BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariffs To Increase Its Revenue for Electric Service	)))	Case No. ER-2012-0166

REPLY BRIEF OF
THE MISSOURI INDUSTRIAL ENERGY CONSUMERS

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I. Policy Considerations Regarding Ameren Missouri's Request for Extraordinary Regulatory Changes

The MIEC demonstrated in its Initial Brief that Ameren Missouri's tale of economic woe is both short-sided and misguided. That brief notes that this Commission has generously bestowed on Ameren Missouri many regulatory sweeteners that have and will better Ameren Missouri's bottom line, largely to the detriment of ratepayers. The evidence does not warrant further regulatory enhancements at the expense of ratepayers. None of Ameren Missouri's arguments in its Initial Brief overcomes those facts.

Ameren Missouri notes that it has relatively low electric rates compared to the rest of the country and that it has lowered its non-fuel expenditures since 2008.[1] It claims that is due to "disciplined management." But Ameren Missouri has made no showing of the factual basis for its lower rates in Missouri. Differences may owe simply to fortuitous circumstances surrounding distant past resource decisions such as having limited nuclear generation, large base-load coal generation, or economies of scale as the single largest Missouri utility. Disciplined management is not evident from Ameren Missouri's recent Taum Sauk incident or in the recent string of large rate increase requests.

Ameren Missouri also notes that it has continued to invest in its system. Specifically, it notes that it has invested approximately $3.2 billion in capital improvements to its system between 2007 and 2011 and that these investments led to measurable operational improvements.[2] Far from an indictment of the Missouri regulatory system, these facts are an admission that the regulatory system in Missouri is working. What these facts show is that this Commission's regulatory policies and authorized rate increases have been adequate to allow continued investment and measurable

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[1] Ameren Missouri Initial Brief, p. 1.
[2] *Id.* at 2.

operational improvements. These facts do not support Ameren Missouri's conclusion that further sweetening of the regulatory framework is needed.

Ameren Missouri's strong earnings are demonstrated by the incentive compensation awarded to its executives. Ameren's 2011 Proxy Statement describes the executive incentive compensation plan, which includes earnings per share targets[3] Ameren's 2011 Proxy Statement Table "Fiscal 2011 Executive Compensation Highlights" shows an annual incentive award of 123.5 percent of the target, and states:

> 2011 annual incentive awards were earned at 123.5 percent of target; this payout reflected strong operational performance by the Company in 2011 that was attributed, in part, to continued disciplined cost management, strong energy center performance and utility rate relief.[4]

Ameren's Board of Directors made the decision to award Ameren Missouri's executives an amount of incentive compensation which was 23.5 percent in excess of target compensation.[5] Why was the incentive compensation so good if the earnings are so bad?

Ameren Missouri ignores cost decreases which offset its cost increases. For example, Ameren issued over $485 million in mortgage bonds at an interest rate of 3.9 percent in September, 2012. Ameren used the proceeds of this bond issue to refinance several bond issues included in its cost structure in this case at lower interest rates.[6] These lower interest rates are not included in the true-up period in this case, which ended July 31.[7] Accordingly, Ameren will retain all the benefits of these interest savings for itself in the amount of approximately $5 million until its next rate case.[8] This savings illustrates how Ameren Missouri profits from same aspects of the Missouri regulatory process that it complains of in this case.

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[3] MIEC Ex. 525, page 65.
[4] *Id.* at page 5.
[5] *Id.* at page 5; Baxter testimony, Tr. 254, ll. 9-12.
[6] MIEC Ex. 526; Baxter testimony, Tr. 307, l. 23 through T309, l. 6.
[7] MIEC Ex. 526; Baxter testimony, Tr. 308, l. 22 – 309. l. 6; Ryan testimony, Tr. 1511, ll. 1-11.
[8] Ryan testimony, Tr. 1509 ll. 21-25; Tr. 1511. ll. 1-11.

Ameren Missouri argues that continued investment in its infrastructure is especially important now.[9] It claims that it now faces a "bow wave of investment needs just to replace the poles, lines, substations, and transformers that are serving current customers but are reaching the end of their service lives."[10] But the record shows that access to capital is not a problem for Ameren Missouri under the current regulatory framework. Bonds are solidly investment grade.[11] When asked to explain how its current needs have been compromised, Ameren Missouri could not identify any inability to finance required infrastructure replacement projects or list any necessary projects that had been deferred.[12] If there really is a "bow wave of investment" in the future, Ameren is telling its investors otherwise as Ameren Missouri's rate base is projected to grow very little between 2012 and 2016 in forecasts presented in June 2012 Investor Meetings.[13]

Ameren Missouri asserts that "regulatory lag" represents a significant obstacle it faces in making the investments needed to meet its investment challenge.[14] But, as indicated above, Ameren Missouri's own evidence shows that it has invested heavily and improved operational performance in spite of the supposed shortcomings of the Missouri regulatory paradigm. Ameren Missouri even goes so far as to assert that "regulatory lag" is a misnomer. It claims that any costs that it incurs between rate cases are not simply delayed, but rather lost forever.[15] But that assertion assumes what the law forbids, namely piecemeal regulation, because it considers only one cost of Ameren Missouri's operation. Adding replacement utility plant actually involves the retirement of older plant that the utility continues to earn a return on, under its existing rates, until the next rate case. Adding replacement plant also reduces reactive maintenance expenses[16] and gives rise to new accumulated

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[9] Ameren Initial Brief at 3.
[10] *Id.*
[11] Gorman Direct, Ex. 507, p. 9, line 26, Sch. MPG-2.
[12] Brosch Direct, Ex. 500, p. 17, ll. 1-15.
[13] Brosch Direct, Ex. 500, p. 24, ll. 16-23; Schedule MLB-7 at page 7.
[14] Ameren Missouri Initial Brief, p. 4.
[15] *Id.*
[16] Brosch Direct, Ex. 500, p. 22, ll. 5-11.

deferred income tax ("ADIT") balances. So Ameren Missouri's existing rates include maintenance expenses that may be much higher than its actual expenses given the retirement of certain plant. The ADIT balances, which represent free money to Ameren Missouri, have been growing rapidly in recent years due to the combined impact of bonus tax depreciation and repairs deductions for tax purposes and also improve Ameren Missouri's bottom line between rate cases.[17]

Ameren Missouri asserts that if the regulatory framework were operating as it should, there should be a roughly equal number of periods when the Company earns above and below its authorized return, at least until, over time, a rate adjustment becomes necessary.[18] It relies on a graph in its Initial Brief to make that point.[19] But Ameren Missouri's presentation of historical ROEs was some of the most complex and confusing evidence in the record. What is clear is that none of these calculations were prepared on a regulatory basis of accounting that removes incentive compensation and other expense normalizations that are routinely employed in setting rates. In calculating earned ROE, it is essential to employ a regulatory basis of accounting, which would include the many adjustments proposed in the Company's filing as well as all incremental adjustments proposed by other parties that are ultimately approved in the Commission's Order. Failure to do so may suggest an apparent attrition problem, when the actual problem is utility management's decision to continue to incur costs that have been determined to be improper by the regulator.[20]

As explained in the MIEC's Initial Brief, the evidence clearly shows that, under Missouri's supposedly outdated regulatory paradigm, Ameren Missouri was systematically and chronically earning <u>more than</u> its authorized return for well over a decade prior to 2006.[21] Moreover, as the

[17] Brosch Direct, Ex. 500, p. 23, ll. 7-13.
[18] Ameren Missouri Initial Brief, p. 6.
[19] *Id.*
[20] Brosch Direct, Ex. 500, p. 13, ll. 1-9.
[21] MIEC Ex. 532.

much discussed June FAC Surveillance Monitoring Report shows, Ameren Missouri reported its ROE as 10.53 percent for the then most recent 12-month period, the period ending June 30, 2012. Staff Ex. 237. The testimony showed that Exhibit 237 was not reporting revenue on a weather normalized basis, nor did it exclude certain unusual items of expense and revenue such as the Entergy refund, certain parts of Callaway refueling costs, incentive compensation costs, advertising costs, or lobbying costs.[22] But the testimony showed that those revenues and expenses would roughly offset each other and that Exhibit 237 was "fair" to show Ameren Missouri's most recent actual return on a regulatory basis of accounting (not including expenses--like Taum Sauk rebuilding expense--that were determined to be imprudent).[23] The reported return of 10.53 percent was higher than Ameren Missouri's authorized return for that period. Remarkably, this most recent earned ROE was reported during a pending rate case review when earnings are expected to be insufficient, before any consideration is given to the earnings improvement that will be directly caused by the rate increase to be ordered in this case.

Ameren Missouri was clearly over-earning for over a decade prior to 2006, just as MIEC Exhibit 532 shows. However, Ameren Missouri observes that in response to an over-earnings case during this period, it settled on a Commission-approved earnings sharing plan, whereby Ameren Missouri was required to refund or credit its over-earnings in excess of 14 percent.[24] The "approved" ROE, Ameren Missouri argues, was thus 14 percent and not 12 percent since it was required to refund or credit only the earnings in excess of 14 percent.[25] That is a complete distortion of the facts. No Ameren Missouri witness disputed that, in fact, its authorized ROE was 12% as listed on Mr. Gorman's graph. Indeed, Ameren Missouri offered its own version of Mr. Gorman's graph, Exhibit 70, where it revised portions of Mr. Gorman's graph, but did not contest Mr.

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[22] Cassidy testimony, Tr. 751.
[23] *Id.*
[24] Ameren Missouri Initial Brief, p. 18.
[25] *Id.*

Gorman's assertion that Ameren Missouri's authorized ROE prior to 2006 was 12%.[26] Simply because Ameren Missouri was allowed to keep part of its over-earnings does not change the fact that it over-earned. Nor does it change the fact that under the supposedly defective regulatory framework, it would have been earning, but for the revenue sharing plan, not only in excess of the 12 percent ROE, but in excess of 14 percent ROE, for many of the years under examination.[27]

Ameren Missouri also attempts to make hay out of the fact that Gorman, like so many of the other witnesses in this case (including numerous Ameren Missouri witnesses) had to revise an exhibit (now MIEC Exhibit 532) because of a calculation error. As Mr. Gorman's testimony shows, he corrected that exhibit on his own,[28] without prompting by Ameren Missouri, and the correction had no impact on the conclusions in his testimony.[29]

Last, Ameren Missouri, in the ROE section of its Initial Brief, argues that the credit rating agencies do not view Missouri's regulatory climate as favorable.[30] Mr. Gorman's testimony lays that claim to rest. It is undisputed that the recent decisions of this Commission have been viewed as credit supportive.[31] He also notes that any poor ratings are just as likely tied to the Commission's disallowance of imprudent costs, such as Taum Sauk and under the FAC, rather than the Missouri regulatory paradigm. That is because regulatory ratings do not differentiate between missed earnings caused by ineffective utility management and missed earnings caused by regulatory practices.[32]

In conclusion, nothing that Ameren Missouri claims in its Initial Brief undercuts the fact that this Commission has already generously provided regulatory sweeteners to Ameren Missouri when specific facts and circumstances warranted departure from traditional regulatory approaches. Nor does Ameren Missouri's Initial Brief provide any reasonable basis to further tip the scale of justice in

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[26] Gorman testimony, Tr. 1689.
[27] MIEC Ex. 532.
[28] Gorman testimony, Transcript 1685.
[29] Gorman testimony, Transcript 1691.
[30] Ameren Missouri Initial Brief, p. 15-18.
[31] Gorman Direct, Ex. 507, p. 61, l. 14 – p. 62, l. 18.
[32] Gorman Direct, Ex. 507, p. 63, l. 4 – p. 65, l. 2.

Ameren Missouri's favor based primarily on recent historical earnings, with no analysis of management prudence or segregation of the costs of Taum Sauk and other management imprudence, during one of the worst economic times in our country's history, while at the same time dismissing over a decade of Ameren Missouri's "over-earnings" prior to that.

II. Cash Working Capital

This Commission should reject Ameren Missouri's cash working capital request, as it results from a fatally flawed collection lag analysis that relies upon a series of demonstrably false assumptions proffered by Ameren Missouri's witness, Mr. Adams. Further, Ameren Missouri proposes to ignore the hard data derived by an actual count of the number of days it takes Ameren Missouri customers to pay their bills – and replaces it with an unverified estimate or projection of Ameren Missouri's collection lag. Ameren Missouri's proposal is analogous to a political party asking an election committee to ignore an actual vote count, and to decide an election based on that party's poll of likely voters. Ameren Missouri's deficient proposal should be rejected.

Moreover, Ameren Missouri's proposal remarkably seeks cash working capital for expenses that it will not incur. That is, it seeks recognition for income taxes that it will not be required to pay. Ameren Missouri's request is untenable.

Flawed Collection Lag Analysis

Ameren Missouri's collection lag analysis lacks merit and should be rejected. More than 25 years ago, Ameren Missouri created a proprietary report (the CURST Report) that records the *actual* (not estimated) customer payments of all its own customers.[33] The results from the CURST Report are superior to any alternative, as the Report measures actual customer payment habits for Ameren Missouri's entire customer base. The CURST Report does not rely on any assumptions, estimates or

[33] Meyer Surrebuttal, Ex. 511, p. 22, ll. 5-8

projections to derive Ameren Missouri's collection lag. It presents the actual collection lag, measured by the reality of customer payments. Since the inception of the Report, Ameren Missouri has relied upon it to determine how long customers take to pay their bills. Despite the fact that Ameren Missouri has not discovered a single discrepancy in the results of the Report, and cannot point to even one customer who is excluded from the Report,[34] Ameren seeks to replace the Report with a baseless methodology constructed by its consultant, Mr. Adams. Notably, Mr. Adams has repeatedly sponsored the results of the CURST Report in several prior rate cases, including ER-2010-0036, ER-2008-0318, GR-2007-0003 and ER-2007-0002.[35] In these cases, the collection lag supported by Mr. Adams ranged from 20.11 days to 21.78 days.[36]

In its Initial Post-Hearing Brief, Ameren Missouri argues that the Commission should adopt Mr. Adams' study because he "analyzed the collection lag using three different methods with each method resulting in a collection lag substantially higher than those calculated using the old CURST Report."[37] Ameren Missouri's argument begs the question it seeks to answer. In other words, Ameren Missouri's argument is premised on the very question at issue - whether Mr. Adams' methodologies are sound. All three of his methodologies suffer from glaring omissions that serve to artificially inflate Ameren Missouri's estimated collection lag.

Mr. Adams' three methodologies render his study wholly unreliable by omitting key items that artificially inflate his estimated collection lag. Below is a brief summary of the "three different methods" used by Mr. Adams, along with a description of the obvious omissions that result in his artificially high collection lag:

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[34] Tr. 473, ll. 12-23.
[35] Boateng Surrebuttal, Ex. 231, p. 3, ll. 1-14.
[36] *Id.*
[37] Ameren Missouri Initial Brief, p. 112.

1) Aged Accounts Receivables: Mr. Adams first employs an aged accounts receivables analysis.[38] Because aged accounts receivables include uncollectibles (revenues that will never be received), Mr. Adams introduces "an estimate" of the effects of uncollectibles into his formula, to allegedly remove their effects. However, that estimate of uncollectibles used by Mr. Adams was provided by Ameren Missouri itself.[39] What's more, Mr. Adams had no idea how Ameren Missouri arrived at the estimate it provided to him.[40] In other words, the results of Mr. Adams' analysis are predicated entirely on an unverified (and indeed unknown) estimate of uncollectibles provided by Ameren Missouri itself. As such, Mr. Adams' aged accounts receivables analysis presents a classic example of a result-driven (rather than a reality-based) analysis. Respectfully, Ameren Missouri's "estimate" is the very number that is the subject of scrutiny under this methodology. That Ameren Missouri's own consultant cannot affirm (or even describe) the accuracy of that estimate renders his methodology useless.

Furthermore, Mr. Adams' aged accounts receivables analysis assumes (without any supporting data) a mid-point payment period for all customers within each of his arbitrarily assigned payment intervals.[41] For example, the first interval analyzed by Mr. Adams was from 0 to 30 days – and Mr. Adams assumes (without any supporting data) that customers pay at the midpoint, or 15 days. However, both Mr. Adams' payment interval and mid-point assumption are refuted by his own testimony. That is, Mr. Adams testified that 64% of Ameren Missouri customers pay

[38] Adams Direct, Ex. 8, p. 7, ll. 14-15.
[39] Tr. 457, l. 23 – 458, l. 7.
[40] Tr. 474, l. 3 – 475, l. 2.
[41] Adams Direct, Ex. 8, p. 7, ll. 14-18.

within 21 days.[42] That means (if one assumes a midpoint), that the average customer who pays on time pays within 10.5 days (half of 21). Why Mr. Adams chose a 30-day interval and a 15-day midpoint remains a mystery – except that both assumptions artificially inflate Ameren Missouri's estimated collection lag. Mr. Adams' use of unverifiable estimates and unsupported assumptions that blatantly exaggerate the "estimated" collection lag, render his aged accounts receivables analysis totally untenable.

2) Customer Sample: Mr. Adams' customer sample analysis also lacks merit, because it fails to recognize the dollar impact of each customer's bill.[43] For example, consider the following: Customer A pays his $100 electric bill within 5 days. Customer B pays his $20 electric bill in 35 days. A dollar-weighted analysis would produce a collection lag for these two customers of **10 days**.[44] However, under Mr. Adams' analysis (which is *not* dollar-weighted), the collection lag for these two customers is **20 days** (or twice as long as the dollar-weighted analysis).[45] As such, Mr. Adams' failure to dollar-weight his analysis renders it useless for approximating Ameren Missouri's actual collection lag. Furthermore, Mr. Adams' analysis fails to capture any partial payments.[46] In other words, if a customer pays 99% of his bill on day one, and the remaining 1% six months later, Mr. Adams' analysis would find that it took six months for this customer to pay his bill. Accordingly, Mr. Adams' methodology completely fails to reflect the reality of customer payment habits, and provides no evidence of Ameren Missouri's actual collection lag.

[42] Adams Rebuttal, Ex. 9, p. 18, ll. 1-5.
[43] Adams Rebuttal, Ex. 9, p. 14, ll. 3-10.
[44] Customer A - $100 x 5 days = $500. Customer B - $20 x 35 days = $700. ($500 + $700) / ($100 + $20) = 10 days.
[45] Customer A pays his bill in 5 days. Customer B pays his bill in 35 days. (5 days + 35 days) / 2 (number of customers) = 20 days.
[46] Adams Rebuttal, Ex. 9, p. 14, ll. 3-10.

3) Accounts Receivables Turnover: Similarly, Mr. Adams' third methodology is fatally deficient. Mr. Adams purportedly verifies his above-two flawed analyses by comparing them to yet another dubious methodology, the accounts receivables turnover analysis. Remarkably, Mr. Adams' Accounts Receivables Turnover analysis fails to exclude (or even attempt to exclude) uncollectibles![47] Indeed, it even fails to exclude the unverified "estimated" uncollectibles provided by Ameren Missouri. In other words, the estimated collection lag derived by this analysis includes revenues that will *never* be collected. Obviously, including uncollectibles in a collection lag analysis will artificially drive the collection lag estimate significantly higher than it would be if uncollectibles were excluded. As such, Mr. Adams' accounts receivables turnover analysis provides no evidence of Ameren Missouri's actual collection lag in this case.

As demonstrated above, Mr. Adams' analysis proves useless for calculating Ameren Missouri's actual collection lag. He simply generates an exaggerated estimate that is substantially higher than the actual collection lag, which is known through the CURST Report by an actual count of the number of days it takes Ameren Missouri customers to pay their bills. This Commission should not replace the actual count provided in the CURST Report with Ameren Missouri's amplified estimate, which is riddled with glaring and self-serving flaws. In addition, the MIEC would welcome the continuation of the CURST Report for Ameren Missouri and the other major utilities that operate in the state of Missouri.

[47] Meyer Surrebuttal, Ex. 511, p. 21, ll. 5-8.

Fictional Cash Outlay

Ameren Missouri's initial brief provides **only one sentence** in support of its baseless proposal to recognize $2.6M of income tax expense in its cash working capital calculation.[48] Because of its brevity, Ameren Missouri's entire argument (one sentence) is quoted below:

> "Because it is inappropriate to includ (sic) an income tax component in the Company's revenue requirement calculation, consistent application of ratemaking principles provides that there should be an income tax component of the cash working capital requirement."

MIEC will not belabor the arguments provided in its opening brief. However, the Commission should note that Ameren Missouri seeks $2.6M in cash working capital for an expense that it will never incur. That is, Ameren Missouri asks this Commission to recognize income taxes that it will never actually pay.[49] Due to changes in federal law, Ameren Missouri has incurred a zero dollar cash outlay for income tax expense.[50] However, despite paying zero dollars in income tax expense, it is asking this Commission to recognize approximately $2.6M of cash working capital for income tax expense.[51] Ameren's only counter to the obvious inequity of providing it revenue for a non-cash expense is that the "expense" of income tax is recognized as a component of Ameren Missouri's cost of service. That income tax is recognized as a cost of service component bears no relevance whatsoever to the issue of cash working capital, because cash working capital is concerned only with providing the cash necessary to fund the day to day expenses that result in inflows and outflows of cash. In this case, there is no outflow of cash – so why should ratepayers provide $2.6M of cash working capital for a non-cash expense? Even Ameren Missouri's own witness, Mr. Adams,

[48] Ameren Missouri Initial Brief, p 113.
[49] Meyer Direct, Ex. 510, p. 19, ll. 9-19.
[50] *Id.*
[51] Weiss True-Up Direct, Docket Item 375, Schedule GSW-TE 19-1. The Income Tax Calculation included in Ameren Missouri's cost of service does not reflect the tax law changes that would result in zero current income taxes.

admitted that "any Ameren Missouri activity that does not represent a cash in-flow or a cash out-flow should not be included in a lead lag study."[52]

Furthermore, in his surrebuttal testimony, Mr. Meyer explained that Ameren Missouri will not incur any income tax payments due to the current tax laws in effect.[53] Although Staff's Accounting Schedules may reflect current income tax expense, Ameren Missouri, as a result of current tax laws, will pay no current income taxes. Ameren Missouri's inability to provide even a half-hearted argument for the recognition of income tax expense in cash working capital demonstrates that such recognition is completely baseless. As such, this Commission should <u>not</u> recognize income tax expense as an item in cash working capital.

III. Income Tax Issues

<u>Income Tax Benefit of Ameren Corporation Paying Dividends to ESOP Plans of Ameren Missouri Employees</u>

As noted in the MIEC's Initial Brief, the facts are undisputed on this issue.[54] Ameren Missouri includes and recovers from ratepayers the costs of Ameren Missouri's employees' salaries and benefits. Those benefits include, among many other things, the employer match when Ameren Missouri employees contribute to their 401k/ESOP plans and buy Ameren Corporation stock. Ameren Corporation earns its income in part from Ameren Missouri's return on equity and the dividends paid by Ameren Missouri to it. The dividends that Ameren Corporation pays to its shareholders, including those Ameren Missouri employees who have Ameren Corporation stock in their ESOP plans, closely track the dividends that Ameren Missouri pays to Ameren Corporation.[55] The Internal Revenue Code allows a deduction from income for dividends paid on shares held in

[52] Tr. 452, ll. 10-13.
[53] Meyer Surrebuttal, Ex. 511, p. 22, ll. 12-16.
[54] Brosch Direct, Ex. 500, pp. 26-27; Brosch Surrebuttal, Ex. 502, p. 16, ll. 5-12.
[55] Brosch Surrebuttal, Ex. 502, p. 18, ll. 9-14.

employee ESOP accounts. That deduction leads to an annual income tax savings that Ameren Corporation realizes. MIEC Witness Brosch, with the support of Staff and the OPC, proposed a roughly $2.8 million adjustment to the income tax expense included in revenue requirement.[56] However, according to the Staff's Reconciliation dated October 25, 2012, that adjustment is now updated to $3.2 million. Ameren Missouri does not dispute the amount of the adjustment should the Commission agree that it is warranted and has not challenged the reconciliation figure.[57] That amount represents only that portion of the income tax savings to Ameren Corporation attributable to those dividends paid to Ameren Missouri employees' ESOP plans.

Here, Ameren Missouri attributes a fair portion of Ameren Corporation's consolidated income tax liability to Ameren Missouri, and thus its ratepayers as part of utility revenue requirements.[58] So far as the MIEC is aware, no party has challenged that "attribution" on the ground that Ameren Corporation, rather than Ameren Missouri, files federal tax returns and incurs that expense. Mr. Brosch, for purposes of determining the fair portion of Ameren Corporation's consolidated income tax liability to attribute to Ameren Missouri for purposes of setting its future rates, seeks to capture a deduction or tax benefit that flows to Ameren Corporation from dividends it pays to Ameren Missouri's employees' ESOP plans, plans that were funded through rates that incorporated the costs of the employee benefits.

Ameren Missouri's Initial Brief predictably asserts that Ameren Missouri and Ameren Corporation are two distinct entities, and thus a tax benefit that Ameren Corporation enjoys should not inure to the benefit of Ameren Missouri and thus its ratepayers.[59] Significantly, as indicated above, Ameren Missouri does not preserve this distinction when it views the income tax liabilities that Ameren Corporation bears on the income of the Ameren consolidated group. Brosch noted

[56] Brosch Direct, Ex. 500, pp. 4 and 28-9, and Sch. MLB-2; Brosch Surrebuttal, Ex. 502, pp. 16, l. 21 – p. 17, l. 23.
[57] Brosch Surrebuttal, Ex. 502, p. 22, ll. 18-20.
[58] Brosch Direct, Ex. 500, p. 27, ll. 17-20.
[59] Ameren Missouri Initial Brief, pp. 89-91.

that in matching costs and benefits, the income tax benefit at issue directly results from revenue requirement and ROE that Ameren Missouri's ratepayers bear, so the corresponding portion of the resulting income tax benefit attributable to revenue requirement and ROE paid by Ameren Missouri's ratepayers should be included as an adjustment to income tax expense.[60] Staff witness Cassidy agrees with this adjustment for those reasons.[61]

Ameren Missouri cites *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666 (Mo 1950) for the unremarkable proposition that once a rate is collected that collection becomes the property of the utility. That case is inapposite. Here, this Commission's charge is to determine revenue requirement in setting future rates. Mr. Brosch does not suggest that the Commission "take the money" of either Ameren Corporation or Ameren Missouri. What Mr. Brosch has proposed is a realistic view of the allocation of Ameren Corporation's income tax liability to Ameren Missouri in setting Ameren Missouri's future rates.

Ameren Missouri asserts that the benefits of the tax deductions associated with ***all*** compensation paid by Ameren Missouri to its employees are fully reflected in Ameren Missouri's rates.[62] But that is not the case because there is an additional tax deduction that Ameren Corporation receives whenever it pays dividends on any Ameren Corporation stock that happens to be held in the ESOP account of any employee of any Ameren group company – including Ameren Missouri. It is this "ESOP dividends paid" deduction that *Ameren Corporation* receives that is at issue in this case.

Ameren Missouri has failed to show any costs or risks that are borne by shareholders that justify retaining the tax savings from the ESOP deduction for the sole benefit of shareholders. Revenue requirements for Ameren Missouri include salaries for Ameren Missouri employees, the

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[60] Brosch Direct, Ex. 500, p. 27, ll. 4-10.
[61] Cassidy Surrebuttal, Ex. 234, pp. 8-11.
[62] Ameren Missouri Initial Brief, p. 89.

401k match that is an employee benefit and an equity return on Missouri rate base investment that provides income and cash flow to enable the payment of dividends on Ameren stock. None of these costs are disallowed in setting rates. None of these costs are absorbed by Ameren shareholders due to rate case disallowances.[63]

Ameren Missouri argues that its customers have absolutely no entitlement to any credit for Ameren Corporation's ESOP dividends paid deduction because Ameren Corporation pays dividends out of its after-tax profits that belong to it and it alone.[64] Legal arguments about "entitlement" and "ownership" are inapplicable to this issue. Ratepayers clearly do not own Ameren Missouri or any of the cash used to pay salaries, expenses or dividends. Yet a return on equity and recovery of salaries and expenses are routinely included in utility revenue requirements. Tracking money or the ownership of money used to pay dividends is a distraction from the real issue, which is who shoulders the costs and burden of Ameren's 401k plan in Missouri? The clear answer here is that the ratepayers, not Ameren shareholders, bear that burden.

Ameren Missouri claims that Ameren Corporation pays dividends with its "own money," and all of the incidents of ownership of that money, including tax benefits that might be derived from its disposition, are owned by Ameren Corporation, not Ameren Missouri customers.[65] But incidents of ownership would imply that ratepayers should not receive any income tax deductions in calculating ratemaking income tax expense, because they don't "own" the money used to pay utility expenses that are tax deductible. This begs the question of regulatory equity. Stated simply, ratepayers surrender money that they previously "owned" to purchase electricity from Ameren Missouri, which is then used by Ameren Missouri to pay expenses, many of which are tax deductible on the Ameren Corporation federal income tax return. Equity, and the matching of costs and

[63] Brosch Direct, Ex. 500, p. 28, l. 29 – p. 29, l. 4; Brosch Surrebuttal, Ex. 502, p. 23, l. 23 – p. 24, l. 7.
[64] Ameren Missouri Initial Brief, p. 90.
[65] *Id.*

benefits, dictate that the tax benefits attributable to costs that are in fact shouldered by ratepayers should offset those costs that are baked into future rates.

Ameren Missouri claims that if the Commission cannot take the money of the *utility it regulates* once the utility has earned it, it certainly cannot take those earnings from a holding company *it does not regulate* after they have been paid by the utility to its parent.[66] There is no "taking" involved in this issue. Utility or holding company "earnings" are not taken. Rather, an income tax deduction on a consolidated tax return is properly allocated in proportion to the underlying costs giving rise to the deduction, namely the salaries of Ameren Missouri employees and the 401k match, along with the equity return that provides income and cash flow to pay dividends.

Ameren Missouri asserts an analogy to make its point. It claims that if Ameren Corporation had, instead of paying a dividend, used its after-tax profits to purchase tax-free municipal bonds, the MIEC would contend that Ameren Missouri customers should get that tax benefit as well because some of the money used to purchase the bonds may have come from dividends paid on Ameren Corporation's shares in Ameren Missouri, which dividends were funded from Ameren Missouri's earnings.[67] That analogy is off the mark. The MIEC's and Staff's position in this regard has nothing to do with tracing the source of money or changing ownership of earnings or money. The specific facts associated with the allocated Missouri share of the ESOP deduction clearly show that all costs and risks giving rise to the tax deduction and related tax savings <u>are included within the Ameren Missouri revenue requirement</u>. A hypothetical purchase of tax-free municipal bonds by Ameren Corporation would have no such linkage to Ameren Missouri employee salaries, 401k match expenses or the dividend yield element of the equity return that is allowed for Ameren Missouri in setting its rates.

[66] Ameren Missouri Initial Brief, p. 91.
[67] *Id.*

Ameren Missouri offers another analogy, equally off base. It claims that the Staff's and MIEC's position on this issue is akin to a Missouri taxpayer claiming entitlement to a state employee's mortgage interest tax deduction because the money used to pay the mortgage derived from state taxes.[68] Our position is that the tax deduction we are allocating is taken within a consolidated tax return containing income of a regulated public utility. If ratepayers don't get the tax savings produced by the ESOP deduction, Ameren keeps it for shareholders. This is unlike Ameren Missouri's argument, where the mortgage deduction and tax savings occur on the tax returns of employees. We are not seeking anything from Ameren employees, or Ameren Corporation for that matter. We are seeking a properly determined income tax expense that considers not just Ameren Missouri's allocated share of income tax that Ameren Corporation pays, but also an allocated share of the related tax benefits.

Ameren Missouri asserts that the parties propose to "seize" Ameren Corporation's dividends paid tax deduction and hand it to Ameren Missouri's customers.[69] If anyone is proposing to "seize" anything, it is Ameren Missouri, only it proposes to "seize" from its ratepayers more than Ameren Missouri's share of Ameren Corporation's income tax expense. In fact, nothing is proposed for "seiz[ure]." Rather, the issue is how to equitably calculate income tax expenses in setting Ameren Missouri's rates. The principle followed by MIEC and the Staff is that tax deductions should "follow" cost responsibility for the related expenses. In this case, it is Missouri ratepayers who are responsible for Ameren Missouri employee salaries, for Ameren Missouri 401k matching expenses and for a return on equity that allows for the payment of dividends on common stock. That the income tax returns are filed by the parent, income taxes are paid by the parent and dividends are paid by the parent does not stop Ameren Missouri from asserting need for rate recovery of income tax expenses or a return on equity investment from ratepayers. Such false corporate distinctions or

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[68] *Id.* at 92.
[69] *Id.*

arguments about who "owns" the cash used to make such payments should not be accepted as a basis to allow retention of the dividends paid deduction for the sole benefit of shareholders.

In conclusion, Ameren Missouri challenges whether an adjustment to the income tax expense is warranted, not the amount of the adjustment. Ameren Missouri does not dispute the facts underlying the proposed adjustment. Rather, Ameren Missouri's primary objection is that Ameren Corporation, rather than Ameren Missouri, directly paid the dividend at issue. But that argument is disingenuous because the adjustment at issue is to an Ameren Missouri income tax expense, even though Ameren Missouri pays no income tax directly; Ameren Corporation does. No party disputes that Ameren Missouri's share of the income tax that Ameren Corporation pays can and should be attributed to Ameren Missouri for ratemaking purposes. But it is only fair to similarly attribute that portion of an income tax benefit from a deduction that is in part enabled by the ratepayers' payment of rates used to fund the ESOP that holds the shares upon which the subject dividends were paid.

Accumulated Deferred Income Taxes ("ADIT")

As indicated in the MIEC's Initial Brief, this issue arises from the fact that the Internal Revenue Code ("Code") allows for accelerated and bonus depreciation and immediate expensing as "repairs" for tax purposes when the per books accounting for utility plant involves straight line depreciation over many years. Thus, while an asset may be depreciated over its 30 or 40 year useful life for book purposes, the Code allows either immediate expense treatment or rapid depreciation of that asset for tax purposes. The result is that the taxpayer puts off, or defers, its income tax liability for many years because, for tax purposes it is reporting depreciation expense that greatly exceeds the actual depreciation of the assets.[70] "ADIT balances represent a form of zero-cost capital to the utility created by the income tax savings permitted under tax laws and regulations where such

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[70] Brosch Direct, Ex. 500, pp. 30-32.

savings are not immediately 'flowed through' to ratepayers and would benefit only shareholders unless properly recognized as a rate base deduction."[71] Ameren Missouri estimated that through July 2012, Missouri's net ADIT balance for inclusion in rate base will exceed $2 billion.[72] There is no dispute that rate base should be reduced to account for ADIT balances associated with Plant in Service. However, Ameren Missouri has excluded from its ADIT balance the ADIT that was related to CWIP ($6.3 million revenue requirement), and that exclusion is at issue here.

In Ameren Missouri's prior rate case it agreed with Staff to reduce its rate base by the amount of the ADIT for these accounts.[73] There are no changed circumstances that support Ameren Missouri's departure from the last rate case in its treatment of ADIT in this case.[74] Ameren Missouri concedes that it is proposing a new treatment for CWIP-related ADIT and explains that change was not proposed in prior rate cases because "the quantity of ADIT of this type was small: and the company simply ignored it. When it first became significant, the Company simply missed focusing on the situation."[75]

Ameren Missouri advances a number of arguments to support its proposed change in regulatory treatment, but none of its arguments has merit. It first claims that since Missouri law prohibits the inclusion in rate base of its investment in CWIP, it would be inappropriate, and arguably unlawful, to adjust rate base to account for the tax benefits stemming from that same investment.[76] But the legal prohibition against including CWIP in rate base is not new. CWIP has been allowed an AFUDC return in place of rate base inclusion (and a current cash return) for many years in Missouri. CWIP-related ADIT has been included in rate base in setting Ameren Missouri rates for many years, even though the related CWIP assets are not included in rate base. Neither

[71] Brosch Direct, Ex. 500, p. 32, ll. 12-15.
[72] Brosch Direct, Ex. 500, p. 32, ll. 24-25.
[73] Cassidy Surrebuttal, Ex. 235, pp. 11-2; Brosch Direct, Ex. 500, p. 34, ll. 15-19.
[74] Brosch Direct, Ex. 500, p. 35, ll. 1-4.
[75] Warren Rebuttal, Ex. 10, pp. 13.
[76] Ameren Missouri Initial Brief, p. 92.

Ameren Missouri, nor any other Missouri utility, has previously asserted such routine accounting is either inappropriate or unlawful. Ameren's own witness acknowledged these facts and agreed with Mr. Brosch that CWIP related ADIT balances are also included in Illinois rate proceedings.[77]

Ameren Missouri claims that since CWIP cannot be included in rates, today's customers are paying none of the costs associated with plant under construction. Instead, it argues that it has to bear the full cost of that investment until (a) the plant is fully operational and used for service, and (b) the Company can file another rate case and have the new plant recognized in rates, months or sometimes years later.[78] This argument, like Ameren Missouri's other arguments, is not compelling. As indicated in MIEC's Initial Brief, CWIP is allowed a fully compensatory return in the form of AFUDC, a fact conveniently missing in Ameren Missouri's Initial Brief. Ratepayers ultimately repay in cash the full amount of all AFUDC that is reasonably recorded. [79]

Ameren Missouri claims that the proposal to credit to ratepayers the ADIT tax benefits derived from CWIP would unfairly provide the tax benefits associated with new construction to customers who are completely free from paying any of the costs of that construction.[80] That claim fails as well. As noted above, customers are not "completely free from paying any costs of new construction" but are instead obligated to pay an AFUDC return on such construction. The MIEC and Staff treatment of ADIT balances does not "credit the tax benefits derived from CWIP to customers" but instead includes such amounts in rate base in the same manner as all prior Ameren Missouri rate cases. This is necessary because the AFUDC return on CWIP does not account for any CWIP-related ADIT balances and, if the Company's new proposal is adopted, Ameren

[77] Warren Rebuttal, Ex. 10, p. 14, ll. 7-14.
[78] Ameren Missouri Initial Brief, p. 93.
[79] Brosch Direct, Ex. 500, p. 36, ll. 1-19.
[80] Ameren Missouri Initial Brief, p. 93.

Missouri's AFUDC accounting will be excessive and will over-compensate for Ameren Missouri's actual investment in newly constructed plant assets, as explained by Mr. Brosch.[81]

Ameren Missouri also claims that once the plant goes into service, then the costs of CWIP and the tax benefits derived from CWIP can both be reflected in rate base.[82] While that assertion might seem superficially attractive, this argument fails to acknowledge that ratepayers are fully responsible for the "costs of CWIP," first through AFUDC during construction and then via rate base inclusion thereafter. However, because AFUDC is calculated without any recognition of tax benefits, it is essential that CWIP-related ADIT balances be fully recognized in rate base. Failure to recognize CWIP-related ADIT balances in rate base would result in overstatement of AFUDC relative to the utility's actual investment in CWIP. Again, this was fully explained by Mr. Brosch.[83]

The example provided in the MIEC's Initial Brief bears restatement here because it clearly demonstrates the inequity of Ameren Missouri's position:

> Consider a simplified example, where a utility is assumed to be constructing a single asset costing \$1 million over a construction period of one year that will be funded fully at the beginning of construction, but will remain in CWIP and earning AFUDC at an assumed 10 percent rate throughout the year of construction. Assume also that the utility has elected "repairs" tax accounting for this asset, allowing the full cost of the asset to be immediately deducted for income tax purposes in the current tax year. The value of the income tax deduction for this project being treated as a deductible "repair" at a 38 percent federal/state tax rate would result in an immediate \$380,000 income tax deferral to the utility, requiring the accrual of CWIP-related ADIT that reduces the utility's actual out-of-pocket investment in the new asset to only \$620,000 after taxes.
>
> However, AFUDC will be accrued at 10 percent on the gross CWIP cost for the full year the asset is in CWIP, resulting in Plant-in-Service added to rate base of \$1.1 million (\$1 million plus \$100,000 of AFUDC) with no recognition given to the CWIP-related ADIT in accruing AFUDC. Clearly, when the AFUDC rate is applied to the entire \$1 million of gross investment, with no reduction for CWIP-related AFUDC, the utility is fully compensated for its gross investment in this asset. In this example, the \$100,000 of allowed AFUDC on a gross \$1 million investment, when the utility's after-tax net investment is only \$620,000, would significantly overstate

[81] Brosch Direct, Ex. 500, p. 36, l. 15 – p. 38, l. 9.
[82] Ameren Missouri Initial Brief, p. 93.
[83] Brosch Direct, Ex. 500, p. 36, l. 15 – p. 38, l. 9.

> AFUDC and future rate base. This is why CWIP-related ADIT balances must be recognized immediately in rate base, even though the CWIP investment not included in rate base earns an AFUDC return.[84]

In conclusion, for AFUDC to work correctly, CWIP-related ADIT balances must be included in rate base and Ameren Missouri's proposed departure from the last rate case should be rejected.[85]

IV. Ameren Missouri's Proposed Plant in Service Accounting ("PISA") Treatment

As explained in the MIEC's Initial Brief, the MIEC, Staff, and the OPC oppose Ameren Missouri's proposed extraordinary regulatory treatment referred to as PISA. Although Ameren Missouri makes numerous requests for extraordinary regulatory treatment in this case, PISA is the "most significant enhancement" it is seeking.[86] Allowing such extraordinary regulatory treatment is bad public policy as evidenced by the fact that no other utility in Missouri and, in fact, no other utility in the country has been granted this extraordinary regulatory treatment,[87] nor is it discussed in any treatise, authoritative text, journal article, PSC decision, or court case.[88] Unlike more common cost tracker regulatory mechanisms, the PISA proposal can never benefit ratepayers; it can only cause rates to increase.[89] Ameren Missouri admits, albeit in a different section of its brief, that the purpose of trackers are to provide a symmetrical benefit to ratepayers if the tracked cost decreases, which cannot be the case here.[90] Moreover, unlike other trackers, the tracked cost is not volatile.[91] PISA also does not fit the traditional standard for other trackers because the cost of newly installed

[84] Brosch Direct, Ex. 500, p. 37, l. 13 – p. 38, l. 9.
[85] Brosch Direct, Ex. 500, p. 38, ll. 13-6.
[86] Ameren Missouri Initial Brief, p. 36.
[87] Barnes testimony, Tr. 580.
[88] Barnes testimony, Tr. 582-3.
[89] Barnes testimony, Tr. 584; Cassidy testimony, Tr. 744.
[90] Ameren Missouri Initial Brief at 103.
[91] Barnes testimony, Tr. 621.

utility plant is not beyond the control of management. Nothing in Ameren Missouri's Initial Brief overcomes these undeniable conclusions.

As Ameren Missouri frequently does in its Initial Brief, it promotes piecemeal, single-issue ratemaking analysis by referring to a chart supposedly showing that Ameren Missouri is not permitted to earn a return on the capital it has committed to construction projects.[92] But Ameren Missouri earns a return for the time prior to which it can seek to include the new plant in its rate base; that return, called AFUDC, fully compensates Ameren Missouri to that point in time. Ameren Missouri is then (after the plant is placed in service) "permitted" to earn a return if it elects to file a rate case <u>and account for all other changes in its revenues, expenses, cost of capital and rate base investment</u>.[93] In contrast, PISA is piecemeal ratemaking that is premised upon this "every new asset must discretely and continuously earn a return" concept that is inconsistent with traditional regulation that updates all elements of the revenue requirement on a matched and consistent basis.[94]

Ameren Missouri notes that after the newly constructed plant is placed in service, but before its costs can be reflected in rates (represented by the red line in the middle of the chart on page 37 of its Initial Brief), it stops accruing AFUDC. It then claims that it "receives absolutely no compensation during that period for the cost of the capital that it has invested in the plant."[95] However, as noted above, Ameren Missouri controls when it will file its rate cases, and could file one to include the new assets in rate base. But in that new rate case, all other factors must be considered. There may be avoided expenses elsewhere, growth in sales revenues, retirement of existing plant assets that are included in rate base, and many other changes to the revenue requirement. On balance, even with the addition of the new plant, a rate increase may not be in order. One need look no further than the decade prior to 2006 to see that Ameren Missouri needed

[92] Ameren Missouri Initial Brief, p. 37.
[93] Cassidy testimony, Tr. 755.
[94] Brosch Direct, Ex. 500, p. 19, l. 17 – p. 20, l. 12; Cassidy testimony, Tr. 755.
[95] Ameren Missouri Initial Brief, p. 37.

no extraordinary PISA accounting for its addition of newly constructed assets. Only in a matched rate case test year can the Commission comprehensively update all elements of the revenue requirement to determine if a rate increase (or decrease) is called for.

Ameren Missouri argues that PISA "address[es] the very same problem [addressed] in the context of a single, large construction project, such as Ameren Missouri's Sioux scrubbers and the Callaway nuclear plant[,]" where "construction accounting" is allowed.[96] But PISA is very different from the previously authorized exceptions to traditional test year regulation, where discretely large projects were isolated because of demonstrable financial need for construction accounting. PISA would apply indiscriminately to all non-growth projects without limitation as to amount or timing, and with no showing by Ameren Missouri of financial need. Moreover, PISA would remove the regulatory lag incentive for management efficiency, and burden PSC Staff with new administrative responsibilities.[97]

Ameren Missouri, again emphasizing its piecemeal approach to ratemaking, argues that its PISA proposal would exclude revenue producing plant (because "it is not appropriate to provide [PISA] for these investments") and include only the net gross plant additions.[98] Again, Ameren Missouri's PISA proposal would not consider all relevant factors, including, among many other considerations, the substantial benefit it derives from ADIT. Failing to do so is a critical omission within PISA because Ameren's ADIT balances have been growing rapidly in recent years.[99]

The standard for applying an extraordinary accounting mechanism, as Ameren Missouri admits in its Initial Brief, is that the "event" under examination be "extraordinary, unusual and unique, and not recurring.[100] Ameren Missouri cites examples of accounting orders for certain

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[96] Ameren Missouri Initial Brief, p. 39.
[97] Brosch Direct, Ex. 500, p. 20, ll. 13-26.
[98] Ameren Missouri Initial Brief, pp. 39-40.
[99] Brosch Direct, Ex. 500, p. 23, ll. 7-10.
[100] Ameren Missouri Initial Brief, p. 41.

expenses (natural disasters, changed accounting standards, enhanced security after 911, compliance with the cold weather rule, vegetation management and infrastructure inspection) to claim that the costs at issue here "are no less 'extraordinary' than other costs that the Commission has permitted utilities to defer in appropriate circumstances."[101] But Ameren Missouri's PISA proposal stretches the "extraordinary" standard beyond all recognition, by applying deferral accounting to nearly all utility construction projects for an unlimited period of time into the future. Perhaps that is why no other state regulator has allowed such an extraordinary mechanism,[102] nor is it discussed in any treatise, authoritative text, journal article, PSC decision, or court case.[103] If the already-authorized extraordinary regulatory accounting does not deal with extraordinary "events" as they should, then the solution is not to authorize more extraordinary regulatory accounting mechanisms for less than extraordinary events, but rather to limit the ones that have already been allowed.

Ameren Missouri again parades the discredited claim that the regulatory process in Missouri is broken (it "systematically deprives utilities of the ability to recover the full cost of their capital investments") to argue that PISA is required under the Commission's obligation to set "just and reasonable" rates.[104] As the opening of this and the MIEC's Initial Brief (as well as Staff's and the OPC's Initial Briefs) demonstrate, Ameren Missouri has not been systematically deprived of the ability to recover its capital investments. Indeed, it was earning in excess of its authorized ROE for a decade prior to 2006 and, more recently, for the year ending June 2012. Moreover, and significantly, "just and reasonable" rates necessarily consider and balance all changes in the revenue requirement at a matched point in time. PISA, in contrast, would provide piecemeal rate increases for all incremental investment in defined net plant additions, while ignoring corresponding growth in ADIT and other changes in expenses, revenues and the cost of capital between rate cases.

101 Ameren Missouri Initial Brief, p. 42.
102 Barnes testimony, Tr. 580.
103 Barnes testimony, Tr. 582-3.
104 Ameren Missouri Initial Brief, p. 42.

Ameren Missouri argues that its PISA proposal will reduce the frequency of rate cases.[105] Ameren Missouri made a similar assurance in its 2007 rate case in the event that this Commission would grant it an FAC.[106] This Commission can take notice of its dockets showing that Ameren Missouri's rate case frequency only increased.

Ameren Missouri argues that had PISA been adopted in the last rate case, the cost to consumers of the PISA proposal would be modest.[107] As the MIEC noted in its Initial Brief, the increased revenue requirement PISA will cause ratepayers to incur starting with the next rate case will be approximately $6 million per year for 30 or 40 years. But that is only the first iteration of PISA. Ratepayers can expect pancaked PISA increases, whether similar, higher or lower, in each subsequent rate case with the increases stacked on top of each other.[108] Perhaps that is why, contrary to its assertion that the impact to consumers will be modest, Ameren Missouri itself characterized this issue as the "most significant enhancement" it is seeking.[109]

In conclusion, Ameren Missouri has not demonstrated a need for departure from traditional cost of service ratemaking, a process that has allowed Ameren Missouri to over-earn since the early 90s through 2006, and as recently as the 12-month period ending June 2012, while a major rate increase case was pending. The Commission recently has generously bestowed a number of trackers, an FAC, and true-up accounting to address Ameren Missouri's concerns. All of the parties should give these extraordinary mechanisms some time to see how they impact Ameren Missouri. Ameren Missouri's under-earning for some recent periods is more likely the result of an anemic economy and the choices made by utility management rather than an indictment of the regulatory compact that has served Missouri for over one hundred years. Last, and most significantly, the

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[105] *Id.* at 43.
[106] In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service provided to Customers in the Company's Missouri Service Area, Case No. ER-2007-0002, p. 22-3.
[107] Ameren Missouri Initial Brief, p. 40.
[108] Barnes testimony, Tr. 675.
[109] Ameren Missouri Initial Brief, p. 36.

PISA proposal is bad public policy in that it involves single-issue ratemaking and should not be allowed for this or other Missouri utilities for this reason alone.

V. Property Tax Refund

Ameren Missouri should be required to return to Missouri ratepayers the $2.9M that it received as a result of its 2010 property tax appeal. In Case No. ER-2011-0028, this Commission provided Ameren Missouri with every single dollar it requested for property tax expense with the express knowledge that Ameren Missouri had appealed a significant portion of those taxes.[110] In its Report and Order in that case, the Commission stated that it was providing Ameren Missouri's level of requested expense with the caveat that Ameren Missouri would be expected to reimburse ratepayers for any refund it received as a result of its 2010 property tax appeal.[111] Now, despite receiving a $2.9M refund from its 2010 property tax appeal, Ameren Missouri refuses to reimburse its customers.

Ameren Missouri argues that the Commission's Order in ER-2011-0028 wrongly assumes "that Ameren Missouri's customers paid the full amount of the Company's 2010 tax bill."[112] Ameren's brief then goes to great lengths to demonstrate the "lack of synchronization between Ameren Missouri's actual property tax expense and the amount of property tax expense included in customer rates."[113] Whether Ameren Missouri's property tax expense synchronizes with the amount of property tax expense included in customer rates is wholly immaterial to this issue. Ameren Missouri falsely characterizes the Commission's "assumptions" in ER-2011-0028. Nowhere in the Commission's Order does the Commission assume that there will be perfect synchronization between the costs of a particular item and the amounts included for that item in rates. On the

[110] Report and Order, ER-2011-0028, pp. 109-110.
[111] Report and Order, ER-2011-0028, pp. 109-110.
[112] Ameren Missouri Initial Brief, p. 99
[113] *Id.* at 110.

contrary, the Commission's Order merely states a verifiable fact: that "customers. . . are ultimately paying the tax bill."[114] Ameren Missouri cannot refute this fact, and so it revises the Commission's reasoning in order to rebut it. That is, Ameren Missouri builds a straw man and knocks it down. It is noteworthy that in another portion of Ameren Missouri's Initial Post-Hearing Brief, Ameren Missouri rightly states the truism that "customers do not pay for particular costs . . . they pay for service."[115] Obviously, the Commission's Report and Order in ER-2011-0028 did not explicitly or implicitly assume that there would be a perfect synchronization between actual property taxes in a given period and the amount of property expense allowed in rates. Ameren's characterization to the contrary is a fiction.

The bottom line is that this Commission granted Ameren Missouri every dollar it sought in property taxes in the last case, with the knowledge that Ameren Missouri was appealing a substantial portion of those taxes and the one caveat that if Ameren Missouri received a property tax refund, it should return the refund to the customers who ultimately paid the tax bill. Ameren Missouri enjoyed the benefit of receiving its requested property tax level, but now refuses to confer the benefit of its refund on Missouri ratepayers. Ameren Missouri's conduct is untenable in light of the Commission's explicit intent with respect to the 2010 property tax refund as described in ER-2011-0028. Accordingly, Ameren Missouri should be required to reimburse $2.9M to Missouri ratepayers to reflect the refund it received as a result of its 2010 property tax appeal.

VI. Property Tax

Conspicuously absent from Ameren Missouri's Initial Brief in this case is a single argument to support its request for the portion of its estimated property tax expense that falls outside the test year and true-up period in this case. The only language provided by Ameren Missouri's brief that even hints at an argument in support of such a request is the following unfounded assertion on page

114 Report and Order, ER-2011-0028, p. 110.
115 Ameren Missouri Initial Brief, p. 82.

98 of its brief: "The principle is that expense amounts used for ratemaking should approximate as closely as possible the operating conditions that Ameren Missouri will experience during the period rates set in this case are in effect."[116] This statement does not reflect a proper ratemaking principle. On the contrary, rates should be established based on the relationship among revenues, expenses and rate base as measured at a consistent point in time such as a test-year or true-up. However, even if Ameren Missouri's "principle" were correct, the MIEC cannot find any concession by Ameren Missouri to reflect the new re-financing cost savings that were experienced by Ameren Missouri a mere 37 days after the true-up period in this case.[117] Ameren Missouri cannot have it both ways. It cannot seek recognition for costs it may incur outside the true up while ignoring savings it *will* incur for that same period. Ameren Missouri's lopsided attempt to benefit itself to the detriment of its ratepayers should be rejected.

VII. Renewable Energy Standard ("RES") Costs

Ameren Missouri's request to include $7.8M as an ongoing level of expense for its Renewable Energy Standard ("RES") costs directly violates Commission Rule 4 CSR 240-20.100, and as such, should be denied. Moreover, Ameren Missouri's request to amortize the expenses incurred through the true-up period over two years with the unamortized balance included in rate base is unreasonable in light of the Commission's Rules and the Commission's Report and Order in ER-2011-0028. Accordingly, for the reasons set forth below, the Commission should include the prudently incurred RES costs (in excess of the amount of solar rebate expense established in the last rate case) through the July 31, 2012 true-up period.[118] Moreover, Ameren Missouri's operating expenses should reflect an amortization of this amount over a six-year period.

[116] Ameren Missouri Initial Brief, pp. 97-98.
[117] ER-2012-0166, Ex. 526.
[118] Meyer Direct, Ex. 510, p. 7, ll. 18-27.

Any RES costs incurred after July 31, 2012 should be deferred through the next general rate proceeding as contemplated by 4 CSR 240-20.100(6)(D).[119]

Proper Recognition of RES Costs

The MIEC's interpretation of 4 CSR 240-20.11 is supported not only by the express language of the Rule itself, but also by a recent Stipulation and Agreement in Case No. ER-2012-0174 involving Kansas City Power & Light Company ("KCPL"). In that Stipulation and Agreement, the parties agreed that the RES costs incurred through the true-up of that case would be amortized to expense over three years with no rate base treatment. Furthermore the parties agreed to comply with the RES Rule in that all costs incurred following the true-up would be recorded in a deferred account; and a carrying cost based on the short term debt rate would be applied to the unamortized deferred balance.[120] In this case, the Commission should enforce the Rule as written, and as interpreted in the Stipulation and Agreement in Case No. ER-2012-0174.[121] While Ameren Missouri's interpretation benefits Ameren Missouri, it directly contradicts the express language of the Commission's Rule on the issue. Furthermore, the Commission already applies this same cost recovery mechanism in addressing energy efficiency costs. For example, in the Commission's Report and Order in Case No. ER-2011-0028, the Commission describes the cost recovery mechanism for energy efficiency costs. On Page 39 of that Order, the following language appears:

> Currently, between rate cases, Ameren Missouri is allowed to book its direct costs incurred while implementing energy efficiency and DSM programs to a regulatory asset. In the rate case, the amount in the regulatory asset is added to the company's rate base and is amortized over a six-year period.[122]

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[119] Meyer Direct, Ex. 510, p. 7, l. 18 - p. 8, l. 8.
[120] Stipulation and Agreement, ER-2012-0174, p. 3.
[121] On page 133 of its Initial Post-Hearing Brief, Ameren Missouri requests a waiver of the Commission Rule regarding RES Costs. Under the Commission's Rule, waiver may be granted only for good cause shown after written application, notice and an opportunity for hearing. Ameren Missouri has failed to provide even a single argument to show that there is "good cause" for the Commission to waive its Rules. Accordingly, the Commission should enforce its Rules and require Ameren Missouri to comply with the RES Rules as written.
[122] Report and Order, ER-2011-0028, p. 40.

By adhering to the RES Rules, the Commission would be employing the same cost recovery mechanism as it previously approved for energy efficiency costs in Ameren Missouri's last rate case. It is clear from the language of the Rule that the Commission contemplated RES costs would be recovered in the same way as energy efficiency costs. Accordingly, the Commission should apply its Rule in this case, and reject Ameren Missouri's request to establish an ongoing level of expense for RES costs.

Moreover, in order to agree with Ameren Missouri's interpretation of 4 CSR 240-20.11, this Commission would have to conduct the same curious interpretive technique that Ameren Missouri employs in its opening brief – it would have to stop reading the Rule mid-sentence.[123] The Rule itself is not complicated. The Rule expressly contemplates that a utility can defer RES costs in between rate proceedings in a regulatory asset and calculate a carrying charge on the balance. There is absolutely no mention of tracking the actual level of costs against the level included in rates. Ameren Missouri cannot point to any language in the Rule that supports its request.

Additionally, Ameren Missouri's interpretation does not comport with ratemaking practices.[124] If rates already included an expense level, it would be inappropriate to defer the total cost of RES and calculate a carrying cost on the balance. If a tracker were intended by the RES Rule, only the difference between the amount included in expense and actual RES costs would be accumulated between cases. A carrying cost would be calculated on only the difference. The Rule is devoid of any language describing the mechanics of tracking RES cost. As such, Ameren Missouri's request to include a base amount in its revenue requirement and to capture any difference in Ameren Missouri's RES expenditures going forward violates Commission Rule and should be denied.

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[123] Ameren Missouri Initial Post-Hearing Brief, P. 133. Ameren Missouri's quotation of the Rule literally ends in the middle of the second sentence.

[124] See Generally Meyer Surrebuttal, Ex. 511, p. 3, l. 7 - p. 4, l. 16.

Amortization

As described more fully in MIEC's Initial Post-Hearing brief, the Commission should implement a six-year amortization period for RES expense. First, a six-year period reflects the Commission's Report and Order in the last rate case regarding Ameren Missouri's energy efficiency program.[125] Second, a six year period comports with the amortization period Ameren Missouri proposes for recovery of energy efficiency expenses in this case.[126] And third, Ameren Missouri has failed to provide any colorable justification for its proposed two-year amortization. Accordingly, the Commission should apply a six-year amortization period for RES expense in this case.

VIII. Coal In Transit

The Commission should reject Ameren Missouri's request for an additional $7M in revenue requirement for Ameren Missouri's coal-in-transit, because as described in MIEC's Initial Post-Hearing Brief, such a request would result in double recovery, and Ameren Missouri cannot present any evidence that this additional amount is justified even by its own internal inventory models.

Ameren Missouri's Initial Post-Hearing Brief fails to even address the fact that its request for recognition for coal in transit would result in double recovery. Ameren Missouri's own witness admits that it does not pay for the coal until approximately two weeks after it takes possession of the coal when it is loaded into the rail cars.[127] This interval of time (from the moment Ameren Missouri takes title to the coal to the moment it pays for the coal) is already captured in Ameren Missouri's and the Staff's cash working capital (lead lag study) allowance.[128] In other words, Staff's Accounting Schedules demonstrate that Ameren Missouri receives cash working capital for the period that the

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[125] *Id.*
[126] Weiss Direct, Ex. 5, p. 15, l. 21 – p. 16, l. 6.
[127] Tr. 1401, ll. 10-17.
[128] Tr. 1440, ll. 2 - 24.

coal is in transit.[129] Ameren Missouri's witness, Mr. Neff testified that Ameren Missouri pays for its coal two weeks after it takes title[130] and Staff's Accounting Schedules reflect a cash working capital allowance for the 17.14 days between the moment Ameren Missouri takes title to the coal, and the moment it pays for the coal. Therefore, if Ameren Missouri received recognition for coal-in-transit, it would literally double recover for the period of time that it took title to the coal until the point that it paid for the coal. Accordingly, any recognition of coal in transit as coal in inventory would impermissibly result in double recovery for the period of transit. For this reason alone, and the other reasons provided in MIEC's Initial Post-Hearing Brief, Ameren Missouri's request for coal-in-transit recognition must be denied.

IX. The Commission Should Deny Ameren Missouri's Request for Special Accounting to Recover Ameren Missouri's Voluntary Separation Expenses Incurred Between Rate Cases ("VS11")

In the MIEC's Initial Brief, it noted that the requested relief here was unwarranted because there are no net VS11 costs to recover, and that Ameren Missouri's request in this regard reeked of retroactive ratemaking. Nothing in Ameren Missouri's Initial Brief overcomes those facts.

Ameren Missouri contends that it "took the extraordinary and prudent step of reducing its workforce by offering one-time lump sum severance payments to several hundred of its employees" in late 2011.[131] While certainly not undertaken on a recurring basis, utility efforts to downsize or right-size its workforce are neither exceptional nor remarkable. In fact, Ameren Missouri implemented a Voluntary Separation Election/Involuntary Separation Program ("VSE/ISP") late in the procedural schedule of its last rate case (Case No. ER-2010-0036).[132]

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[129] ER-2012-0166, Ex. 203.
[130] Tr. 1401, ll. 2-24.
[131] Ameren Missouri Initial Brief at 80.
[132] Ferguson Surrebuttal, Ex. 470, p. 10, ll. 5-16.

This Commission has long employed a historic test year in setting cost-based utility rates under a rate base/rate of return framework.[133] Under the regulatory compact, Ameren Missouri has an obligation to control, contain and minimize the cost of providing safe and adequate regulated utility service at just and reasonable rates.[134] Ameren Missouri has this obligation whether the costs involve fuel expense based on economic dispatch, the purchase of energy from third party suppliers, or the cost of employee wages, salaries and benefits.

Ameren Missouri states that "[w]hile there is some dispute about whether the cumulative payroll and benefit savings through the end of 2012 (or until January 2, 2013, when new rates are expected to take effect) equal or exceed the $25.8 million of one-time costs, Ameren Missouri would agree that the cumulative payroll and benefit savings total nearly $25 million."[135] Curiously, Ameren Missouri then admits that the approximately $26 million of gross costs at issue are offset by about $26 million of savings, resulting in a net "zero benefit."[136] That admission is consistent with the testimony of Ameren Missouri's Vice President and Controller,[137] and the testimony of MIEC witness Carver.[138] It is undisputed that the gross costs at issue will be offset by savings realized by Ameren Missouri before the new rates take effect in this case.

In its Initial Brief, Ameren Missouri demonstrates that it can perform a basic mathematical computation (i.e., $24 million in expense savings offset by $8.6 million of higher amortization expense would yield about $15 million in annual expense savings that would not have occurred

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133 *See* for example this Commission's Order in Case No. 18501 at p. 4.

134 In the matter of Union Electric Company of St. Louis, Missouri, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company. Case Nos. EO-85-17 and ER-85-160, 27 Mo. P.S.C. (N.S.) 183, 193 (Mo. PSC 1985) (finding that approximately $383,716,000 of the Callaway-related rate base expenditures and associated AFUDC should not be recovered from ratepayers since they represent inefficient, imprudent, unreasonable or unexplained costs).

135 Ameren Missouri Initial Brief at 80.

136 *Id.* at 82.

137 Barnes Rebuttal, Ex. 12HC, p. 17, ll. 9-14.

138 Carver testimony, Transcript p. 1811, l. 2 - p. 1812, l. 10.

without the severance program).[139] However, that mathematical calculation must be intended to obscure the undisputed fact that Ameren Missouri is seeking to recover through rates approximately $8.6 million per year (for three years) of gross costs that it admittedly will have already recovered through savings that it will have realized between rate cases. Since Ameren Missouri will have fully recovered those one-time costs through retained savings, the $8.6 million per year requested recovery represents a bonus for prudently managing its workforce. For the same public policy reasons that the Commission rejected a similar request in Case No. GR-96-285, Missouri Gas Energy,[140] the Commission should deny the requested bonus here.

Ameren Missouri argues that the Commission's discretion is limited on "some things" but that the Commission has very broad discretion on "some [other] things" and that the severance issue falls into this latter category.[141] But the Commission does not have discretion to grant the Company's bonus request. The only evidence the Company offers in its attempt to support its bonus request looks back to an alleged under-recovery of payroll and benefit costs from March 1, 2009, through the true-up date in the pending proceeding.[142] The law is clear that utility rates should be based on the cost of providing service, that the matching of costs and benefits is an important element in the ratemaking process, and that retroactive ratemaking is prohibited.[143] The Commission does not have the discretion to ignore the cost of providing service in setting utility rates, nor to intentionally introduce a mismatch of costs and benefits into the ratemaking process, nor to engage in illegal retroactive ratemaking. As pointed out by MIEC witness Carver, two of the most fundamental concepts underlying utility ratemaking are the matching principle and the

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139 Ameren Missouri Initial Brief at 81.
140 *See* MIEC Initial Brief at 31.
141 Ameren Missouri Initial Brief at 81.
142 Ameren Missouri Initial Brief at 82.
143 *State ex rel. Utility Consumers Council of Missouri v. P.S.C.*, 585 S.W.2d 41, 59 (Mo. banc 1979); *In the matter of the application of Missouri Public Service for the issuance of an accounting order relating to its electrical operations*, Case Nos. EO-91-358, 360, p. 18.

prohibition against retroactive ratemaking.[144] The Company's requested bonus violates both of these concepts. As admitted by Ameren Missouri, there is no unrecovered cost or benefit if the matching principle is properly applied.[145]

By suggesting that the Staff and MIEC witnesses on this issue should recognize these alleged under-recoveries in periods that precede the test year in this case, Ameren Missouri's testimony and Initial Brief urge the Commission to violate the prohibition against retroactive ratemaking by now granting a bonus based on alleged past losses.[146] Whether the Company did or did not recover its payroll and benefit costs in periods prior to the test year is not a proper matter for consideration by the Commission in evaluating Ameren Missouri's request for a bonus in the current rate case. If the Company truly under-recovered these costs in those prior periods, Ameren Missouri should conduct an internal inquiry about management's inability and ineffectiveness at controlling its costs during a period in which the Company was filing rate cases on an average 17-month interval,[147] rather than attempt to collect a bonus from current ratepayers to make up for claims of past losses.

Ameren Missouri argues that even if the Commission grants it the requested bonus it will not be made whole as it allegedly under-recovered other payroll costs that more than offset the amount of the bonus.[148] But that argument still fails to deal with the fact that Ameren Missouri is in this instance seeking a reward premised upon retroactive ratemaking. The question is not whether it under-recovered in the past. The question is whether tomorrow's ratepayers should be made to pay more than the current cost of providing service in order to compensate Ameren Missouri for its alleged past under-recoveries. The answer is no, because to do so would be to engage in illegal retroactive ratemaking.

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[144] Carver Surrebuttal, Ex. 515 p. 6, l. 1 – p. 7, l. 28.
[145] Ameren Missouri Initial Brief at 82.
[146] *State ex rel AG Processing, Inc. v. Public Serv. Comm'n*, 311 S.W.3d 361, 365 (Mo. App. 2010) ("Retroactive ratemaking is defined as the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits[.]").
[147] Carver Surrebuttal, Ex. 515 p. 4, ll. 25–6.
[148] Ameren Missouri Initial Brief at 82.

In conclusion, there are no net severance costs for Ameren Missouri to recover from ratepayers. As a matter of policy, the Commission should not award a bonus to Ameren Missouri, at the expense of ratepayers, to reward Ameren Missouri for managing its operations by prudently incurring and reducing its labor, benefits and related payroll tax costs since the law required Ameren Missouri to do that.

X. Return on Equity ("ROE")

Capital costs have decreased since the Commission's decision in Ameren Missouri's last rate case. This fact is fully supported by the record in this case and is wholly inconsistent with Ameren Missouri's contention that the Commission should increase its authorized ROE from 10.2% to 10.5%. Ameren Missouri's opening brief does not dispute this—indeed, Ameren Missouri's brief does not even *mention* this important fact. Instead, Ameren Missouri's ROE discussion begins by focusing on the "12-month rolling average of authorized ROEs for integrated electric utilities published by Regulatory Research Associates (RRA),"[149] and presents a chart showing that rolling average from July 2009 through July 2012.[150] Using the current rolling 12 month average as its benchmark, Ameren Missouri asserts the recommendation of the MIEC's expert witness, Mr. Gorman, is "far outside the mainstream."[151] But as the Company notes, the "RRA data submitted in this proceeding can be sliced and diced in numerous ways."[152] By choosing a "slice" of data that looks back in time, Ameren Missouri is obviously attempting to draw the Commission's attention away from the current downward trend of authorized ROEs. The record in this case reveals, and Ameren Missouri concedes, that the average ROE for integrated electric utilities in the third quarter

[149] Ameren Missouri Initial Brief, p. 10.
[150] *Id.,* p. 10.
[151] *Id.,* p. 11.
[152] *Id.*

of 2012 was actually below 10%.[153] As Mr. Gorman explained in the hearing, "what's relevant in this case . . . is what the *current* market cost of equity is for Ameren Missouri and these other companies."[154] And the current cost of equity is lower than the cost of equity in Ameren Missouri's previous rate case.

As explained in the MIEC's opening brief, Ameren Missouri's witness offered a flawed and overstated analysis that inflated his cost of equity recommendation in this proceeding. When a balanced approach is used to estimate Ameren Missouri's cost of equity in the current market, Ameren Missouri's market cost of equity is found to be in the range of 9.2% to 9.4%. The arguments to the contrary set forth in Ameren Missouri's initial brief are based on distorted facts, are not corroborated by expert witnesses' testimony, or are simply in error.

<u>Ameren Missouri Does Not Have Higher Regulatory Risks</u>

Ameren Missouri asserts that it should be awarded an ROE that is higher than the industry average, in part because the Missouri regulatory environment increases Ameren Missouri's regulatory risk compared to the proxy group used by its expert witness, Mr. Hevert. This argument, which is without merit, is based on Mr. Hevert's contention that Missouri regulatory mechanisms make it more difficult for Ameren Missouri to earn its authorized return on equity relative to the proxy group. Specifically, Mr. Hevert evaluated Missouri's regulatory environment on the basis of the following factors:

(1) whether a utility can include construction work in progress ("CWIP") in rate base;

(2) the test year used; and

(3) whether the utility is allowed to request interim rates.[155]

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[153] *Id.*
[154] Tr. p. 1768, ll. 5-8 (emphasis added).
[155] Ameren Missouri Initial Brief, p. 15; Hevert Direct, Ex. 20, p. 46, ll. 1-8.

Ameren Missouri's evidence on these three factors is not persuasive, and does not establish that it has higher regulatory risks than the proxy companies. With respect to CWIP, Ameren Missouri asserts that Missouri's regulatory mechanisms create greater risk because CWIP is not included in rate base. As explained by Mr. Gorman, however, including CWIP in rate base would not enhance Ameren Missouri's ability to earn its authorized return on equity (as Mr. Hevert's testimony erroneously implies). Rather, including CWIP in rate base simply enhances cash flows. In reality, accruing an AFUDC return on CWIP enhances the predictability and stability of Ameren Missouri's earnings compared to including CWIP in rate base.[156] As Mr. Gorman explained in his testimony—which was not refuted by any Ameren Missouri witness—"[a]n AFUDC return is far more stable than is a cash return on CWIP." [157]

With respect to the test year used in Missouri's regulatory scheme, Mr. Hevert believes that the proxy group companies are at an advantage because Ameren Missouri must use a historical test year.[158] But Missouri's test year rules have benefits to investors that Mr. Hevert ignored. As Mr. Gorman explained, under Missouri's approach, the inclusion of a true-up of historical costs and the use of "end-of-period rate base" mitigate any disadvantages that may be inherent in this approach.[159] The use of a true-up period ensures that data used to develop rates is typically no more than six months old by the time rates go into effect.[160] Moreover, the end-of-period rate base is more advantageous to the utility than the average rate base which is typically used in a forecasted test year.[161] Finally as Mr. Gorman noted, "a test year of any design will have benefits and detriments."[162]

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[156] Gorman Direct, Ex. 507, p. 71, l. 4 – p. 72, l. 2.
[157] Gorman Surrebuttal, Ex. 509, p. 18. l. 4.
[158] Hevert Direct, Ex. 20, p. 46, l. 12.
[159] Gorman Direct, Ex. 507, p. 69, ll. 12-20.
[160] *Id.,* l. 17.
[161] *Id.,* ll. 18-20.
[162] *Id.,* l. 21.

Mr. Gorman also observed that Missouri's rules for implementing interim rates is comparable to the rules applicable to the utilities included in Mr. Hevert's proxy group. Hence, there is little, if any, difference between Missouri's interim rate rules and those of the proxy group used by Mr. Hevert.[163] Mr. Gorman observed that Mr. Hevert's own evidence "makes this clear."[164]

In addition to these three factors, Ameren Missouri points out that Mr. Hevert "exhaustively examined the regulatory mechanisms of Ameren Missouri and compared them to the regulatory mechanisms of the proxy group companies."[165] But despite his exhaustive lists of regulatory mechanisms, Mr. Hevert "did not and could not explain the amount and significance of revenue collected through the regulatory mechanisms he identifies."[166] Without this analysis, there is no way for the Commission to evaluate the degree to which these mechanisms actually mitigate regulatory risks for the proxy group companies. In sum, Ameren Missouri's evidence does not establish that it faces greater regulatory risks than do the proxy companies. Nor does this evidence prove that Ameren Missouri should be awarded a higher than average ROE in this rate case.

Ameren Missouri's Assertions Concerning Its Earned ROE Are Erroneous

Ameren Missouri's statements concerning its historical actual earned return on equity are erroneous and misleading. The Company was critical, justifiably, of Mr. Gorman's Schedule MPG-21 which included an error and incorrectly represented Ameren Missouri's earned return on equity. However, as the corrected schedule shows, the Company's earned return on equity was in fact above its authorized ROE for the period from 1996 until 2005.[167] This revised and corrected schedule did not change any of Mr. Gorman's conclusions.[168] As he explained in his direct and surrebuttal testimony, the Missouri regulatory framework provides Ameren Missouri with a reasonable

[163] *Id.,* ll. 4-9.
[164] *Id.,* l. 6; *see* Hevert Schedule RBH-E8.
[165] Ameren Missouri Initial Brief, p. 14; Hevert Direct, Ex. 20, Schedule RBH-E7.
[166] Gorman Direct, Ex. 507, p. 59, ll. 11-12.
[167] Ex. 532.
[168] Tr. 1691, ll. 5-8.

opportunity to earn its authorized return on equity. On the other hand, the testimony offered by Ameren Missouri to support its assertion that Missouri's regulatory framework is deficient focused on the period from 2007 to 2012. This period includes the most severe economic recession of the past 100 years. Not surprisingly given these economic conditions, the Company's earned return on equity fell below its authorized ROE during this period. Ameren Missouri's evidence fails to establish that this was the result of flaws in Missouri's regulatory regime.

With no citation to the record, Ameren Missouri asserts in its brief that its authorized return "was not 12%" from 1996 to 2006.[169] Mr. Gorman's direct testimony reveals, however, that "in 1987 Ameren Missouri was awarded a 12.01% return on equity according to SNL."[170] Ameren Missouri asserts that a regulatory plan was in effect during this period which required the Company to make refunds to customers if its earned return exceeded 14.0%.[171] Mr. Gorman's corrected graph shows that the Company earned 14% several years during this time period. Regardless of whether these earnings were refunded to customers, these facts show that the regulatory mechanisms in Missouri did not prevent the Company from achieving a level of earnings in excess of its authorized returns on equity.

In sum, what Mr. Gorman's corrected graph demonstrates is that Ameren Missouri's rates have provided it with the opportunity to earn its authorized returns on equity during most of the 15-year historical period (1996 – 2011). It should also be noted that Ameren Missouri failed to show that its historical earnings variation is any different than any other utility in the country, or any utility in Mr. Hevert's proxy group. For all of these reasons, Ameren Missouri's arguments that Missouri regulatory rules increase its risk and justify an above average industry authorized return on equity should be rejected.

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[169] Ameren Missouri Initial Brief, p. 18.
[170] Gorman Direct, Ex. 507, p. 65, ll. 20-21.
[171] Ameren Missouri Initial Brief, p. 18; Tr. 279, ll. 5-6.

Mr. Gorman's Testimony Supports an ROE in the Range of 9.2 – 9.4%

Ameren Missouri accuses Mr. Gorman of selectively using data to achieve his "very low results."[172] As explained in the MIEC's opening brief, however, Mr. Gorman took a conservative approach in setting his recommended range of results; omitting his CAPM results, which he found to be too low, and using his highest average DCF results for the upper end of his range. Ameren Missouri does not cite the testimony of any expert witness to support the attacks it includes in pages 19 to 26 of its initial brief, which mirror the cross-examination questions asked of Mr. Gorman by Ameren Missouri's attorney during the hearing.[173] Rather, this portion of Ameren Missouri's critique of Mr. Gorman's testimony is based on unorthodox, flawed and incomplete assessments of Mr. Gorman's analyses. This approach fails to produce a balanced and fair assessment useful for estimating a fair return on equity in this proceeding.

Even with this highly biased results-oriented approach, however, Ameren Missouri fails to show that a reasonable estimate of its cost of common equity is above 9.9%.[174] Its highly flawed re-assessment of Mr. Gorman's risk premium studies produce a return on equity estimate no higher than 9.8%.[175] Ameren Missouri's assertions that Mr. Gorman's DCF studies should have been interpreted using the proxy group *medians* instead of *means*, would support an estimated ROE of no more than 9.9%.[176]

Ameren Missouri takes issue with Mr. Gorman's risk premium studies and asserts that he should have focused more on near-term risk premium estimates rather than the risk premium estimates produced over his entire study period.[177] That assertion is without merit. Mr. Gorman noted that his methodology used a time period during which equity risk premiums reflected

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172 Ameren Missouri Initial Brief, p. 19.
173 Tr. pp. 1727-1758.
174 Tr. p. 1771, ll. 8-25; Ameren Missouri Initial Brief, pp. 21-23.
175 Ameren Missouri Initial Brief, p. 21; Tr. p. 1736, ll. 1-25.
176 Ameren Missouri Initial Brief, p. 23.
177 *Id.*

authorized returns on equity which supported stock prices in excess of book value.[178] Mr. Gorman explained that when stock prices are in excess of book value, it is an indication from market participants that the authorized return on equity represents fair compensation. Using this historical time period with market-to-book ratios in excess of one, Mr. Gorman developed a range of equity risk premiums that were found to be acceptable by market participants.[179] Based on his assessment of risk spreads in the market today, he gauged an appropriate equity risk premium based on current market conditions.[180]

Ameren Missouri's criticism of Mr. Gorman's DCF results focus on his use of proxy group mean estimates instead of median estimates. Ameren Missouri points out that Mr. Gorman relied on the median, and not the mean in previous cases, and if he would have relied on the median in this case his results would have been higher (in the range of 9.70% to 9.90%).[181] Mr. Gorman explained that use of either the mean or the median should reflect the greatest characterization and the central tendency of the estimates within the proxy group.[182] The median is used during periods when most of the proxy group company results fall on or near the median line. Conversely, when the proxy group is skewed above and below the median line, the mean of the group provides a better estimate of the proxy group results.[183] Ameren Missouri offered scatter graphs of Mr. Gorman's studies in this case and in previous cases.[184] It is clear based on those scatter graphs, that the group mean estimate in this case was appropriate because the individual company estimates within the proxy group did not fall on the median line in any significant manner. However, in prior cases, they did.[185] Based on Mr. Gorman's expert assessment of his DCF results, which was not

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[178] Tr. p. 1769, l. 4 – p.1770, l. 7.
[179] *Id.*
[180] Tr. p. 1725, ll. 8-14.
[181] Ameren Missouri Initial Brief, p. 23.
[182] Tr. p. 1775, l. 20 – p. 1777, l. 19.
[183] *Id.*
[184] Ameren Missouri Initial Brief, pp. 24-25.
[185] Tr. p. 1775, l. 20 - p. 1777, l. 19.

contested or refuted by any witness of Ameren Missouri, he concluded that they supported a return on equity of 9.4%, the high end of his recommended ROE range.[186]

The arguments discussed above concerning the interpretation of Mr. Gorman's risk premium and DCF studies are results-oriented and not supported by expert testimony. It is clear that Ameren Missouri chose numbers that would produce the highest results possible, without any sound basis in making its selection. This approach simply cannot produce a reasonable or balanced estimate of Ameren Missouri's return on equity in this proceeding.

Ameren Missouri's arguments also include a discussion of Mr. Hevert's "recommended adjustments" to Mr. Gorman's constant growth and Multi-Stage DCF analyses.[187] As Mr. Gorman explained in his surrebuttal testimony, these adjustments include adding Empire District Electric to the proxy group and discarding low results as "outliers" while including outlying high results.[188] If these self-serving, results-oriented adjustments are excluded from Mr. Hevert's revision of Mr. Gorman's constant growth DCF analyses, the result is a return on equity estimate of 9.9%.[189] Similarly, if Mr. Hevert's proposed adjustments to Mr. Gorman's Multi-Stage DCF analyses are revised to exclude self-serving, unsupported adjustments, the result is a DCF return estimate in the range of 9.4 to 9.7%.[190]

In sum, even if one accepts the flawed and results-oriented approach taken by Ameren Missouri in critiquing Mr. Gorman's testimony, the Company's arguments demonstrate that its authorized ROE should be no higher than 9.9%. The evidence offered by Ameren Missouri does not support its recommended ROE of 10.5%. For these reasons, the Commission should authorize an ROE of 9.3% as recommended by Mr. Gorman.

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[186] Gorman Direct, Ex. 507, p. 36, Table 5.
[187] Ameren Missouri Initial Brief, pp. 26 – 28.
[188] Gorman Surrebuttal, Ex. 509, p. 5, l. 22- p. 6, l. 21.
[189] Gorman Surrebuttal, Ex. 509, p. 7, ll. 4-7.
[190] Gorman Surrebuttal, Ex. 509, p.p. 14, ll. 1-10.

XI. FAC Tariff Issues

<u>The Commission Should Set the Sharing Mechanism in the FAC to 85 Percent Cost to Ameren Missouri and 15 Percent Cost to Ratepayers</u>

The MIEC supports the position of Staff that the sharing percentage in the FAC should be 85/15 and incorporates the briefing of Staff on this issue.

<u>The Commission Should Not Allow Long-Term Transmission Capacity Charge to Flow Through the FAC</u>

Ameren Missouri, Not the MIEC or Staff, Seeks to Change the Status Quo

The current FAC tariff, and the version proposed by Ameren Missouri in this case, expressly excludes from the FAC "capacity charges for contracts with terms in excess of one (1) year." No one, particularly Ameren Missouri, disputes that the expenses that the MIEC takes issue with here are in fact "capacity charges" under Account 565 (Transmission of Electricity by Others) or that they are incurred under Account 565 contracts having terms over one year. The discussion should rightfully end there. Perhaps recognizing its weak position on this sub-issue, Ameren Missouri attempts to manufacture an ambiguity in these simple words so that, under the guise of construction, the Commission can rewrite the FAC tariff to Ameren Missouri's liking to make it look like the MIEC and Staff are seeking to change the status quo. The Commission should reject Ameren Missouri's argument because it is contrary to law.

A tariff is construed under the same rules that a statute would be construed.[191] A tariff should also be construed as contracts would be construed, where any ambiguity would be resolved against the drafter.[192] Here, it makes no difference if the tariff is viewed like a statute or like a contract, because under either standard it is not ambiguous on this issue. Courts must give effect to the language of the tariff as written and will not add words or requirements by implication where the

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[191] *Laclede Gas Co., v. Pub. Serv. Comm'n*, 156 S.W.3d 513 (Mo. App. 2005).
[192] *Penn Cent. Co. v. General Mills, Inc.*, 439 F.2d 1338, 1340-1341 (8th Cir. Minn. 1971).

tariff is not ambiguous.[193] If the words of the tariff are clear and unambiguous, then no interpretation is required.[194] In other words, a court will not look beyond the plain meaning of the tariff unless the language is ambiguous.[195]

The courts determine the plain meaning of words from the dictionary.[196] The dictionary definition most on point for "capacity" is: "2 b: the maximum amount or number that can be contained or accommodated <a jug with a one-gallon --> <the auditorium was filled to -->."[197] Under this plain meaning, an expense for a "maximum accommodation" of power would be a charge for capacity. Under the tariff, that "maximum accommodation" could be of power on a transmission line or power from a power plant. Because there is no question that the subject charges are under contracts having terms over one year, the subject charges are excluded "capacity charges." Under these plain words, no construction is warranted.[198]

Ameren Missouri violates numerous of the above rules of statutory construction in its attempt to twist the meaning of the tariff. First, it rewrites that tariff from "capacity charges for contracts with terms in excess of one (1) year" to "<u>generation</u> capacity charges for contracts with terms in excess of one (1) year" by adding the word "generation" to the tariff. Courts refrain from doing that.[199] Second, Ameren Missouri engages in no analysis of the plain meaning of "capacity." Indeed, it does not even cite the dictionary definition of "capacity." There is nothing about that word that is ambiguous in the context of the FAC tariff. Without ever identifying any ambiguity in the word "capacity" in the tariff, Ameren Missouri immediately proceeds to its construction

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[193] *Cravens. v. Nixon*, 234 S.W.3d 442 (Mo. App. 2007).

[194] *Harpagon Mo, LLC v. Bosch*, 370 S.W.3d 579 (Mo. App. 2012); *A.C. Jacobs and Co., Inc., v. Union Elec. Co.*, 17 S.W.3d 579 (Mo. App. 2000).

[195] *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998).

[196] *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. banc 1993).

[197] Merriam Webster's Collegiate Dictionary 168 (10th ed. 1997).

[198] *Spradlin v. City of Fulton, supra.*

[199] *Cravens. v. Nixon, supra.*

arguments to add the word "generation" to the exclusion. Again, there should be no construction of an otherwise unambiguous tariff.[200]

Ameren Missouri attempts to manufacture a conflict with the other words of the tariff. Ameren Missouri argues:

> MISO transmission charges arise under MISO Schedules 7, 8, 26 and 26-A. None of those schedules are listed as exclusions from the express inclusion of charges reflected in Accounts 555, 565, and 575. It makes absolutely no sense for the parties to have listed, by MISO schedule, specific MISO schedules whose charges are to be excluded (even though they are reflected in Accounts 555, 565 or 575), but fail to list among those exclusions charges under Schedules 7, 8, and 26. Had the intention been to exclude charges under those three Schedules one would have expected them to be listed.[201]

But this argument is misplaced. Charges under some of the expressly listed schedules can be under contracts that have terms that are less than one year or can be under contracts that have terms that are greater than one year. It is the term of the contract that is the key under the tariff. And focusing on the term of the contract, as the tariff's exclusion does, makes perfect sense given the purpose of the FAC clause to address volatile fluctuations in fuel and purchased power costs. Certain MISO charges are short-term charges to either support off-system sales or to support delivery of power purchases from entities not located on the MISO transmission system and, as such, are appropriate for recovery under the FAC tariff.[202] But the long-term charges are not of the type that should be contemplated under an FAC.

Ameren Missouri argues that the meaning of the unambiguous words of the tariff's exclusion "must be determined by reference to the circumstances that existed when the Commission approved this language back in 2008-2009, and must be based upon what the Company and Commission intended by it."[203] Oddly, Ameren Missouri cites *Laclede Gas Co. v. Pub. Serv.*

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[200] *Spradlin v. City of Fulton, supra.*
[201] Ameren Missouri Initial Brief at 52.
[202] Dauphinais Surrebuttal, Ex. 519, p. 13, ll. 14-22.
[203] Ameren Missouri Initial Brief at 53.

Comm'n[204] for that proposition. That case concerned certain incentives allowed Laclede under a price stability tariff. There, the Commission ignored the plain meaning of the subject tariff in favor of its understanding of its and Laclede's intentions. But on appeal, the Court of Appeals reversed the Commission because it did not give Laclede what "it was entitled to under the plain language of the tariff."[205] In fact, the Court stated:

> The Commission's attempts to harmonize this explicit language of the Stipulation and Agreement with its legal conclusion that the parties did not intend for the Overall Cost Reduction Incentive to persist are unpersuasive. The PSP Tariff is clear and unambiguous and cannot be given another meaning by the Commission's hypothetical envisioning of an "illogical result."[206]

Ameren Missouri asks the Commission to repeat the error that it made in the *Laclede* case.

Ameren Missouri argues that because there are multiple "kinds" of "capacity", that term is ambiguous and the Commission is thus free to determine intent and rewrite the tariff.[207] That argument makes no sense. If a statute declared a $1 per bushel tax on apples, would the word "apples" be ambiguous simply because there are Granny Smith apples, Jonathon apples and other "kinds" of apples? Of course not.

Ameren Missouri sets forth language of a Commission decision (Aquila) that discusses the testimony of Cary Featherstone.[208] Ameren Missouri contends that the discussion addressed "generating capacity" in the context of the FAC and that such a discussion is "highly relevant."[209] But that discussion is irrelevant to the meaning of "capacity." The MIEC does not contend that the word "capacity" in the tariff refers only to "transmission capacity," to the exclusion of other types of capacity. Were that the case, the MIEC would be doing exactly what Ameren Missouri is doing—improperly adding a word to the tariff. Thus, a capacity charge for generation under a long-term

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204 156 S.W.3d 513, 521 (Mo. App. 2005).
205 *Id.* at 523.
206 *Id.* at 522.
207 Ameren Missouri Initial Brief at 53.
208 *Id.* at 54.
209 *Id.*

contract is also excluded under the words of the current tariff. However, the Featherstone quote is revealing for another reason. Featherstone notes that "only variable fuel and purchased power costs, including variable transportation costs, should be included in a fuel adjustment clause." He then notes that "demand charges are fixed costs to reserve capacity and as such are more like plant investment cost than fuel or purchased power cost" and should not be included in the FAC. This Commission found Featherstone's analysis "persuasive."[210] That analysis is again offered by Staff and the MIEC here, and is still persuasive.

Finally, Ameren Missouri notes that Ms. Mantle thought that "capacity" applied to generating capacity.[211] But she explained that her reason for so thinking was that she believed that no transmission costs would ever flow through that FAC definition:

> **In fact when you read that language you were thinking it referred to generation capacity, didn't you?**
>
> A. I was thinking in the light that the tariff was written and we were thinking generation at the time, not transmission, so that's why I would believe that that meant, that whole section was on generation, not transmission.
>
> ***
>
> A. That's right. Because I believe the fuel adjustment clause is for fuel and purchased power, it is not for transmission.[212]

Ms. Mantle did not contemplate that any transmission charges would flow through the FAC; Ms. Mantle's statement hardly supports Ameren Missouri's attempt to rewrite its FAC tariff.

In conclusion, the existing FAC tariff never allowed the types of transmission charges that Ameren Missouri seeks to flow through to consumers between rate cases. If the Commission seeks to preserve the status quo, it should not expand the words of the tariff in this case.

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[210] *Id.*
[211] *Id.* at 55.
[212] Mantle testimony, Tr. pp. 1244-5.

The FAC Tariff in This Case Should Not Allow Any Type of Capacity Charges, Whether for Transmission or Generation, If Those Charges Are Incurred Under Long-Term Contracts

The issue here is not whether Ameren Missouri may recover the subject transmission costs. Rather, the issue is whether the subject transmission costs are appropriate for inclusion in a tariff that automatically flows those costs through to ratepayers between rate cases. While both the MIEC and Staff understandably cite section 386.266 in addressing this issue, Ameren Missouri apparently does not view the authorizing statute as important or it would have cited and discussed it.[213] Failure to discuss the operative statute makes sense when it does not support you. As indicated in MIEC's Initial Brief, that statute allows, but does not require, the Commission to authorize the FAC to "reflect increases **and decreases** in [a utility's] prudently incurred fuel and purchased power costs, including transportation."[214] All of the costs at issue are arguably not transportation costs because electricity is not literally transported, as the electrons do not literally move across the transmission wires.[215] The wires used for this purpose are not called transportation lines; they are called transmission lines.

The obvious purpose for the FAC under the statute is to allow a utility to pass through to customers any increase <u>or decrease</u> in costs of fuel and purchased power between rate cases. The bulk of the charges at issue here are the Schedule 26-A charges, which is the way MISO recovers its capital investment in MVP transmission projects.[216] Capital costs are hardly transportation charges. Thus, these charges are not for fuel, nor purchased power, nor are they charges to transmit purchased power. If the Commission allows Ameren Missouri to flow its transmission capital investments through the FAC, then why not its capital investments in generating plant as well? The statute simply does not allow it.

213 Initial Briefs of the MIEC, p. 40, and Staff, pp. 48 and 51. Ameren Missouri Initial Brief, pp. 55-7.
214 Emphasis added.
215 Haro testimony, Tr. pp. 1189-90.
216 Haro testimony, Tr. pp. 1173.

Moreover, these costs are not fluctuating, like for instance the price of coal or natural gas might fluctuate. These charges, because they relate to capital projects, are increasing. They will not also be decreasing as section 386.266 envisions. As explained in more detail below, these charges are simply not volatile costs contemplated by section 386.266 for recovery through an FAC.

Moreover, even if the short-term transmission costs were deemed "transportation," inclusion of costs under long-term contracts does not appear to be within the spirit and intent of the FAC, which is to allow the utility to recover its net fuel and purchased power costs. As Mr. Dauphinais explained, transmission charges associated with short-term transmission service, whether deemed "transportation" charges or not, are at least incremental costs directly related to Ameren Missouri's fuel and purchased power costs.[217] But MISO transmission charges associated with the long-term transmission service taken for Ameren Missouri's network load are not incremental costs incurred to enable power purchases or off-system sales.[218] Staff agrees that the charges at issue should not flow through the FAC because the charges at issue are not related to fuel and purchased power costs.[219] Staff also notes that the subject charges are not volatile nor of sufficient magnitude to justify such extraordinary regulatory treatment.[220]

Ameren Missouri asserts in its Initial Brief that, although it is a member of MISO, it has limited control over the subject costs.[221] Mr. Dauphinais noted significant avenues available to the Company to manage its anticipated increase in transmission expenses.[222] He explained that, first and foremost, Ameren Missouri has the opportunity as a stakeholder in MISO's MTEP process to help ensure the BRP, MEP and MVP transmission projects that are planned and ultimately pursued by MISO are consistent with providing reliable electric service at the lowest reasonable cost to its

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[217] Dauphinais Surrebuttal, Ex. 519, p. 13, 1. 8 – p. 14, l. 8.
[218] *Id.*
[219] Mantle testimony, Tr. pp. 1208-9.
[220] *Id.* at 1209.
[221] Ameren Missouri Initial Brief, pp. 56-7.
[222] Dauphinais Sur-Sur-Surrebuttal, Ex. 527, p. 8, l. 15 – p. 10, l. 7.

ratepayers. It can also participate in the MISO stakeholder process to help ensure MISO carefully monitors BRP, MEP and MVP transmission construction to ensure that construction by transmission owners is being pursued in an efficient and reasonable fashion. Second, the Company can participate in the MISO MTEP stakeholder process to ensure previously authorized BRP, MEP and MVP projects are still needed and still consistent with providing reliable electric service to the Company's ratepayers at lowest reasonable cost. If previously authorized BRP, MEP or MVP projects are no longer needed or otherwise no longer consistent with providing reliable electric service at lowest reasonable cost, the Company can actively advocate for cancellation of such projects before unnecessary costs are incurred. Third, the Company can take action before the Federal Energy Regulatory Commission ("FERC") against MISO or transmission owners to the extent that Ameren Missouri is unsuccessful in getting relief in the MISO stakeholder process. It can also take action at FERC to challenge the reasonableness of transmission rates proposed by MISO, MISO transmission owners and non-MISO transmission providers. This also includes challenging the reasonableness of updates to the inputs of formula transmission rates including the prudence of the construction costs a transmission owner is trying to roll into its transmission rates. Fourth, to the extent the Company itself is constructing MISO BRP, MEP or MVP transmission projects, such as the Lutesville to Heritage transmission project, the Company can directly act to reasonably and prudently manage its transmission construction costs.

Mr. Dauphinais' testimony in this regard is not speculation. Ameren Missouri has these avenues of influence available to it. Whether these avenues of influence are sufficient in the Commission's view remains to be seen. But removing Ameren Missouri's incentive to control the reasonableness of these costs cannot be in the ratepayers' interest, as this Commission has so held.[223] It is for this Commission to determine whether Ameren Missouri has sufficient ability to control

[223] In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service provided to Customers in the Company's Missouri Service Area, Case No. ER-2007-0002, p. 22.

these costs, to insure that they are reasonable, but it certainly has more ability to do so than the ratepayers.

Ameren Missouri also asserts that the charges at issue are volatile because they are rapidly increasing.[224] But that is not the standard contemplated by the statute or by the Commission. Section 386.266 seeks to address costs that are increasing <u>and decreasing</u>, clearly calling for unpredictability in costs. Indeed, this Commission concluded in Case No. ER-2007-0002, that volatile costs are those that tend to go up and down in an <u>unpredictable</u> manner.[225] The costs at issue are predictable and thus are not volatile.

Last, Ameren Missouri argues that the subject charges are large enough in magnitude to justify the extraordinary regulatory treatment authorized by section 386.266. But the increases between now and the likely next rate case are not significant. There is no net increase in the subject expenses for 2012, the likely increase in 2013 is a modest $2 million increase, and the likely increase for 2014 is $10 million.[226] Thus, these costs are hardly costs at a level that would compromise the financial integrity of Ameren Missouri and Ameren Missouri's Initial Brief fails to demonstrate otherwise.

In summary, the subject costs should not be allowed to flow through the FAC because they were not contemplated by section 386.266 and because it would be bad public policy to flow through the FAC to customers costs that are not volatile, not sufficiently beyond the control of Ameren Missouri, and not of sufficient magnitude in the near future to justify such extraordinary ratemaking.

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[224] *Id.* at 56.
[225] In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service provided to Customers in the Company's Missouri Service Area, Case No. ER-2007-0002, pp. 20-1.
[226] Haro testimony, Tr. pp. 1166-7.

The Commission Should Deny Ameren Missouri's Eleventh Hour Request for a Transmission Cost Tracker

As explained in MIEC's Initial Brief, this issue was introduced at the eleventh hour. As a result, the Office of Public Counsel, the only advocate for all ratepayers, did not have time to retain a witness nor, as evidenced by Public Counsel's Initial Brief, was he able to weigh in on this important issue. Second, as indicated in the MIEC's Initial Brief, the use of trackers is bad public policy because they involve single-issue ratemaking.[227] Such trackers are illegal in that they track only certain costs between rate cases and thus do not consider all relevant factors between rate cases. This concern is particularly true now. Ameren Missouri boasts that "disciplined management" has reduced Ameren Missouri's non-fuel expenditures since 2008 such that its non-fuel expenditures were $300 million less in 2011 than they were in 2008.[228] That fact highlights how inappropriate it is to track this cherry-picked non-fuel expense while overall non-fuel expenses are decreasing. Moreover, as explained above and in the MIEC's Initial Brief, the subject charges do not meet the standard that the Commission set for the use of a tracker—that the costs be volatile, uncontrollable, and of sufficient magnitude.

Ameren Missouri first argues that trackers are not illegal single-issue ratemaking. It contends that *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*,[229] and *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n*,[230] expressly so hold. First, the *Noranda* decision does not even address single-issue ratemaking. There, the Court rejected a claim of retroactive ratemaking.[231] Second, the *Office of the Public Counsel* decision rests on a different (or flawed) factual basis, namely that all relevant factors will be considered at the time that the tracked costs are considered for inclusion in rates.[232] As we

[227] Dauphinais Sur-Sur-Surrebuttal, Ex. 527 (designated Sur-Surrebuttal in the docket), p. 4, ll. 8 – 16.
[228] Ameren Missouri Initial Brief, p. 1.
[229] 356 S.W.3d 293 (Mo. App. 2011).
[230] 858 S.W.2d 806, 812-3 (Mo. App. 1993).
[231] 356 S.W.3d at 316-8.
[232] 858 S.W.2d at 813.

know, all other costs and revenues will not be tracked (only the ones that Ameren Missouri cherry-picks) between rate cases while the tracked costs are deferred, so there is no basis to even consider all relevant factors. In short, as Ameren Missouri's proposed tracker would operate, it is illegal single-issue ratemaking.

The tracker is also bad public policy. It is bad public policy (retroactive ratemaking) to allow a utility to retroactively recover its under-collections in future rates. It is doubly bad public policy to allow additional recovery for periods where the utility may have already been over-earning. But the proposed tracker would allow that very thing. Moreover, because it tracks a cherry-picked cost known to be increasing, it can only increase rates and, as indicated above, possibly do so after periods of over-earning anyway. Ameren Missouri admits, albeit in a different section of its brief, that trackers "are intended to benefit both utilities and their customers[.]"[233]

Ameren Missouri claims that it would be inequitable to change the FAC tariff and then deny it a tracker.[234] As explained above, the Commission would not be changing the FAC. The charges at issue—capacity charges under long-term contracts—have always been excluded from the FAC and should remain so. Ameren Missouri should not be allowed to "spin" its way into another cost tracker under the guise of "leaving things as they are."

In conclusion, a tracker for the expense at issue is not appropriate at this time. It is poor policy. It does not meet the Commission's standards for a tracker in that the costs at issue are not volatile, the costs at issue are not of sufficient magnitude at this time and in the near future, and Ameren Missouri has some means available to it to limit or control the charges. The Commission has never authorized a tracker solely on the basis of projected higher future costs where the utility has not demonstrated that it already has been absorbing significant expense increases. Last, the

[233] Ameren Missouri Initial Brief at 103.
[234] Ameren Missouri Initial Brief, p. 62.

Public Counsel should be afforded an opportunity to be heard on an issue such as this, where the tracker can only result in higher rates to ratepayers.

XII. Storm Tracker

Ameren Missouri's Initial Post-Hearing Brief presents only one argument for the inclusion of a storm tracker -- and it is a very curious argument at that. Ameren Missouri argues that the implementation of a storm tracker "creates a powerful incentive for the Company to continue to do what it has been doing: aggressively responding to storms."[235] There are a few deficiencies in this argument. First, does Ameren Missouri mean to imply that it will stop aggressively responding to storms if it does not receive a tracker? Nothing in Mr. Wakeman's testimony would imply that Ameren Missouri would alter its storm response based on whether or not it was awarded a tracker. Second, one wonders why a powerful incentive is needed for Ameren Missouri to do "what it has been doing" and what it will obviously continue to do. Third, as demonstrated at the hearing in this case, a tracker provides no additional incentive for Ameren Missouri to aggressively respond to storms. That is, Ameren Missouri would not recover storm costs any more quickly with a tracker than it does with an Accounting Authority Order ("AAO").[236] This fact, of itself, refutes Ameren Missouri's assertion that a storm tracker would "mitigate excessive regulatory lag." A tracker would not effect regulatory lag at all, because recovery from either a tracker or an AAO would occur in the rate case following the storm costs at issue. And furthermore, this Commission has already found that Ameren Missouri has recovered in rates every dollar it has ever incurred in storm costs.[237] Furthermore, Ameren Missouri has available the regulatory mechanisms to collect possible future storm costs as they occur. So, when one puts aside Ameren Missouri's heightened rhetoric about

[235] Ameren Missouri Initial Brief, p. 86.
[236] Tr. 1910, ll. 10-16.
[237] Report and Order, ER-2011-0028.

aggressively responding to storms and improving the storm restoration process, one discovers the real reason that Ameren Missouri seeks a storm tracker – a storm tracker insulates Ameren Missouri's earnings from a consideration of all relevant factors at the time the costs are incurred. In other words, Ameren Missouri seeks to exclude storm costs from the all relevant factors analysis, such that it can recover storm costs even when it is earning in excess of its authorized rate of return.

Notably, Ameren Missouri's Initial Post-Hearing Brief states that "since 2008, the Company has reduced its total non-fuel expenditures, in spite of inflation."[238] If true, and Ameren Missouri is steadily reducing its non-fuel expenditures, what justification could there be for the Commission to implement a tracker that segregates one expense without consideration of the other expenses that are apparently declining?

Ameren Missouri's request represents bad policy and bad ratemaking. Moreover, as described in MIEC's Initial Post-Hearing Brief, the Commission is not in favor of trackers. As such, trackers should be implemented, if ever, very sparingly and only when absolutely necessary. With respect to storm expense, a tracker is completely unnecessary, because Ameren Missouri has already recovered all of its storm costs through traditional ratemaking processes. As such, Ameren Missouri's request for a storm tracker should be denied, because a tracker is unwarranted and does not address any of the pre-textual reasons offered as justification for a tracker by Ameren Missouri.

XIII. Storm Costs

Ameren Missouri's Initial Post-Hearing Brief failed to provide even a single line of argument in support of its adoption of Staff's recommendation regarding storm costs. Staff's recommendation is fully addressed in the MIEC's Initial Post-Hearing Brief. As such, the MIEC will not belabor the arguments it has already made regarding storm costs. As a brief re-cap however, the MIEC advocates the exact same methodology that was adopted by the Commission in ER-2011-

[238] Ameren Missouri Initial Brief, p. 1.

0028. The Commission should simply normalize all known storm expense data from April 2007 to the present and grant Ameren Missouri $6.3M as an annual level of storm expense.[239]

XIV. Storm Assistance Revenue

Ameren Missouri's argument against setting a level for storm assistance revenue goes as follows: 1) some years Ameren Missouri generates more storm assistance revenue than other years; 2) some years Ameren Missouri generates no storm assistance revenue; 3) therefore, the Commission should not set a level for storm assistance revenue, because storm assistance revenue in any given year may not match the amount set in rates. The absurdity of this argument can be demonstrated by simply applying it to Ameren Missouri's storm recovery costs. Surely, Ameren Missouri would not argue against setting a level of storm recovery expense on the grounds that some years it incurs greater storm costs than other years. Indeed, Ameren Missouri's Initial Post-Hearing Brief appears to advocate excluding the revenues from 2011 from any storm assistance revenue average, because 2011 represents the year that Ameren Missouri generated the most storm assistance revenue.[240] Seriously? Would Ameren Missouri similarly advocate excluding from a normalization period a year that it incurred its greatest amount of storm expense? Ameren Missouri's arguments are simply untenable. Like it does for storm expense, the Commission should set a level of storm assistance revenue to reflect the amounts generated by Ameren Missouri's assistance to other utilities. As MIEC noted in its Initial Post-Hearing Brief, Ameren is providing storm assistance even this moment -- as of November 9, there were 427 Ameren crews providing assistance in the Hurricane Sandy restoration effort.[241] Ameren Missouri has generated substantial revenues by providing storm assistance in the past – and it can reasonably anticipate generating substantial revenues by providing storm assistance in the future. Therefore, the Commission should set a level

[239] Tr. 1903, ll. 12-25.
[240] Ameren Missouri Initial Brief, p. 88.
[241] http://www.ameren.com/outagecenter/pages/amerenhurricanesandy.aspx.

of $800,000 in annual storm assistance revenue, as such a level reflects a conservative amount for inclusion in Ameren's cost of service.

XV. Vegetation Management and Infrastructure Inspections Tracker

Just when it became apparent that Ameren Missouri's argument for the continuation of the vegetation management and infrastructure inspections tracker had lost its legs, Ameren Missouri changed the argument. Ameren Missouri previously argued that the tracker was necessary because Ameren Missouri could not predict the level of costs it would incur through its first trim cycle under the new rules. Now that the first trim cycle is essentially completed, Ameren Missouri argues that it needs to keep the tracker through the *second* trim cycle! This argument is without merit in light of the five years of historical data demonstrating essentially no volatility in the costs associated with vegetation management and infrastructure inspections.[242] Indeed, any volatility over the past five years has proven to be immaterial.[243] Furthermore, in light of Ameren Missouri's admission that its costs have been declining every year since 2008, the necessity for a tracker in this case is unwarranted.

Additionally, the Commission has repeatedly held that trackers are disfavored and that this tracker was implemented only to mitigate the uncertainty of the costs to comply with the new vegetation management and infrastructure inspections rules.[244] The new rules are no longer new. They were enacted more than four years ago; and Ameren Missouri has complied with them for nearly five years (beginning six months before they were enacted). Despite the overwhelming evidence to the contrary, Ameren Missouri impossibly argues that it still needs the trackers because it does not know what it will experience the second time through the trim cycle. However, unless the foliage in Ameren Missouri's service territory begins to suddenly behave in ways that it never has

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[242] Meyer Surrebuttal, Ex. 511, p. 23, l. 1 - p. 24, l. 6.
[243] *Id.*
[244] Meyer Direct, Ex. 510, p. 28, ll. 10-20.

before, Ameren Missouri can reasonably anticipate that its vegetation management and infrastructure inspections costs will do what they have done for the past five years – nothing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been transmitted by electronic mail this 15th day of November, 2012, to all parties on the Commission's service list in this case.

/s/ Diana Vuylsteke