found to be "necessary and essential" in the case. The Missouri Supreme Court stated, in part, as follows:

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine *whether the acquisition premium was reasonable*, and *it should have considered it as part of the cost analysis* when evaluating whether the proposed merger would be detrimental to the public.[15] The PSC's refusal to consider *this issue in conjunction with the other issues raised by the PSC staff* may have substantially impacted the weight of the evidence evaluated to approve the merger. The PSC erred when determining whether to approve the merger because *it failed to consider and decide all the necessary and essential issues*, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.
>
> [15] *See State ex rel. Martigney Creek Sewer Co. v. Pub. Serv. Comm'n*, 537 S.W.2d 388, 399 (Mo. banc 1976) (stating that, for ratemaking purposes, recovery of the cost of an asset acquired from another utility depends on the reasonableness of the acquisition, considering the factors of *whether the transaction was at arm's length*, if it resulted in operating efficiencies, and if it made possible a desirable integration of facilities).

120 S.W.3d at 736; Emphasis added; Footnote 16 omitted.

> The judgment is reversed, and the case is remanded. The circuit court shall remand the case to the PSC to *consider and decide the issue of recoupment of the acquisition premium in conjunction with the other issues raised by PSC staff* and the intervenors in making its determination of whether the merger is detrimental to the public. Upon remand the Commission will have the *opportunity to reconsider the totality of all of the necessary evidence* to evaluate the reasonableness of a decision to approve a merger between UtiliCorp and SJLP.

Id. at 737; Emphasis added.

The Staff believes that the Missouri Supreme Court's decision in *Love 1979 Partners v. Public Serv. Comm'n,* 715 S.W.2d 482 (Mo. banc 1986)(*Love 1979 Partners*) is relevant. In *Love 1979 Partners*, whether rate increases that steam customers would subsequently receive as a result of the transfer of UE's steam operations and facilities would be detrimental to the public

was a necessary and essential issue for the Commission to determine at the time it considered whether the particular proposed sale of steam operations and facilities should be authorized by it.

Paragraph 47, pages 23-24 of AmerenUE's Application For Rehearing And Alternative Motion deserves particular attention for the confusion that it brings to the discussion of ratemaking in general and what AmerenUE characterizes as "single issue ratemaking." AmerenUE indicates that in a pure ratemaking scenario a $10.0 million reduction in overall generation costs due to the Metro East transfer would "cancel out" $5.0 million liabilities such as asbestos claims also associated with the Metro East transfer. That is not true. Revenue requirement is not determined, in part, by merely subtracting total expenses from total revenues. Adjustments are made to both revenues and expenses to normalize, annualize, remove imprudent or unreasonable costs, and impute revenues to address imprudent or unreasonable operations or transactions. In AmerenUE's example, the Staff would disallow the $5.0 million of asbestos claims because the costs should be assigned to AmerenUE's former Illinois retail customers. AmerenUE's argument that the $5.0 million in asbestos claims would simply be offset by the $10.0 million decrease in overall generation costs due to the Metro East transfer is simply not an accurate statement regarding ratemaking. Furthermore, the Commission should note that AmerenUE is saying that there would be a reduction of $10.0 million in overall generation costs from what they would otherwise have been. The Staff would audit AmerenUE's assertion that there is a $10.0 million decrease in overall generation costs than what those costs would have been if the Metro East transfer had not occurred.

AmerenUE's recourse respecting what *AG Processing* means is not to urge this Commission to make inappropriate decisions, but for AmerenUE to appeal the Commission's decision and try to get the Missouri judiciary to alter the *AG Processing* decision.

G. Sections 393.190.1, 393.130, 393.150.2 and 393.140(11) and Affiliate Transactions

The Staff, for the most part, will not repeat the extensive legal analysis that it presented in its Initial Brief and Reply Brief, but once again in paragraphs 24 and 25 of its Application For Rehearing And Alternative Motion, AmerenUE clouds the true issues. AmerenUE attempts to portray this transaction as a simple sale of property. It is not. The Commission correctly recognized that this is not a simple sale of property but, instead, it is a transfer of property among regulated and nonregulated affiliates, with the ultimate effect of benefiting the nonregulated parent holding company, Ameren, and the nonregulated affiliate, AEG, to the detriment of AmerenUE's regulated Missouri retail ratepayers.

While the ability to sell property is an important incident of ownership, the ability of a regulated utility in Missouri to transfer property to a regulated or nonregulated affiliate falls under Sections 393.190.1, 393.130, 393.150.2 and 393.140(11) and the Commission's affiliate transactions rules, which is designed to address cross-subsidization issues. The Missouri Supreme Court explained the reason for this standard when it discussed the reason that such transfers are governed by the Commission:

> [Movement by utilities into non-regulated businesses creates an] incentive to shift their non-regulated costs to their regulated operations with the effect of unnecessarily increasing the rates charged to the utilities' customers. See *United States v. Western Elec. Co*., 592 F.Supp. 846, 853 (D.D.C.1984) ("As long as a [public utility] is engaged in both monopoly and competitive activities, it will have the incentive as well as the ability to 'milk' the rate-of-return regulated monopoly affiliate to subsidize its competitive ventures....") To counter this trend, the new rules--and in particular, the asymmetrical pricing standards--prohibit utilities from providing an advantage to their affiliates to the detriment of rate-paying customers. In addition, to police compliance, the rules require the utilities to ensure that they and their affiliates maintain records of certain transactions.

State ex rel. Atmos Energy Corp. v. Public Serv. Comm'n, 103 S.W.3d 753, 764 (Mo. banc 2003).

The Missouri Supreme Court continued with a discussion of the Commission's authority to enact and regulate such transactions:

> The PSC's authority to enact these regulations is set out in chapter 393. Section 393.130.2 precludes a utility from "directly or indirectly by any special rate ... or other device or method ... [from] collect[ing] or receiv [ing] from any person or corporation ... greater or less[er] compensation" for that utility's services than it charges every other person or corporation. Section 393.140(1) states that the PSC shall have "general supervision" over all gas utilities, electric utilities, and heating utilities. Reading section 393.130.2 in conjunction with the broad supervisory power granted under section 393.140(1), the PSC's authority to require utilities to maintain records so that it may determine whether utilities are following their obligations under section 393.130.2 is firmly established.

Id.

As explained by the Missouri Supreme Court, the Commission's authority over affiliate transactions, which the proposed Metro East transaction is, and the Commission's statutory authority in this case respecting the regulated portion of the transaction, extends beyond Section 393.190.1, contrary to AmerenUE's suggestion. Therefore, the Staff believes that the Commission correctly determined that this transaction occurred between affiliates of Ameren, the parent, and was not a simple sale of property.

AmerenUE claims in paragraph 20 at page 9 of its Application For Rehearing And Alternative Motion that the power of the Commission is found exclusively in Section 393.190.1 This assertion is easily refuted by reference to the Missouri Supreme Court's 2003 *Atmos Energy Corp*. decision, Section 393.130. RSMo. Cum. Supp. 2004, Section 393.150.2 RSMo 2000 and Section 393.140(11) RSMo 2000, which states that a utility is prohibited from extending "to any person or corporation any form of contract or agreement . . . or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

The contract at issue, the Asset Transfer Agreement, is not an agreement that AmerenUE would make with any third party under similar circumstances. AmerenUE, acting in the best interest of its customers would never agree to the terms of this proposed transfer with an unrelated third party. What Ameren, through AmerenUE, is extending to AmerenCIPS is an agreement that relieves Ameren's regulated Illinois retail customers and Ameren's Illinois nonregulated entities of responsibility to pay a fair share of the pre-closing costs of liabilities from events that occurred prior to the proposed transfer. AmerenUE would not extend such an agreement to any unrelated third party, but would, instead, sell the asset at fair market value. An arms-length transaction also would include compensation or an adjustment to the sale price for acceptance of the liabilities at issue. The Commission by statutory obligation has taken the place of the Missouri party seeking to effectuate an arm's-length transaction and has correctly determined that the obligation to pay more than a just and reasonable share of the actual costs of these liabilities will not be shifted to Missouri ratepayers. The Commission has correctly applied the appropriate statutory provisions to this questionable AmerenUE proposal.

V. AMERENUE'S MATHEMATICAL ANALYSIS OF BENEFITS AND DETRIMENTS

At page 20 of its Application For Rehearing And Alternative Motion, AmerenUE states that "a mere mathematical analysis is not necessarily required or appropriate" and AmerenUE purports to make the "corrections that the record would require be made."

A. Detriment From JDA Requirement To Price Transfers to CIPS At Incremental Cost

The sixth line item is "JDA requirement that surplus UE power be available to CIPS at incremental cost." At page 50 of the Commission's Report And Order, there is a chart for which there are hyphens in the column labeled "Benefits" and a question mark ("?") in the column labeled "Detriments" and at page 58 of the Commission's Report And Order there is a chart for

which there are hyphens in the column labeled "Benefits" and a dollar sign and a zero ("$0") in the column labeled "Detriments." At pages 8-9 in Public Counsel's October 25, 2004 Response To AmerenUE's Application For Rehearing And Alternative Motion, the Public Counsel takes the position that there are numbers in the record in this proceeding that can be placed in the column "Detriments" on page 50 of the Commission's Report and Order.

In AmerenUE's Reply to Public Counsel's October 25, 2004 Response To AmerenUE's Application For Rehearing and Alternative Motion, AmerenUE points out that if a number were put into the detriment column of the Commission's chart on page 50 of its October 6, 2004 Report And Order, this "double counts - reduces again for an item for which a reduction was already made – the results of the least cost analysis." If, on the chart on page 50, the intention of the Commission is to reflect a detriment that occurs solely from the Metro East transfer, the Staff agrees with AmerenUE. The calculation of generation-related savings from the Metro East transfer includes the current operation of the JDA. Thus, any detriment from the JDA related to the Metro East transfer is reflected in the low level of benefits from generation-related savings (i.e., $0.9 million) in the Commission's chart on page 50 of its October 6, 2004 Report And Order.

If (1) the proposed Metro East transfer is authorized, (2) the difference between market price and incremental cost is assumed to be a conservative $2.50 per MWh, and (3) the approximately 4.0 million MWhs of Illinois retail former AmerenUE load, previously served by AmerenUE at incremental cost, is served by AmerenUE at market price, then an additional $10.0 million of revenue is available to AmerenUE. (Proctor Reb., p. 15, ls. 5-16; p. 16, ls. 2-12; Vol. 13, Tr. 1279, ls. 18 – Tr. 1280, ls. 9; Tr. 1282, ls. 23 – Tr. 1283, ls. 2, Proctor.) Footnote 40, at page 46, of the Commission's October 6, 2004 Report And Order, states "[t]he likely value of

this detriment was never quantified in the record." Based on the Staff's understanding of the Commission's Report And Order, a conservative $10.0 million amount is the number that the Commission is looking for and it is in the record in this proceeding as a benefit that could be added if the condition that the second amendment to the JDA be applied to any energy transferred from AmerenUE to serve Metro-East customers. Thus, the Commission's table on page 58 of its October 6, 2004 Report And Order should include a positive dollar amount for the benefits related to that condition being met in the same way that a positive $7.0 million benefit is included for a change to the JDA to reflect sharing profits by generation rather than load. [3]

If the intent of the Commission in its October 6, 2004 Report And Order is to indicate the detriment that exists from the JDA irrespective of the Metro East transfer, and to correct that detriment as a part of this case, then the Staff agrees with the position of the Office of Public Counsel. This detriment to AmerenUE's Missouri customers exists whether or not the Metro East transfer takes place and should be corrected.

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[3] Other numbers in the record include the following:

** HC

HC **

In the Staff's 2001-02 earnings complaint case against AmerenUE, Case No. EC-2002-1, Dr. Proctor submitted testimony that the effect of changing the JDA to effectuate transfers of energy between AmerenUE and Ameren Energy Marketing (AEM) at market price instead of at incremental cost would result in AmerenUE's revenue requirement decreasing by $100.0 million. (Vol. 13, Tr. 1236, ls. 4-7, 18-24; Tr. 1288, ls. 8-23, Proctor).

B. Detriment From Possible Transmission Charges

In its Application For Rehearing And Alternative Motion, AmerenUE states that the $13.8 million included as a detriment under the category of possible transmission charges is too high and should only be, at most, 20% to 25% of that level, resulting in a detriment in the range of $2.76 million to $3.45 million. (AmerenUE's Application For Rehearing and Alternative Motion, paragraph 31). Despite AmerenUE's argument about the amount that should have been included in the Commission's table, this detriment would be mitigated in that the Commission states in its Order that it "will exclude any such costs from UE's rates in the future as a condition of its approval of the transfer." (Report And Order, p. 57). If AmerenUE accepts this condition, then it should have set the detriment level to zero, not $2.76 million to $3.45 million. On the other hand, if AmerenUE does not accept this condition, the Commission stated that its calculation of detriments was meant to reflect a conservative scenario that reflects the occurrence of the detriment. In this regard, the $13.8 million represents an expected level of detriment if AmerenUE were put into a position of having to pay for transmission from generation units located in Illinois.

In contrast, the calculation made by AmerenUE is the expected value of the detriment only in the context where AmerenUE is forced to pay this cost 20-25% of the time. For example, if at the beginning of each year, a ball was drawn from an urn containing 1 black ball and either 4 or 5 white balls, and if a black ball is drawn, AmerenUE must pay, but if a white ball is drawn, AmerenUE does not have to pay. Only in situations where repeated trials actually occur is this mathematically correct calculation of expected value appropriate. However, AmerenUE will not be faced with repeated trials on the question of whether or not it must pay for transmission service from its plants located in Illinois, and when repeated trials do not occur, it is appropriate to include an analysis of risks. As a policy matter, the Commission should take into account the

risk of the detriment occurring, and it is clear from the October 6, 2004 Report And Order that the Commission did so: "prudence requires that the Commission consider the benefits at a conservative level and the detriments at the 'worst-case scenario' level." (Report And Order, p. 51). While AmerenUE may object to the Commission's policy with respect to the weight that it puts on the risk of detriments, it has no basis for objecting for reasons of mathematical accuracy.

In considering the analysis of benefits and costs, or detriments, performed by AmerenUE in this case, and the seeming finality of the transaction once the transfer occurs, a rigorous application of the standard by the Commission would be appropriate. The Staff believes that the case law indicates that a *de minimis* application of the not detrimental to the public standard as advocated by AmerenUE is not what is required. *See Love 1979 Partners v. Public Serv. Comm'm,* 715 S.W.2d 482 (Mo. banc 1986); *State ex rel. AG Processing, Inc. v. Public Serv. Comm'm,* 120 S.W.3d 732 (Mo. banc 2003); *State ex rel. Martigney Creek Sewer Co. v. Public Serv.Comm'm,* 537 S.W.2d 388 (Mo. banc 1976); *State ex rel. Intercom Gas, Inc. v. Public Serv. Comm'm,* 848 S.W.2d 593 (Mo. App. 1993).

C. JDA Amendment To Share Profits By Generation

AmerenUE's major change to the Commission's calculation of benefits and detriments was to change the $7.0 million dollar benefit from its offer to share profits based on generation rather than load to a higher, forecasted level of $24.0 million. This is another instance of where AmerenUE uses a multi-year approach to put in a high estimate when such an approach is to AmerenUE's advantage. The Commission's Report And Order is clear with respect to its intent on this matter; the Commission intended to include a conservative calculation. The Staff understands the Commission's Report And Order to state that in order to protect Missouri ratepayers, it is prudent to be conservative in the Staff's estimate of benefits rather than to use the value of benefits put forth by AmerenUE. The Staff agrees with the Commission particularly

with respect to this area where the $24.0 million of profits is based on AmerenUE's projections of market prices rather than on actual or experienced market prices for electricity, and the $7.0 million in benefit is based on actual market prices from 2002. (Ex. 6, Voytas Sur., p. 4, ls. 13-19).

D. Staff's Recommendation for Changes to the Commission's Cost-Benefit Analysis Charts/Tables

Based on the arguments made above, the Staff agrees with the Commission's cost-benefit analysis chart/table that appears on page 50 of its October 6, 2004 Report And Order. This chart correctly represents a comparison of the benefits and the potential costs (detriments) if the Metro East transfer is implemented without any conditions beyond changing the JDA to distribute profits based on generation.[4]

The Commission's cost-benefit analysis chart that appears on page 58 of its October 6, 2004 Report And Order is meant to be a comparison of the benefits and costs if the Metro East transfer is implemented with the additional conditions set out by the Commission in its Order. There is one modification that should be made to this table. If the second amendment to the JDA is made that requires energy transferred to meet the Metro East load to be priced at market rather than at incremental cost, then the difference should be included as a benefit. The table below shows how that would change if the conservative estimate of $10 million is added as the benefit from making the second change to the JDA.

[4] The Staff would recommend removal of the question mark in the detriment column for the JDA requirement that surplus AmerenUE power be available to Ameren CIPS at incremental cost in the cost-benefit analysis chart on page 50 of the Commission's October 6, 2004 Report And Order. This detriment is already reflected in the low level of benefits for generation-related savings.

Description	Benefits	Detriments
Generation-related savings	$0.900 million	--
JDA amendment to share profits by generation	$7.000 million	--
Transmission related savings	$2.033 - 3.089 million	--
Decommissioning Trust Fund issues	--	--
JDA requirement that surplus UE energy be transferred at market price	**$10.000 million**	--
Possible transmission charges	--	**$0**
Sauget remediation	--	**$0**
Future environmental capital investments	--	$5.100 – 7.000 million
Natural gas: possible Fisk/Lutesville impact	--	$0.010 million
Natural gas: possible power plant impact	--	$0.098 million
TOTALS:	$19.933 – 20.989 million	$5.928 – 7.828 million
DIFFERENCE:	**$12.105 – 15.061** million	

The Staff would point out that if AmerenUE's argument that there will be no transferred energy to serve the Metro East load is correct, which it is not, the impact on the above table would be to reduce the $10 million benefit to zero, and the chart that appears on page 58 of the Commission's October 6, 2004 Report And Order would mathematically be correct.

VI. STAFF RESPONSE TO OTHER SPECIFIC ISSUES RAISED BY AMERENUE

A. AmerenUE's Least-Cost Analysis Is Flawed

If the Commission were to consider AmerenUE's October 15, 2004 proposals, the record should be reopened and AmerenUE directed to perform its least cost analysis: (1) on current data, rather than on a test year of the twelve (12) months ended December 31, 2002, in a manner that AmerenUE deems appropriate, and (2) on current data, rather than on a test year of the twelve (12) months ended December 31, 2002, in a consistent and reasonable manner as Dr. Michael S. Proctor proposed in these proceedings that AmerenUE could have and should have performed. AmerenUE performed its least cost analysis on the basis of: (1) a multi-year analysis

for its non-Metro East transfer, addition of combustion turbine generator (CTG) capacity option [5] and (2) a single-year analysis for its Metro East transfer of 6 percent (6%) of existing AmerenUE generating capacity option. (Tr. 1271, ls.7-14, Vol. 13; Tr. 1625, ls. 19-22, Vol. 17).[6] AmerenUE was inconsistent in its approach. AmerenUE's least cost analysis did not include a factor for cost escalation for fixed operations and maintenance (O&M) expense for the Metro East transfer option, but did include a cost escalation factor for fixed O & M expense for the non-Metro East transfer CTGs option. (Tr. 1625, ls. 19-22, Proctor, Vol. 17; Tr. 1621, ls.21 – Tr.1623, ls. 25, Voytas, Vol. 17; Tr. 1819, ls. 8-25, Kind, Vol. 18HC). The test year approach originally used by AmerenUE is not appropriate for addressing the issues that it is now raising in its Application For Rehearing And Alternative Motion.

In response to questions from Judge Thompson at the evidentiary hearing, Dr. Proctor stated that AmerenUE could have and should have extended for at least a five (5) year period: (1) its load forecast and fuel savings analysis and (2) its "mark to market" analysis. (Tr. 1782, ls.

[5] AmerenUE, in previous resource planning studies, determined that if it did not transfer the Metro East service area it would need to add capacity to serve its current load including the load in the Metro East service area, and that adding CTGs would be the least cost method for meeting the reliability requirements for serving its existing load. (Ex. 14, Proctor, p. 3, ls. 9-21).

[6] AmerenUE performed a one-year (12 months ending December 31, 2002) snapshot approach and extrapolated that analysis over 25 years, without considering the effect of load growth (thereby not taking into account: (a) the decrease over time of AmerenUE baseload capacity available to either serve the remaining AmerenUE load or to be sold into the wholesale spot market when it is not needed to serve that load, under the Metro East transfer scenario, or (b) the need over time for the capacity and the running of the CTGs that would be added to serve load, under the non-Metro East transfer, addition of CTGs option) to evaluate the costs, capacity and variable production costs, of the Metro East transfer. (Ex. 14, Proctor Rebuttal, p. 6, ls. 25 – p. 10, ls. 2; Tr. 1782, ls. 15-17, Vol. 18HC, Proctor; Tr. 1784, ls. 3 – Tr. 1785, ls. 24, Vol. 17, Proctor).

Dr. Proctor further testified that for its non-Metro East transfer addition of CTG capacity analysis, AmerenUE could have and should have performed further analysis based on: (1) phasing in the CTG capacity over a three-year period, rather than all CTG capacity of 597 MWs being needed in the same year, and (2) "mark to market" analysis being based on the CTGs running to sell into the spot-market anytime the spot-market price of electricity is greater than the incremental cost of running the CTGs, rather than assuming that the CTGs would only run 50% of the time to sell into the spot-market. AmerenUE should have performed specific production cost analysis to support its assumption that the CTGs would only run 50% of the time to sell into the spot-market. (Ex. 14, Proctor Rebuttal, p. 11, ls. 14 – p. 13, ls. 12; Tr. 1782, ls. 15-17, Vol. 18HC, Proctor; Tr. 1784, ls. 3 – Tr. 1785, ls. 24, Vol. 17, Proctor).

15-17, Vol. 18HC, Proctor; Tr. 1784, ls. 3 – Tr. 1785, ls. 24, Vol. 17, Proctor). On April 14, 2004, AmerenUE filed AmerenUE's Reply To Staff's List Of Conditions.[7] At page 27 of AmerenUE's Reply To Staff's List Of Conditions, AmerenUE states, in part, as follows:

> In response to Judge Thompson's questions of him during the last day of the hearings in this case, Dr. Proctor suggested that 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.

Dr. Proctor testified that AmerenUE did not perform its (1) non-Metro East transfer, addition of combustion turbine generator (CTG) capacity analysis[8] nor its (2) Metro East transfer of 6 percent of existing AmerenUE generating capacity analysis consistently and reasonably for purposes of comparing the economics of these two capacity options.

B. Relationship of Multi-Year, Least-Cost Analysis to AmerenUE's Application For Rehearing And Alternative Motion

In its Application For Rehearing And Alternative Motion, AmerenUE makes arguments involving additional multi-year "analysis" (e.g., paragraphs 35-38), which it has not performed other than on a "back of the envelope basis" for use in its Application For Rehearing And Alternative Motion.[9] In essence, the "back of the envelope" calculations made by AmerenUE in its Application For Rehearing And Alternative Motion do not constitute a proper methodology for determination of the issue being addressed – the amount of energy from AmerenUE generating units that would be transferred to AmerenCIPS to serve Metro East customers.

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[7] April 14, 2004 AmerenUE's Reply To Staff's List Of Conditions Necessary For Staff 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.

[8] AmerenUE in previous resource planning studies determined that if it did not transfer the Metro East service area it would need to add capacity to serve its current load including the load in the Metro East service area, and that adding CTGs would be the least cost method for meeting the reliability requirements for serving its existing load. (Ex. 14, Proctor, p. 3, ls. 9-21).

[9] In fact, most of that analysis is from AmerenUE's 10-K, which the Staff had marked as Exhibit 59 at the hearing.

AmerenUE states in paragraph 38 of its Application For Rehearing And Alternative Motion that "there is therefore no detriment arising from the transfer that relates to requiring or not requiring the second JDA amendment at all." It appears that AmerenUE's position is that no energy will be transferred to serve its former Metro East retail customers. This assertion is false; it simply cannot be the case. An appropriate multi-year analysis will show that energy transfers from AmerenUE to AmerenCIPS will occur, not only for the snapshot test period, which AmerenUE selected as the basis for its case (i.e., the twelve (12) months ending December 31, 2002), but also for the out years beyond the test period. There are two arguments that provide strong support for the Staff's position that AmerenUE's assertion is false.

1. AmerenUE's Argument Confuses Missouri Customer's Need For Capacity With The Transfers Of Energy Under the JDA.

As noted by Public Counsel in its October 22, 2004 Response To AmerenUE's Application For Rehearing, AmerenUE's argument in its Application For Rehearing And Alternative Motion does not make the necessary distinction between energy and capacity. The JDA addresses the transfer of energy, not the transfer of capacity. The JDA requires AmerenUE to provide energy to the former AmerenUE Illinois retail customers, after the proposed Metro East transfer, during hours when the energy form AmerenUE generation capacity is not needed to meet AmerenUE's Missouri retail load requirements. Even if the proposed Metro East transfer occurs and the EEInc. contract terminates on December 31, 2005, if AmerenUE needs the generation capacity formerly serving AmerenUE's Illinois retail customers to now provide capacity for its Missouri retail customers, AmerenUE will not need all of the energy from this capacity to serve its Missouri retail customers 100% of the time.

On this point, AmerenUE's Reply To Office Of The Public Counsel's Response To AmerenUE's Application For Rehearing states: "None of that changes the fundamental fact that

these additional 4,166 GWh's will come from the 6% additional generation freed-up by the transfer, and none of that changes the fact that but for the transfer, that energy which Missouri will need would not be available to Missouri." AmerenUE is incorrect in all of its statements. The additional 4,166 GWh's of load growth does not come from generation capacity that is freed-up by the Metro East transfer. Again, AmerenUE is confusing energy and capacity. What does happen is that the load growth is served from whichever generation units of AmerenUE have the lowest cost energy available. This may or may not be from the 6% capacity made available by the Metro East transfer. Also, absent the Metro East transfer, the energy needed to serve this load growth would still be available to Missouri. As AmerenUE's own case shows, the issue in the transfer is AmerenUE's need for capacity, not energy, and absent the Metro East transfer that capacity need would be filled by combustion turbine peaking capacity. Moreover, AmerenUE's own testimony in this case rebuts the arguments that it is now making in its post-hearing pleadings.

2. Energy Transfers From AmerenUE To Metro East Load Will Continue To Occur In the Future Even With Load Growth And The Termination Of The Contract With EEInc. For Power From The JOPPA Generation Facility.

Mr. Nelson's workpapers to his surrebuttal testimony show that there most definitely will be transfers of energy to serve the proposed former AmerenUE Metro East retail customers. Those workpapers were marked and received into evidence as Exhibit 51.[10]

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[10] Mr. Nelson testified that in July 2003, AmerenUE promised the Staff that the JDA would be analyzed and AmerenUE would report back to the Staff. Except for one page of Exhibit 51, which Mr. Nelson stated was subsequently provided to the Staff, Exhibit 51 is the report on the JDA that AmerenUE provided to the Staff and Public Counsel on January 15, 2004. (Vol. 9, Tr. 826, ls. 23 – Tr. 828, ls. 23, Nelson).

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Exhibit 51 also illustrates that the issue, raised at this late date by AmerenUE in its Application For Rehearing And Alternative Motion, can only be measured by the type of multi-

year analysis that Dr. Proctor proposed in his rebuttal testimony and at the hearing. Because AmerenUE declined to submit such a multi-year analysis, what the Staff cannot know is the exact magnitude of these energy transfers for years beyond the test period. However, for the twelve (12) month test period ending December 31, 2002 used by AmerenUE, Dr. Proctor testified that:

> The JDA has a significant impact on the economics of the proposed Metro East transfer. As a part of the transfer of the Metro East assets to AmerenCIPS, the Metro East load will also be transferred to AEM. Under the current JDA, the joint unit commitment and dispatch will remain unchanged. However, the native loads for AmerenUE and AEM will change. AmerenUE's native load will decrease and AEM's native load will increase by the amount of the Metro East load. Thus, the transfer of energy from AmerenUE's generating resource to serve AEM's load will increase and the amount of energy from AEG's resources to serve AmerenUE's load will decrease. In addition, the amount of profits from off-system sales going to AmerenUE will decrease and the amount of profits from off-system sale going to AEM will increase because of the change in native loads. It is also likely that a smaller portion of off-system purchases will be allocated to AmerenUE and a larger portion to AEM.

(Ex. 14, Proctor, Reb., p.15, ls. 5-16).

> … The current pricing of energy transfers at incremental cost instead of market price is detrimental to the Metro East transfer in that all of the Metro East load that is currently being served by AmerenUE generation would continue to be served by AmerenUE generation at incremental cost. Thus, AmerenUE generation that is released by the transfer would not be able to be sold into the spot market at competitive prices, but would instead be sold to AEM at below market price…

(Ex. 14, Proctor, Reb., p. 16, ls. 2-7).

While the above statements are a true description of the test year analysis provided by AmerenUE as its least cost analysis, the only amendment to the above description that would be necessary for a description of an appropriate multi-year analysis is that an analysis needs to be performed to determine the level at which the Metro East load that is currently being served by AmerenUE generation would continue to be served by AmerenUE generation at incremental cost. The analysis that needs to be performed is a production cost model run which would

simulate the dispatch of AmerenUE's and AEG's generating units to serve the total native load of AmerenUE and AmerenCIPS. The production cost model run would be able to identify the amount of energy (kwhs) that is being transferred from AmerenUE's generating units to AmerenCIPS's and AEM customers.

It should be noted that no matter how small or how large the amount of the Metro East load being served by AmerenUE generation is in the out years, this still remains a detriment as AmerenUE ratepayers will be denied the opportunity to sell that energy to the market at market prices and instead will be required under the JDA to transfer that energy to the Metro East load at incremental cost. This economic loss is a detriment, the only question that remains is how large of a detriment is it.

The Staff would like to point out that while the Commission included providing energy to AmerenCIPs at incremental cost as a detriment in its table of costs and benefits (page 50 of the Commission's Report And Order), the Commission was not able to quantify the dollar level of the detriment, and it was effectively treated as zero. Thus, despite the Commission's characterization of the detriments as a dollar measure of the case where "all of the potential negative impacts do actually occur," the impact from the pricing of transferred energy at incremental cost is missing. Any additional information gathered from a multi-year analysis that would help to quantify that detriment would only result in the difference being an even larger detriment than what the table currently indicates.

With respect to another area, it should be noted that the Commission has accepted in its October 6, 2004 Report And Order, the Staff's position that the addition of 330 MWs of CTGs at Venice, Illinois and the termination of the EEInc. contract are linked. AmerenUE, in its Application For Rehearing And Alternative Motion, gives no recognition to the 330 MWs of

CTGs at Venice, Illinois being brought into service for AmerenUE. This would certainly need to be taken into account in a multi-year least-cost analysis. The availability of 330 MWs of CTG's at Venice, Illinois does not resolve the Staff's position that there needs to be an investigation of AmerenUE not continuing to meet its capacity and energy needs though a contract with EEInc. beyond December 31, 2005.

Also, in Public Counsel's October 22, 2004 Response To AmerenUE's Application For Rehearing And Alternative Motion, Public Counsel noted that at page 5, paragraph 9 and page 28, paragraph 54 of AmerenUE's Application For Rehearing And Alternative Motion, AmerenUE refers to the Midwest ISO's Day 2 Markets as not existing yet. On cross-examination Dr. Proctor stated that there are alternatives to pricing system energy transfers other than by using a Day 2 market (Vol. 11, Tr. 932, ls. 8-12; Tr. 936, ls. 1 – 937, ls. 15; *See also* Ex. 10, Voytas Surrebuttal, p. 5, ls. 9-22). Therefore, the Commission should not waiver on its decision regarding the JDA because of the unavailability of what would be the best information regarding the mark-up or profit margin on energy transfers.

C. AmerenUE's Proposals Respecting "Unknown Generation-Related Liabilities" And Second Amendment To JDA

AmerenUE's proposal in its Application For Rehearing And Alternative Motion, Appendix A, respecting the present "Ordered: 6" on costs and liabilities, requires, in addition to the determination of "unknown generation-related liabilities," the determination of "the Missouri ratepayer benefits attributable to the transfer in the applicable test year" (i.e., "overall transfer-related benefits"). AmerenUE volunteers to be required to establish, by a preponderance of the evidence, that the sum of the Missouri ratepayer benefits attributable to the transfer in the applicable test year is greater than 6% of such unknown generation related liabilities sought to be recovered by AmerenUE.

AmerenUE's proposal in its Application For Rehearing And Alternative Motion, Appendix A, respecting the present "Ordered: 4" on the "second amendment to the JDA," requires the determination of "the Missouri ratepayer benefits attributable to the transfer." If AmerenUE is unable to establish, by a preponderance of the evidence, that the sum of the Missouri ratepayer benefits attributable to the transfer is greater than or equal to the net revenue loss to AmerenUE associated with any increase in energy transfers from AmerenUE to AEG at incremental cost on account of the transfer, then AmerenUE will not object to an imputation of revenues. The revenues that would be imputed to AmerenUE would be equal to the difference between the market prices AmerenUE could have received for the increased quantities of energy transferred to AEG due to the transfer, which otherwise could have been sold by AmerenUE at a market price, and the revenues that AmerenUE actually received for such increased quantities of energy priced at incremental cost.

The task that would be required, if the Commission were to accept AmerenUE's proposal, would be akin to determining merger savings arising from a merger. The Staff has consistently taken the position that attempting to track merger savings calls for an impossible counterfactual analysis. The Commission has yet to adopt a merger savings sharing proposal. The closest that the Commission came to doing so was in the merger of Kansas Power & Light Company and Kansas Gas & Electric Company, *Re Kansas Power & Light Co.*, Case No. EM-91-213, Report And Order, 1 Mo.P.S.C. 3d 150, 156-57 (1991).[11]

Although the Commission stated its interest in the merger savings sharing concept proposed by KPL in Case No. EM-91-213, no part of the cost savings tracking system (CSTS) was ever implemented. The Commission stated in its Report And Order as follows:

[11] Kansas Power & Light Company was the predecessor of Western Resources Inc. and at the time of its acquisition of Kansas Gas & Electric Company, Kansas Power & Light Company owned what is now Missouri Gas Energy.

> . . . the Commission will not approve at this time the savings sharing proposal. Staff has persuasively argued that KPL has a strong incentive to view savings as merger–related even if they are not and to classify them in the CSTS so as to increase the pool of savings subject to the sharing plan. Staff demonstrated several flaws in the CSTS which could allow nonmerger savings to seep into the pool of savings to be shared.
>
> The Commission is not opposed to the concept of the savings sharing plan provided that only merger–related savings are shared. The Commission does not wish to discourage companies from actions which produce economies of scale and savings which can benefit ratepayers and shareholders alike. However, the Commission wishes to ensure that savings which would have been offset against the cost of service without the merger benefit ratepayers one hundred percent. To avoid any detriment to ratepayers it is imperative that only savings which would not have occurred absent the merger be shared by ratepayers with shareholders.
>
> . . . [T]he Commission will direct the parties to meet for the purpose of attempting to devise a method of tracking merger-related savings. If the parties are unable to agree on such a system within sixty days, the Commission will hold a hearing to gather the information necessary to decide if any tracking plan can exclude nonmerger-related savings and, if so, which system would be best suited to this purpose.

1 Mo.P.S.C. 3d at 156-57.

. . . .

> IT IS THEREFORE ORDERED:
>
> 9. That the parties to this case be directed hereby to meet for the purpose of attempting to devise a merger savings tracking plan (MSTP) which will ensure that all nonmerger related savings can be excluded from the merger savings to be shared between ratepayers and shareholders. The parties will file this plan with the Commission for its approval on or before November 22, 1991.

Id. at 161. As previously noted, no part of the cost savings tracking system (CSTS) was ever implemented.

If the Commission is inclined to seriously consider AmerenUE's proposal the Staff would note that there is not a particularly good recent history with AmerenUE concerning parties agreeing on a common understanding of terms and conditions in stipulations and agreements. A

prime example of this situation is set out in the recent opinion of the Western District Court of Appeals in *Union Electric Co. v. Public Serv. Comm'n*, 136 S.W.3d 146 (Mo.App. 2004).

From July 1, 1995 to June 30, 1998 and from July 1, 1998 to June 30, 2001 two separate, three-year experimental alternative regulation plans (EARPs) were in effect for AmerenUE. Under each of the EARPs, a rate of return matrix was established whereby depending upon AmerenUE's earnings for a July 1 to June 30 period, the level of earnings determined whether AmerenUE was required to credit on customers' bills any of those earnings. The two EARPs were patterned on an experimental alternative regulation plan that the Commission had adopted for Southwestern Bell Telephone Company, which was in effect from January 1, 1990 to December 31, 1994. The EARPs provided that the parties could go to the Commission for resolution of any disputes respecting a calculation of the earnings.

The Staff and Public Counsel could not resolve with AmerenUE a calculation of AmerenUE's earnings for the third year of the first EARP (July 1, 1997 to June 30, 1998). The matter went to hearing. The Commission rejected several adjustments proposed by the Staff and Public Counsel, but the Commission adopted some of the adjustments proposed by the Staff and Public Counsel. AmerenUE challenged the Commission's adoption of any of the adjustments proposed by the Staff and Public Counsel. In June of this year, the Western District Court of Appeals upheld the Commission's Report And Order. AmerenUE did not seek further judicial review of the Commission's Report And Order concerning the third year of the first EARP.

One provision of the EARPs permitted a party to present to the Commission concerns over any category of costs not previously included in a ratemaking proceeding. UE took the position that this meant the Commission was permitted to resolve a cost that was a type of cost that UE had never before encountered or incurred. Noting that "UE's witnesses were hard-

pressed in the hearing to come up with a single example of a cost fitting their interpretation . . . describing them as 'rare' and 'quite difficult to pinpoint exactly what type of cost would fall under this category,'" the Court stated that "[w]e agree with the Commission's counter-argument that UE's interpretation of this provision would render it meaningless." 136 S.W.3d at 154. The Court held the Commission's Report And Order did not do injustice to the terms of the EARP. *Id.* at 160.

For example, UE took the position that software work performed to modify its computers for the Year 2000 (Y2K) problem should be expensed as a subset of the type of computer software maintenance expenses it had incurred since its first computer was installed and was not a new category of cost never previously included in any ratemaking proceeding. Thus, AmerenUE contended that Y2K computer costs were routine, recurring costs that should be expensed in the year incurred. The Staff took the position that Y2K computer costs were unusual, non-recurring and extraordinary, and, as a consequence, should be amortized over a reasonable period. The Commission adopted the position that the Y2K costs were unusual, non-recurring and extraordinary, and, as a consequence, should be deferred until the Y2K project was completed and all facts regarding the reasonableness and prudence of the costs were available and an appropriate method of recovery could be determined. 136 S.W.3d at 150, 156. The Court found the Commission's Report And Order was reasonable and supported by competent and substantial evidence upon the whole record. *Id.* at 156.

With AmerenUE not agreeing on the definition of simple terms in the context of the EARPs, the chances of AmerenUE and parties agreeing on the definition of the AmerenUE proposed term "unknown generation-related liabilities" is probably zero.

AmerenUE has raised as an issue in this case a matter that is so fundamental to even attempting to reach a resolution of outstanding issues that the Staff questions whether any "agreement" would be worth anything because of what AmerenUE might subsequently argue is or is not part of the agreement. At page 28, paragraph 56 of its Application For Rehearing And Alternative Motion AmerenUE again argues that the Staff's condition on transfer pricing, that energy from AmerenUE to AEG should be priced at market value rather than at incremental cost, "is unlawful because the JDA issues were settled and the settlement was approved by the Commission in its order in Case No. EC-2002-1." The Staff addressed this matter in detail at pages 64-68 of its Initial Brief and will not repeat that response herein, but recommends those pages to the Commission. Nonetheless, the Staff notes as follows. Case No. EO-2004-0108 is not a Staff initiated case, it is an AmerenUE initiated case. The JDA operates to the detriment of AmerenUE and to the benefit of Ameren and AEG. Even though AmerenUE is seeking, by its Application the approval of a transaction that will enhance the detriment effectuated by the JDA on AmerenUE, AmerenUE argues that the Staff and the Commission are bound not to address the imbalance of the JDA, and must permit an even greater detriment to AmerenUE's Missouri retail ratepayers.

D. Future Environmental Capital Investments

AmerenUE argues that since Metro East customers will not be served by energy from AmerenUE plants, the six percent (6%) of possible future costs for environmental upgrades are not a detriment to the Metro East transfer. This argument is incorrect on two points. First, Metro East customers will be served by energy from AmerenUE plants through the JDA, and because these environmental costs are likely to be fixed costs rather than incremental costs, the current pricing of transfers from the JDA will not charge the Metro East customers for their future uses. Second, and most importantly from the perspective of calculating detriments, the

AmerenUE proposal for the Metro East transfer does not charge any of the environmental fixed costs to Metro East customers. This means that six percent (6%) of these costs must be picked up by Missouri customers. When comparing two alternatives this additional six percent (6%) must be included as an additional cost to Missouri customers and must, therefore, be included as a detriment to the Metro East transfer. There is no logical basis for excluding these costs as a detriment to Missouri ratepayers under the proposal that AmerenUE has submitted in this proceeding. Furthermore, the Staff would contend that these capital expenditures would have been properly included in a multi-year least-cost analysis approach instead of a test-year approach where no costs existed.

E. AmerenUE's 6% Solution Should Be Rejected

As noted above, the Staff recommends that the Commission reject AmerenUE's proposed substitute condition involving costs and liabilities as they relate to AmerenUE's Illinois customers. The Commission's decision is correct in requiring AmerenUE's Illinois customers to continue to contribute six percent (6%) towards the costs and liabilities of AmerenUE. In reviewing the Commission's Report And Order, the Staff notes that on page 52 of the Commission's Report And Order, the following language appears:

> … As to allocated costs and liabilities, Staff recommends that amounts allocated to UE's Illinois retail operations shall either transfer to CIPS or be separately tracked by UE in its books and records until either the amount that would have been allocated to Illinois is reduced to zero or UE can demonstrate savings due to the transfer that exceed those amounts. …

The above language may be derived from the April 6, 2004 Staff's List Of Conditions filed with the Commission. Upon further review, the Staff would suggest that the language contained in Staff's List Of Conditions (Ex. 68, pp. 6-7) was probably imprecise in some of the words utilized and as a consequence may have been misinterpreted by the Commission and applied to a larger base of costs and liabilities than what the Staff was intending to indicate. In

the Staff's List Of Conditions regarding the costs and liabilities between AmerenUE Illinois and AmerenUE Missouri operations, there is discussion about costs and liabilities as they relate to costs reflected on the income statement and liabilities reflected on the balance sheet. Specifically, the following language appears:

> AmerenUE shall either transfer these costs and liabilities to AmerenCIPS or shall maintain on its books and records the separate identity and amount of any cost or liability that was previously allocated to AmerenUE's Illinois Business until such time as it can demonstrate that it has reduced the cost or liability below the amount that would have been assigned to AmerenUE's Illinois Business absent the transfer. AmerenUE may also discontinue this reporting requirement upon a finding by the Commission that the Metro East transfer has generated savings that equal or exceed the amount of costs that were previously allocated to AmerenUE's Illinois Business absent the transfer. This effort shall include a total true-up of provisions/reserves included in account 228, Accumulated Provisions and account 253, Other Deferred Credits. …

(Ex. 68, pp. 6-7)

The above language was intended to apply to those liabilities or costs that would be on AmerenUE's balance sheet or income statement at the end of the month preceding the Metro East transfer closing. The Staff proposed this condition as a means to protect Missouri ratepayers from being subjected to unrecovered expenses or under-accrued liabilities as they exist at the time of closing. By suggesting the above condition, the Staff attempted to make sure that the Missouri retail customers of AmerenUE would not be required to pay additional monies, after the closing, for costs or liabilities that had not been properly accounted for on AmerenUE's books. This Staff condition was not intended to cover liabilities or costs that would occur subsequent to the closing, or cover liabilities or costs that occur prior to the closing for which no accrual or expense recovery occurred.

The language "a finding by the Commission that the Metro East transfer has generated savings that equal or exceed the amount of costs that were previously allocated" was not

intended by the Staff, as a proposal that purported savings arising from the Metro East transfer should be tracked and used as an offset to the costs on the income statement or the liabilities on the balance sheet. Thus, what AmerenUE has proposed with its Appendix A to its Application For Rehearing And Alternative Motion is not consistent with the Staff's List Of Conditions.

The Staff would suggest that the sentence noted on page 52 of the Commission's Report And Order should be revised.

F. Ameren's Asset Transfer Agreement (ATA) Produces Unfair Results Respecting Environmental Costs and Liabilities

Contrary to AmerenUE's assertions in paragraph 8 at pages 4-5 of its Application For Rehearing And Alternative Motion, the Asset Transfer Agreement (ATA) was written unfairly by Ameren to the detriment of AmerenUE's Missouri retail ratepayers and approved by the Illinois Commerce Commission (ICC). It is not the responsibility of this Commission to accept an agreement that is detrimental to the public because it has received ICC approval.

In its October 6, 2004 Report And Order, the Commission properly determined that the proposed transfer produces unfair results and is, therefore, detrimental to Missouri retail ratepayers. The terms and conditions presented in the AmerenUE's Application and in the ATA were developed and proposed by Ameren to the ICC before they were presented to this Commission. Importantly, the terms were not developed or ordered by the ICC as a requirement for the ICC's approval of the Metro East transfer. Ameren chose to transfer the obligation to pay future liabilities, including environmental and other costs associated with generation, to Missouri from Illinois. It is no surprise that the ICC approved it. The conditions of this transfer are exactly opposite from how Ameren treated the transfer of asbestos-related liabilities when

generation assets were transferred from CIPS or CILCO to as nonregulated affiliates Genco or AERG.[12] (Ex. 59, p. 154 of 184.)

Ameren says that AmerenUE "will not receive any rate recovery of these liabilities in Illinois rates because the generation will not serve Illinois when these liabilities become (if they become) known and liquidated" (AmerenUE Application For Rehearing And Alternative Motion page 4, paragraph 8) and complains that shareholders are being treated unfairly by the Missouri Commission. If shareholders are forced to bear six percent (6%) of generation liabilities that rightfully belong to the former Illinois customers of AmerenUE, that is the result of the Ameren-drafted ATA, and not due to an unlawful, or an arbitrary or capricious Missouri Commission Report And Order.

AmerenUE's Missouri retail customers are receiving no compensation through the proposed Metro East transfer transaction for assuming additional liabilities as a result of this proposed transaction. An arm's-length transaction would have included compensation or an adjustment to the sale price for acceptance of the additional liabilities. Even though the final amount of these costs cannot be determined at this time, in an arm's-length transaction an estimate could be used to determine an amount acceptable to the parties to the transaction and the regulators, or the liabilities could remain with the original owner. The Commission has been forced to take the place of a party in the transaction and has stated, as a condition to its Report And Order approving the transfer, that the obligation to pay the actual costs of these liabilities belongs to Illinois consumers and the obligation will not be shifted to Missouri retail ratepayers.

The Staff addressed this issue in its Reply Brief at pages 53-54. As stated previously, how Ameren has dealt with its Missouri retail customers is the exact opposite of the way Ameren treated the transfer of asbestos-related liabilities when generation assets were transferred from

[12] AERG is AmerenEnergy Resource Generating Company - a subsidiary of CILCO.

CIPS or CILCO to nonregulated affiliates Genco or AERG as reported in Ameren's 10-K to the SEC for the fiscal year ended December 31, 2003 (Ex. 59, p. 154 of 184):

> … As a part of the transfer of ownership of the generating plants, the transferor (CIPS or CILCO) has contractually agreed to indemnify the transferee (Genco or AERG) for liabilities associated with asbestos-related claims arising from activities prior to the transfer.

In other words, the nonregulated affiliates, Genco or AERG, receiving the assets from CIPS or CILCO will not be responsible for future liabilities even though they will have the benefit of the future generation from the assets. The regulated affiliates, CIPS and CILCO, surrendering the generation assets, will be responsible for future unknown liabilities resulting from events that occurred prior to the asset transfers to the nonregulated affiliates.

Even more recently, Ameren has agreed in Illinois to pay part of Illinois Power Company's future environmental costs as a condition to Ameren receiving approval from the ICC of Ameren's purchase of Illinois Power from Dynegy. In the Hazardous Materials Adjustment Clause ("HMAC") Rider attached as Appendix B to the September 22, 2004 Final Order of the ICC in Case No. 04-0294, it is stated "Ameren Corporation shall create a trust fund to reflect shareholders' contribution to asbestos costs ('HMAC Cost Fund'), with an initial balance of $20 million…" The ICC recognized that future environmental costs, even though the amounts are not known today, should not be paid entirely by ratepayers, even though the transaction between Ameren and Dynegy indemnified Ameren. The ICC approved the Agreement whereby shareholders will bear responsibility for ten percent (10%) of the asbestos costs.

The Commission's Report And Order properly provides that liabilities including environmental costs associated with the transferred generation assets, both capital expenditures and expenses related to remediation and legal claims resulting from events that occurred *prior* to

the transfer, are the responsibility of all parties that benefited from the assets. That is a just and equitable result for all parties including Missouri consumers and correctly resolves AmerenUE's claim that the environmental liabilities may never arise and Staff's position that Missouri retail consumers should be protected from assuming AmerenUE's Illinois customers' responsibility for pre-close liabilities.

G. SO_2 Issue

In paragraph 70 of its October 15 Application for Rehearing And Alternative Motion, AmerenUE takes issue with the following statement regarding SO_2 allowances, which appears on page 33 of the Commission's Report And Order: "The allowances, each of which authorizes the release of one ton of pollutants, are necessary for utilities with coal-fired plants." AmerenUE labels the statement "inaccurate and contrary to the record in this case." AmerenUE reasons that if the utility does not have sufficient SO_2 allowances, it "will have to emit less SO_2, which it would do by burning lower sulfur coal, by installing pollution control equipment, or both." AmerenUE apparently concludes, therefore, that SO_2 allowances are not "necessary" for utilities with coal-fired plants.

The issue, then, centers on the definition of the word "necessary." The Staff believes that, taken in context, AmerenUE's definition is too narrow. The Commission's use of the term is consistent with its previous findings respecting SO_2 allowances. Specifically, the Commission found in *Re Kansas City Power & Light Co.,* Case No. EO-92-250, 1 Mo. P.S.C. 3d 359 (1992) that SO_2 allowances are indeed assets of an electrical corporation's operating system. Inasmuch as an SO_2 allowance is an asset of the electric utility, that allowance is a "necessary" item in the generation of safe and adequate electric service at just and reasonable rates. Although AmerenUE, if faced with a shortage of SO_2 allowances, may be able to remain in compliance through remedial actions such as adding control equipment, fuel switching, and curtailments,

AmerenUE would run the risk of becoming less efficient and reliable, with the attendant detrimental impact on its ability to deliver safe and adequate service at just and reasonable rates.

Although SO_2 allowances may not be "necessary" in the sense that, for example, coal is "necessary" for coal-fired generation of electricity, these allowances are "necessary" for environmental compliance. Indeed, the Staff is not aware of any control technology or coal resources, the use of which will result in a coal-fired generating unit with zero SO_2 emissions. Therefore, the Commission is correct that SO_2 emission allowances, at least a certain number of them, are "necessary" in order for a coal-fired generating unit in particular to comply with the Acid Rain Provisions of the Clean Air Act without penalty, and generally to produce safe and adequate electric service at just and reasonable rates.

H. Decommissioning

"Ordered: 5" of the Commission's Report And Order in this proceeding requires, as a condition of its approval of the Metro East transfer, that AmerenUE "annually contribute $6,486,378 to the Decommissioning Trust Fund with respect to its Missouri-jurisdictional operations pending the further order of this Commission." Stated another way, the Commission's order requires AmerenUE to continue to make an annual contribution of $6,486,378 to its nuclear decommissioning trust fund up until the Commission issues its final order in the next triennial review proceeding. (Tr. 352, ls. 6-17, Vol. 6).

According to paragraph 63 of AmerenUE's October 15, 2004 Application For Rehearing And Alternative Motion, "The Commission totally fails to explain how it can require the Company to increase the Missouri jurisdictional contribution to the nuclear decommissioning fund when the *only* evidence offered on this point was that the contribution was not necessary." (Emphasis in original). Contrary to AmerenUE's assertion, the Commission's action was both lawful and appropriate.

AmerenUE claims that the Commission's requirement is unlawful because it is not supported by competent and substantial evidence. The assertion is incorrect. As noted in the Staff's Initial Brief (pp. 74-75), the record contains a number of reasons why the requested reduction in contribution is inappropriate and detrimental to the public, including the following:

a) The estimated cost to decommission Callaway has increased in each of the triennial reviews conducted to date (Tr. 273, ls. 4-10, Vol. 6), and AmerenUE's expectation is that it will continue to increase for many years. (Tr. 240, ls. 15-19, Vol. 6).

b) AmerenUE's Missouri customers would normally expect to receive more than 91% of any reduction in AmerenUE's contribution. (Ex. 1, Redhage Dir., p.3, l. 16). However, in this instance, the benefit is not realized; rather, 100% of it would go to AmerenUE's Illinois customers.

c) AmerenUE's assertion that a reduced annual contribution would still be within what it calls the "zone of reasonableness" is questionable, given that AmerenUE performed only a limited analysis in making this determination. (Tr. 234, ls. 13-19, Vol. 6).

d) The fact that a contribution level may fall within the zone of reasonableness offers little comfort when one considers that the zone of reasonableness itself is at least as large as the entire amount of AmerenUE's current annual contribution to the trust fund. (Tr. 264, ls. 16-24, Vol. 6).

e) Cutting the funding as requested would be creating a deficit from a level that was previously determined to be reasonable by all parties to the most recent triennial review case. (Ex. 4, Meyer Reb,. p. 7, ls. 5-8).

Clearly, the Commission, upon weighing the record evidence on this matter, was persuaded that a reduction in AmerenUE's contribution to the trust fund at this time would be detrimental to the public.

In its Initial Brief (p. 72), the Staff pointed out that the proposal to cut current AmerenUE contributions to the Callaway plant decommissioning fund in connection with the proposed transfer generally harms Missouri ratepayers in two ways. First, as noted above, the savings resulting from such a cut would go entirely to AmerenUE's Illinois ratepayers, whereas AmerenUE's Missouri ratepayers would receive more than 91% of the reduction if the Commission were to order it in the context of a triennial review. Second, upon completion of the Metro East transfer, AmerenUE would be assuming an additional liability of more than $22 million. (See Staff's Initial Brief, p. 73, n.15 for the calculation of that amount.) One would normally expect that any reduction in funding of the decommissioning trust fund would not be accompanied by the assumption of a liability by AmerenUE. Moreover, in an arm's-length transaction, AmerenUE would never assume a liability of such magnitude, with all of its attendant risk, without due compensation.

Commission rule 4 CSR 240-3.185(3) provides for a thorough analysis every three years in order to determine the appropriate level of the AmerenUE contribution to its nuclear decommissioning trust fund. A Commission authorization of AmerenUE's proposal, as part of the Metro East transfer, to lower the contribution during the period between triennial reviews, on the basis of a relatively cursory analysis, would be detrimental to the public. Further, the effect would be to circumvent the existing Unanimous Stipulation And Agreement in the most recent triennial review proceeding. As noted in the Staff's Initial Brief (p. 79), "this can be used as

precedent in future cases for a party seeking an outcome inconsistent with the agreements previously reached among the parties to the latest triennial review proceeding."

In paragraph 68 of its Application For Rehearing And Alternative Motion, AmerenUE states: "The Company did not agree to contribute the additional $272,554 decommissioning fund contribution, but rather indicated in its Brief that if that condition were imposed alone the Company would go ahead and complete the transfer." However, irrespective of any AmerenUE offer to continue funding of the Callaway plant decommissioning trust fund at the current Missouri and Illinois retail ratepayer level, for the reasons stated hereinabove and as argued in the Staff's briefs based on the record evidence, the Commission was correct in so ordering and should therefore not consider modifying the condition itself.

In "Ordered: 5" of its Report And Order, the Commission states, in part, that the ordered annual contribution of $6,486,378 to the nuclear decommissioning trust fund (Missouri-jurisdictional operations) "is included in . . . AmerenUE's Missouri-jurisdictional cost-of-service for ratemaking purposes *and is established based on the economic and financial input parameters used in the 'Zone of Reasonableness' analysis attached as Schedule 4 to Exhibit 2 received in this proceeding*." (Emphasis added). The Commission has never in the past "specifically made a finding as to whether the economic and financial input parameters used in AmerenUE's zone of reasonableness analysis were valid and acceptable." (Staff's Initial Brief, p. 78). Moreover, such a finding has never been necessary in order for AmerenUE to obtain the desired tax treatment of its contributions to the decommissioning trust fund. (Staff's Initial Brief, p. 79). The Commission went further in its Report And Order than was necessary. The Commission should make clear that the language in the italicized clause above does not constitute an endorsement of the validity and acceptability of the specific financial and economic

assumptions and input parameters to the zone of reasonableness analysis for purposes of future triennial reviews.

I. Access To Books And Records

Regarding the substitute condition that AmerenUE has proposed respecting the JDA, Staff access to books, records, officers and employees, as the Staff proposed with the condition that Staff listed at page 14 of its April 6, 2004 Staff's List Of Conditions,[13] is in the Staff's view important to the operation of AmerenUE's proposed substitute JDA condition regardless of the fact that the Staff is opposed to the Commission adoption of the AmerenUE proposal. Such access to books, records, officers and employees goes to the determination of market price for energy. The Staff is referring to the condition which the Commission rejected at page 58 of its October 6, 2004 Report And Order. The Commission stated at page 58 of its October 6, 2004 Report And Order that "[t]he Commission is of the opinion that this condition is unnecessary because it has not waived the record-keeping requirements of the affiliate transaction rules." The condition that the Staff proposed at page 14 of its April 6, 2004 List Of Conditions, which the Commission rejected at page 58, of its October 6, 2004 Report And Order, is not the same condition as the Staff addressed at page 10 of its October 6, 2004 List Of Conditions. For example, if the Staff wanted to access the records of Ameren Energy Marketing (AEM) to see the prices which AEM was receiving for its sales of energy, AmerenUE might object on the grounds that 4 CSR 240-20.015(4), (5), (6) and (7) do not cover the information sought by the Staff because the information does not involve an AmerenUE affiliate transaction, the information is not in the control, custody or possession of AmerenUE and the information is not

[13] Said document is entitled in entirety Staff's List Of Conditions Necessary For Staff Recommendation That The Commission Approve AmerenUE's Proposed Metro East Transfer.

required to be made available to the Commission under the Public Utility Holding Company Act of 1935 (PUHCA).

AmerenUE's discussion of *AG Processing* adds nothing that has not been previously addressed in the Staff's Initial or Reply Briefs.

J. Natural Gas Costs

The portion of "Ordered: 6" of the Commission's Report And Order, which AmerenUE has called the [5] condition, and which AmerenUE addresses in paragraphs 49, 50, and 51 of its Application For Rehearing And Alternative Motion (i.e., the condition that AmerenUE shall not recover in rates 16 percent of any allocable pre-closing natural gas costs) is reasonable and is not arbitrary and capricious. The calculation of 16 percent is substantiated in the record by taking an allocation applicable to 2003 AmerenUE gas volumes between Missouri and Illinois customers. This calculation can be substantiated through the AmerenUE's 2003 annual report to the Commission (FERC Form 2). Missouri natural gas sales volumes represent 84 percent of total AmerenUE natural gas sales volumes. Staff witness Janis Fischer was asked by Judge Thompson if allocating 6 percent would be fair, at which point Ms. Fischer replied that an allocation appropriate for natural gas liabilities could be based upon revenues, or customers, etc. (Vol. 15, Fischer, Tr. 1443, ls. 18-23). Thus, the calculation of 16 percent is based on volumes as suggested by Ms. Fischer, and this condition is fully supported by competent and substantial evidence.

AmerenUE creates confusion by referring to Mr. Sommerer's testimony regarding the natural gas detriments that the Commission properly included in its evaluation of the detriments. The "condition [5]," as AmerenUE has labeled it, is, in fact, a matter that has been addressed by Ms. Fischer, and, therefore, AmerenUE's comments regarding this condition are misleading. In other words, the condition challenged by AmerenUE was related to testimony from Ms. Fischer

based on a question by Judge Thompson about unknown natural gas liabilities and costs and not based on the separate natural-gas detriment issues addressed by Mr. Sommerer.

In response to paragraphs 51 and 52 of AmerenUE's Application For Rehearing And Alternative Motion, the Staff agrees that Mr. Sommerer's testimony concerning natural gas detriments had nothing to do with an additional 16 percent of gas costs that used to be shared between Missouri and Illinois that would now be allocated to Missouri. The Staff believes the Commission's condition regarding 16 percent relates to natural gas related liabilities and costs, an issue addressed by Staff witness Fischer and discussed above in regard to paragraph 50 of AmerenUE's Application For Rehearing And Alternative Motion. AmerenUE has confused the Commission's condition with the PGA and fuel cost type issues addressed by Mr. Sommerer with the gas related liability issues addressed by Staff witness Fischer. The Commission has properly determined this liability issue and this portion of "Ordered: 6" is reasonable and is supported by the record.

VII. STAFF'S RESPONSE TO AMERENUE'S MOTION FOR CLARIFICATION OF THE COMMISSION ORDER OF OCTOBER 6, 2004

AmerenUE's comments in paragraph 65, pages 30-31 of its Application For Rehearing And Alternative Motion are purely a function of the operation of the JDA and a double standard.

In response to paragraph 66 in which AmerenUE asserts that the Report And Order is incorrect in that it states that AmerenCIPS receives a share of off-system sales profits, the Staff would concur that reference in paragraph 66 should be to the Genco, which is AEG.

Respecting paragraph 69 of AmerenUE's Request For Rehearing And Alternative Motion, the Staff does not necessarily agree that the intent of the conclusions of the Commission's Report And Order is to have Missouri ratepayers support the bonds and related expenses that are secured by assets being transferred to AmerenCIPS, including T&D assets

proposed to be transferred in this case. Pages 28-32 of the Report And Order, Pre-transfer Costs and Liabilities, provides a narrative that distinguishes between the various types of liabilities and on which balance sheet (AmerenUE or AmerenCIPS) these liabilities will appear after the transfer takes place. The AmerenUE liability accounts described on pages 28-32 were first identified in the Supplement Surrebuttal testimony of Ameren's witness Gary S. Weiss, in Schedule GSW-3. The Report And Order on pages 28-32 appears to summarize liability account information from Schedule GSW-3. This information therefore represents AmerenUE's position related to on which balance sheet (AmerenUE or AmerenCIPS) these liability accounts should appear after the transfer takes place. It seems that the intent of the Commission in listing and explaining the transfer of liabilities between AmerenUE and AmerenCIPS resulting from the ATA was to clarify that which was not provided to the Staff until the Supplemental Surrebuttal testimony of Mr. Weiss was filed. The Staff's cross examination of Mr. Weiss provided additional clarification to how liabilities appearing on the balance sheet of AmerenUE would be affected by the ATA.

The Commission does not specifically address liabilities related to debt in the Ordered paragraphs of the Report And Order. AmerenUE has not requested any ratemaking determination from the Commission in its Application with regard to rate of return or capital structure, and, therefore, the treatment of interest expense has not been determined. The Commission's "Ordered: 8," page 61 of the Report And Order states:

> That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions or expenditures herein involved, except as is expressly stated to the contrary. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

This affirms the Staff's position as Staff witness Ronald L. Bible stated on page 3, lines 16-24 of his Rebuttal testimony (Ex. 3):

> …Staff recommends that if the Commission approves the transfer, the transaction should be approved with the condition that nothing in the Commission's order shall be considered a finding by the Commission of the value of this transaction for rate making purposes, and that the Commission reserves the right to consider the rate making treatment to be afforded these transactions and their results in cost of capital, in any later proceeding.

At page 31, paragraph 67 of its Application For Rehearing And Alternative Motion, AmerenUE states that the output of its Keokuk, Iowa generating plant is 134 MWs, not the 12 MWs shown on page 23 of the Commission's Report And Order. The Staff agrees and would refer the Commission to Exhibit 59, page 22 of 184 where the net kilowatt capability of the Keokuk, Iowa facility is shown as 134,000 kvs or 134 MWs.

VIII. AMERENUE'S QUESTIONS TO THE COMMISSION REGARDING THE TWO JDA AMENDMENTS ORDERED BY THE COMMISSION

At paragraph 71, page 32 of its Application For Rehearing And Alternative Motion, AmerenUE asks that the Commission clarify: (1) whether the Metro East transfer may proceed pending AmerenUE's best efforts to obtain regulatory approvals respecting the first JDA amendment and (2) whether the second JDA amendment is required beyond the December 31, 2005, termination of AmerenUE's contract with EEInc. for capacity and energy from the Joppa, Illinois generating facility. Regarding item (1), if AmerenUE proceeds with the transfer, and Public Counsel appeals and prevails on appeal, then AmerenUE is at risk as was Aquila, Inc. in the *AG Processing* case. Regarding item (2), the Commission should not relieve AmerenUE from complying with the second JDA amendment. The Staff and Public Counsel dispute AmerenUE's assertion that the applicability of the second JDA amendment does not survive the December 31, 2005, termination of AmerenUE's contract with EEInc. Even if AmerenUE is correct, which it is not, there would be no harm in the second JDA amendment continuing

beyond December 31, 2005, and would provide some level of protection for dealing with this matter when it is shown that AmerenUE's assertion is incorrect.

IX. STAFF'S RESPONSE TO PUBLIC COUNSEL'S APPLICATION FOR REHEARING

In paragraph A of its Application For Rehearing, Public Counsel raises the single overarching issue in this case, that AmerenUE's least-cost analysis is very seriously flawed. Public Counsel's pleading points to the fundamental problem with this case - that AmerenUE's least-cost analysis is fundamentally unsound in that it failed to address all relevant items and did not entail a multi-year analysis of the Metro East transfer option. The Staff notes that individual adjustments to such a deficient analysis are not a solution. Isolated corrections to such a flawed analysis do not rise to the level of performing an appropriate least cost analysis. The best approach would be to reopen the record and order Ameren UE to perform a least cost analysis consistent with the recommendations of Staff witness Dr. Michael S. Proctor.

In paragraph B, page 3 of its Application For Rehearing, Public Counsel raises the issue of the tax impact of SO_2 emissions allowance revenue and indicates that the Commission should have reduced the impact of SO_2 emission allowance revenues in its cost benefit analysis by the amount of taxes that AmerenUE would have to pay on the revenues earned on the sale of allowances. The Staff would agree that this is another flaw in AmerenUE's least cost analysis that the Commission should take into account. The Staff would refer the Commission to the Staff's comments in the immediately preceding paragraph.

Paragraph C in Public Counsel's Application for Rehearing raises the EEInc. issue, i.e., AmerenUE's/EEInc.'s/Ameren's decision not to use the 405 MW of capacity from the Joppa, Illinois generating plant to supply AmerenUE's load after December 31, 2005. The Staff's position is that EEInc. remains an outstanding matter and although its resolution is not necessary

to the resolving the instant case, the Staff continues to recommend that this issue be addressed through a separate investigation directed by the Commission to be conducted by the Staff. AmerenUE has belatedly found a use for the EEInc. issue to assault the Staff's proposed second JDA amendment.

In response to Public Counsel's paragraph D, the Staff agrees with Public Counsel's comment that the Commission should amend its Report And Order respecting its language regarding long-term debt. In its Report And Order at page 30, the Commission states:

> Interest on long-term debt will stay with UE; there is no cost of service impact because the interest is "below the line." Short-term debt will also stay with UE. The interest expense is "below the line" and thus excluded from cost of service. . . .

The Staff agrees with Public Counsel that these statements are not consistent with traditional cost of service ratemaking because interest expense is included in the calculation of the overall rate of return. The Commission has allowed interest expense to be included in rates as documented in many Reports And Orders. An example of the Commission's determination follows:

> This issue concerns the amount of SJLPC's tax deductible interest expense. The interest expense is calculated by multiplying the jurisdictional rate base by the weighted cost of debt. This method assures that the amount of interest expense used in the calculation of income tax expense, for ratemaking purposes, equals the *interest expense the ratepayer is required to provide the company in rates*. Since the revenue requirement is based on a rate of return computation, the interest synchronization method allows an interest deduction consistent with the rate of return computation which is applied to rate base.

Re St. Joseph Light & Power Co., Case Nos. ER-93-41 and EC-93-252, Report and Order, 2 Mo.P.S.C.3d 248, 258 (1993); Emphasis added.

The Staff does not necessarily agree with Public Counsel that "excluding interest from the rate of return calculation would produce rates of return that were unlawful and unreasonably

high." Staff cannot agree because the section of the Report And Order, Pre-transfer Costs and Liabilities (pages 28-32), from which Public Counsel references the quote, was to identify the effect liabilities appearing on the balance sheet would have in future rate cases. The Supplemental Surrebuttal testimony of Ameren witness Gary S. Weiss, Schedule GSW-3, may have been used as a source document for the Report And Order language. The lack of clarification related to interest expense in Schedule GSW-3 presents the need for clarification in the Report And Order.

As noted above, AmerenUE has not requested any ratemaking determination from the Commission in its Application with regard to rate of return or capital structure, and, therefore, the treatment of interest expense has not been determined. The Commission's "Ordered: 8," page 61 of the Report And Order states:

> That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the properties, transactions or expenditures herein involved, except as is expressly stated to the contrary. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding.

Staff witness Bible stated on page 3, lines 16-24 of his Rebuttal testimony (Ex. 3):

> …Staff recommends that if the Commission approves the transfer, the transaction should be approved with the condition that nothing in the Commission's order shall be considered a finding by the Commission of the value of this transaction for rate making purposes, and that the Commission reserves the right to consider the rate making treatment to be afforded these transactions and their results in cost of capital, in any later proceeding.

In paragraph E, Public Counsel raises the issue of using a RFP to obtain resources to meet the long-term needs of AmerenUE. Staff does not agree that it is an issue that is necessary to address in the Commission's Report And Order. While a RFP may be a solution for short-term energy needs, a RFP is not a solution that Staff considers reasonable to meet a utility company's long-term power requirements.

X. CONCLUSION

Based on the Commission's October 27, 2004, Order Directing Filing, the Staff has provided above the legal and technical commentary requested. The Staff, in conclusion, would note that to some degree the Commission has fashioned a result which borrows from the positions of AmerenUE, the Staff and Public Counsel. For some reason, adjudicators seem to like to say that if all of the parties are unhappy with a result, the adjudicators must be doing something right. Although in public utility regulation there may not necessarily be only one correct answer, that does not mean that the adjudicator has complete freedom to create a mix from the various positions presented. The adjudicator is rarely presented a situation in a multifaceted case where it must choose either the position in entirety of party A or the position in entirety of party B. Nonetheless, mixing the positions of the parties may create on occasion an unreconcilable hybrid. Missouri courts have opined as follows:

> An administrative agency is not bound by stare decisis. *State ex rel. Churchill Truck Lines, Inc. v. Public Serv. Comm'n*, 734 S.W.2d 586 (Mo.App.1987). "Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable." *Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo.App.1980). It is the impact of the rate order which counts; the methodology is not significant. *State ex rel. Arkansas Power & Light Co. v. Public Serv. Comm'n*, 736 S.W.2d 457 (Mo.App.1987).

State ex rel. GTE North, Inc. v. Public Serv. Comm'n, 835 S.W.2d 356, 371 (Mo.App. 1992)

> It is not the methodology, but the impact of the rate order which counts. *State ex rel. Associated Natural Gas Company v. Public Service Commission of Missouri*, 706 S.W.2d 870, 879 (Mo.App.1985). If the total effect of the rate order cannot be said to be unjust or unreasonable, judicial inquiry is at an end. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S.Ct. 281, 287, 88 L.Ed. 333 (1944). No methodology being statutorily prescribed, and ratemaking being an inexact science, requiring use of different formulas, the Commission may use different approaches in different cases. *Associated Natural Gas*, *supra*, at 880.

State ex rel. Arkansas Power & Light Co. v. Public Serv. Comm'n, 736 S.W.2d 457, 462 (Mo.App. 1987).

In endeavoring not to reargue positions that it did not prevail on, but to provide the commentary and analysis that the Commission has requested, it is not always possible for the Staff to avoid mentioning those positions. It is not the intent of Staff to relitigate issues in this pleading.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 12th day of November 2004.

/s/ Steven Dottheim