**STATE OF ILLINOIS**
**ILLINOIS COMMERCE COMMISSION**

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| **CENTRAL ILLINOIS LIGHT COMPANY d/b/a AmerenCILCO, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS, and ILLINOIS POWER COMPANY d/b/a AmerenIP** | ) | |
| **Petitioners.** | ) | **Docket Nos. 05-0160, 05-0161, 05-0162 (consol.)** |
| **Proposals to implement a competitive procurement process establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV.** | ) | |

# REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION


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Table of Contents

**STATE OF ILLINOIS**
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| **CENTRAL ILLINOIS LIGHT COMPANY d/b/a AmerenCILCO, CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS, and ILLINOIS POWER COMPANY d/b/a AmerenIP** | ) | |
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**REPLY BRIEF OF THE STAFF OF**
**THE ILLINOIS COMMERCE COMMISSION**

Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, pursuant to Section 200.800 of the Rules of Practice (83 Ill. Adm. Code 200.800) of the Illinois Commerce Commission ("Commission"), respectfully submits its Reply Brief in the above-captioned matter.

## I. INTRODUCTION

The Initial Brief of the Staff of the Illinois Commerce Commission ("Staff IB" or "Staff's Initial Brief") was filed on October 14, 2005. The Initial Brief Of The People Of The State Of Illinois In Opposition To The Proposed Riders ("AG's Initial Brief" or "AG IB"), the Initial Post-Hearing Brief Of The Ameren Companies ("Ameren's Initial Brief" or "Ameren IB"), the Initial Brief Of Constellation Energy Commodities Group, Inc. ("CCG's Initial Brief" or "CCG IB"), the Initial Brief Of The Coalition Of Energy Suppliers ("CES's

Initial Brief" or "CES IB"), the Citizens Utility Board's Brief In Opposition To Ameren's Proposal To Implement A Competitive Procurement Process ("CUB's Initial Brief" or "CUB IB"), the Initial Brief Of Direct Energy Services, LLC and U.S. Energy Savings Corp. ("DES-USESC's Initial Brief" or "DES-USESC IB"), Dynegy Inc.'s Opening Brief ("Dynegy's Initial Brief" or "Dynegy IB"), the Initial Brief Of Illinois Industrial Energy Consumers ("IIEC's Initial Brief" or "IIEC IB"), the Initial Brief Of Morgan Stanley Capital Group Inc. ("MSCG's Initial Brief" or "MSCG IB"), and Midwest Generation EME, LLC's Initial Brief ("MWGen's Initial Brief" or "MWGen IB") were also filed on October 14, 2005.

As noted in Staff's Initial Brief, Central Illinois Light Company d/b/a AmerenCILCO ("AmerenCILCO"), Central Illinois Public Service Company d/b/a AmerenCIPS ("AmerenCIPS"), and Illinois Power Company d/b/a AmerenIP ("AmerenIP") (collectively, the "Ameren Companies", the "Ameren Utilities", "Ameren" or the "Companies") filed virtually identical tariffs implementing a competitive procurement process on February 28, 2005. Staff continues to recommend, for the reasons stated in Staff's Initial Brief and in this Reply Brief, that the Commission approve the Ameren Companies' proposed tariffs with the revisions supported by Staff. Many of the issues raised in the parties' initial briefs were addressed in Staff's Initial Brief and, in the interest of brevity, Staff has not raised or repeated every argument or response previously made in Staff's Initial Brief. Thus, the omission of a response to an argument that Staff previously addressed simply means that Staff stands on the position taken in Staff's Initial Brief because further or additional comment is neither needed nor warranted.

## II. NEED FOR COMMISSION ACTION

Response to AG

The AG argues that the only action the Commission needs to take is to "permanently suspend the tariffs Ameren has filed." (AG IB, p. 3) More specifically, the AG argues that the Commission does not need to approve the Ameren Companies' proposed procurement method or any other procurement method for 2007 and beyond. (*Id.*) The AG also contends that the Commission should exercise its ratemaking authority to "effectuate[ ] an extension of the transition period . . . ." (*Id.*) The AG observes that the end of the mandatory transition period on January 1, 2007, does not signify the end of regulation in Illinois, and declares that the Commission's obligations to determine whether rates are "just and reasonable" and to limit utilities to recovery of costs determined to be "just, reasonable and prudent . . . " will likewise continue. (*Id.*, p. 4) Finally, the AG notes that the Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILCS 5/16-101 et seq. (the "Restructuring Law"), "retained all of the PUA's longstanding consumer protections for electric service for those customers who take service that has not been declared competitive pursuant to Section 16-113 of the Act." (*Id.*)

Although Staff agrees, in most cases, with the generalizations made by the AG regarding the Commission's ratemaking authority, the AG offers no specific arguments in this portion of its Initial Brief to support its contention that the Commission should "permanently suspend" and "not approve" the Ameren Companies' proposed tariffs. As demonstrated in Staff's Initial Brief and other sections of this Reply Brief, the Ameren Companies' proposal should be approved (with the modifications recommended by Staff) based on applicable law and the relevant facts established in the record for this proceeding. Although the AG does not support its ultimate conclusion in this section of its Initial Brief, Staff will analyze certain assertions made here by the AG and discuss those assertions in the context of the Ameren Companies' proposal that is the subject of this proceeding.

First, the AG's assertion that the Commission should "permanently suspend" the Ameren Companies' proposed tariffs is not proper under Illinois law. The Commission's power to "suspend" tariffs is limited as set forth in Section 9-201 of the Public Utilities Act ("Act" or "PUA") (220 ILCS 5/9-201), and does not include the power to "permanently suspend" tariffs. As the Commission is well aware, it may suspend tariffs for a period not to exceed approximately eleven months, at which point the filed tariffs become effective on a pass to file basis if the Commission has not ruled on the merits.[1] (*See* Central Illinois Public Service Co. v. Illinois Commerce Comm'n, 5 Ill. 2d 195, 206 (1955) ("If [the suspension] period has expired before the Commission has concluded its inquiry, then the utility may begin collecting charges under the new rate . . . ."); 220 ILCS 5/9-201) Staff assumes that the AG intended to indicate that the proposed new tariffs should be rejected and permanently cancelled based on its position that the proposed tariffs are improper as a matter of law or otherwise fail to produce just and reasonable rates. While these positions also lack merit, they would – if accepted –

[1] Section 9-201(a) of the Act provides that no tariff change may become effective on less than 45 days notice absent special permission from the Commission. (220 ILCS 5/9-201(a)) Section 9-201(b) of the PUA provides that the Commission may enter upon a hearing to consider the propriety of any tariff change, and may suspend the effective date of such tariff for a period not more than 105 days beyond the time when such tariff change would otherwise go into effect unless the Commission extends the period of suspension for a further period not exceeding 6 months. (220 ILCS 5/9-201(b)) The 45 day, plus 105 day, plus 6 month periods total approximately 11 months.

provide a basis to permanently cancel the proposed tariffs rather than permanently suspend those tariffs.

Second, the AG's assertion that the Commission does not need to approve the Ameren Companies' proposed procurement method or any other procurement method for 2007 and beyond appears to present both legal and policy assertions, and is inadequate on both counts. Staff will not address here the substantive merits of the Ameren Companies' auction procurement proposal except to note, as explained in other portions of this Reply Brief and in Staff's Initial Brief, that the facts and the law support approval of their auction proposal (with certain modifications recommended by Staff). Thus, on a substantive level, the AG is incorrect to assert that the Commission need not approve the Ameren Companies' proposal.

Assuming, *arguendo*, the Commission found that the Ameren Companies' proposed tariffs do not establish just and reasonable rates, the AG is wrong to suggest that that should be the end of the Commission's inquiry from a procedural perspective under the PUA. In Central Illinois Public Service Co. v. Illinois Commerce Comm'n, 5 Ill. 2d 195, 200-201, 203 (1955) ("*CIPS*"), the Court considered an appeal where the Commission rejected and cancelled newly proposed tariffs and found there was not sufficient evidence to determine what would be a new just and reasonable rate. Parties argued that the Commission was obligated to approve the newly filed tariffs or determine new just and reasonable rates. The Illinois Supreme Court rejected these arguments based on the language of Section 36 (now Section 9-201) of the PUA. Specifically, the Court in *CIPS* held that the determination of whether proposed rates are just and reasonable is different and distinct from the determination of what rates would be just and reasonable, and explained that the obligation of the Commission to determine what would be just and reasonable rates depends on the evidentiary showing:

> The contention that the Commission must conclude its inquiry into the proposed rate within a ten-month [now eleven-month] period confuses the power of the Commission to suspend with its power to determine the reasonableness of the rate. The ten-month period applies only to the former. If that period has expired before the Commission has concluded its inquiry, then the utility may begin collecting charges under the new rate, so far as pre-existing contractual obligations permit. The running of the period does not terminate the Commission's inquiry, however, and the new rate remains subject to permanent cancellation by the Commission's final order in the proceedings. (Illinois Bell Telephone Co. v. Commerce Com. ex rel. City of Edwardsville, 304 Ill. 357; City of Edwardsville v. Illinois Bell Telephone Co. 310 Ill. 618.) …
>
> The contention that the Commission should have established some other rate is also based on a misconstruction of section 36 [now Section 9-201]. That section requires the Commission to establish only such rates as the Commission "shall find to be just and reasonable." It does not command the Commission unconditionally to establish a rate without such a finding; nor does it compel the Commission to make such a finding.
>
> It is obvious that the Commission cannot be required to establish some alternative rate without evidence in the record that that rate is reasonable. And we think it equally plain that the Commission is not required to take the initiative in seeking out such evidence. While the act authorizes the Commission to investigate a utility's accounts and to appraise its property, and to assess the expenses against the utility, (Ill. Rev. Stat. 1953, chap. 111 2/3, par. 41a,) there is nothing in the act indicating that such a power carries with it a duty to exercise it whenever a utility applies for an increase in rates. To impose such a duty might seriously impair the Commission's functions.

(*Id.*, pp. 206-207)

Thus, while the Commission has no independent legal obligation to inquire into the issue of what would constitute just and reasonable rates if the utility's filed tariffs fail to meet that requirement, the Commission cannot ignore proper evidence on the issue of alternative just and reasonable rates and simply decline to rule. Here, the evidence provided by Staff and others establishes modifications to the Ameren Companies' proposal that result in just and reasonable rates.

Moreover, Staff must note the enormous policy implications of the AG's recommendation to reject the Ameren Companies' proposed tariffs and take no further action. The Ameren Companies no longer own significant generation assets and their existing supply contracts expire on January 1, 2007 -- contemporaneous with the end of the mandatory transition period. Thus, the Ameren Companies currently have no identified sources of electric supply to serve their customers' needs post-2006, and such supply must necessarily be acquired from third parties. The Ameren Companies prudently filed their proposed procurement plan well in advance of the expiration of their current supply contracts and a decision in this docket is anticipated in January 2006 – approximately one year prior to the termination of the existing supply contracts. The AG's recommendation to essentially turn a blind eye to the immensely important issue of how the Ameren Companies should and will procure its electric supply post-2006 (putting aside the fact that the auction-based proposal is reasonable), creates pointless and ill-advised uncertainty regarding how the Ameren Companies will procure supply after 2006.

Finally, although Staff agrees with the AG that the end of the mandatory transition period on January 1, 2007, does not signify the end of regulation in Illinois or the elimination of various regulatory requirements, the AG never addresses in any reasonable way the fact that the instant proposal with Staff's proposed revisions passes muster under those very requirements. Staff will address specific arguments in this regard in other sections of this Reply Brief. Similarly, although the AG is correct that the world as we know it will not end on January 1, 2007 (AG IB, p. 1), the AG appears to ignore the fact that the regulatory arena in Illinois underwent significant changes in 1997 as a result of the Restructuring Law. Before enactment of the Restructuring Law in 1997, "[e]ach local utility company was vertically integrated, meaning that each one produced electric energy, transmitted it to the general vicinity of the consumer, and distributed it to the customers' businesses and homes." (Illinois Power Co. v. Illinois Commerce Comm'n, 316 Ill. App. 3d 254, 257 (5th Dist. 2000)) The Restructuring Law "was enacted to introduce competition into the Illinois electricity market . . . [and] authorizes electric utilities to transfer . . . power plants to affiliated or unaffiliated entities and to enter into service agreements and power purchase agreements with the transferee." (Commonwealth Edison Co. v. Illinois Commerce Comm'n, 332 Ill. App. 3d 1038, 1044 (2nd Dist. 2002)) Consistent with the Restructuring Law, the Ameren Companies restructured their electric operations and transferred virtually all of their power plants to other entities. The AG and certain other parties fail to acknowledge these significant developments in their arguments.

Because the Ameren Companies no longer own significant generation facilities (as a result of the Ameren Companies taking actions specifically authorized by the Restructuring Law), the only legitimate issue to be considered here is whether the Ameren Companies' proposal constitutes a prudent and reasonable method to procure power from third party suppliers consistent with the requirement for just and reasonable rates contained in the PUA – not whether the cost of providing electric energy would have been lower if the Legislature had decided against restructuring and the Ameren Companies still owned all of their generation facilities. This proceeding is not a forum to second-guess the Legislature's decisions embodied in the Restructuring Law. The focus here should be on the best means to procure electric energy given applicable legal and factual constraints. As explained elsewhere, the auction-based procurement method meets these requirements.

## III. LEGAL ISSUES

Response to CUB

CUB has raised issues in this Section that are substantially similar to the AG. Staff's arguments below, although directed to the AG, are equally applicable to CUB.

### A. Background: the Illinois Electric Service Customer Choice and Rate Relief Law of 1997

Response to AG

In this section of its Initial Brief, the AG continues to make a number of generalizations regarding the Commission's ratemaking authority following enactment of the Restructuring Law. For the most part, Staff does not contest these general statements of the law regarding the Commission's ratemaking authority. In particular, Staff agrees that after the termination of the mandatory transition period utilities may seek and obtain changes to rates, provided the changes "result in just and reasonable rates." (AG IB, p. 6) However, the AG quickly jumps to an unreasonable reading of the PUA that is based on misstatements or mischaracterizations of the law and the Ameren Companies' auction-based procurement proposal.

The AG states that "the statute does not authorize utilities to charge market rates until sufficient retail competition exists to justify the reclassification of the service as competitive." (*Id*., pp. 6-7) Although couched in general terms, this statement is misleading and confuses or ignores the difference between retail market rates and wholesale market rates. The Ameren Companies' tariffs embodying their auction-based procurement proposal do not establish retail market rates; instead, the Ameren Companies' proposed tariffs establish retail rates through use of formulae based on its wholesale cost of procuring electric energy through auctions. Although these wholesale costs will be market based since FERC allows electricity wholesalers to charge market based rates (*see* AG IB, p. 15), this is not the same as a retail market rate.

The Restructuring Law, codified as Article XVI of the PUA, establishes that regulation of electric retail services declared to be "competitive services" will be substantially reduced. (*See* 220 ILCS 5/16-103(a)(e); 220 ILCS 5/16-113(b); 220 ILCS 5/16-116(b)) The genesis of this new regulatory model for competitive electric services is set forth in the statement of electric utility service obligations contained in Section 16-103(a) of the PUA, which provides, in full, as follows:

> (a) An electric utility shall continue offering to retail customers each tariffed service that it offered as a distinct and identifiable service on the effective date of this amendatory Act of 1997 until the service is (i) declared competitive pursuant to Section 16-113, or (ii) abandoned pursuant to Section 8-508. Nothing in this subsection shall be construed as limiting an electric utility's right to propose, or the Commission's power to approve, allow or order modifications in the rates, terms and conditions for such services pursuant to Article IX or Section 16-111 of this Act.

(220 ILCS 5/16-103(a)) Thus, Section 16-103(a) requires an electric utility to continue to provide each retail tariffed service offered at the time of enactment of the Restructuring Law until "the service is . . . declared competitive pursuant to Section 16-113 . . . or abandoned pursuant to Section 8-508." (*Id*.)

An electric utility relieved of its provider of last resort obligations for a service declared competitive under Section 16-103(a) could, absent requirements or limitations specified elsewhere in the PUA, decline to offer such service or, if it did offer that service, charge whatever the retail market might bear. The extent of deregulation for services declared competitive is established in Section 16-116(b) of the PUA, which provides, in full, as follows:

> (b) An electric utility may offer any competitive service to any customer or group of customers without filing contracts with or seeking approval of the Commission, notwithstanding any rule or regulation that would require such approval. The Commission shall not increase or decrease the prices, and may not alter or add to the terms and conditions for the utility's competitive services, from those agreed to by the electric utility and the customer or customers. Non-tariffed, competitive services shall not be subject to the provisions of the Electric Supplier Act or to Articles V, VII, VIII or IX of the Act, except to the extent that any provisions of such Articles are made applicable to alternative retail electric suppliers pursuant to Sections 16-115 and 16-115A, but shall be subject to the provisions of subsections (b) through (g) of Section 16-115A, and Section 16-115B to the same extent such provisions are applicable to the services provided by alternative retail electric suppliers.

(220 ILCS 5/16-116(b)) The ability to charge market rates for **retail** services declared competitive under the Restructuring Law is the ability under Section 16-116(b) to charge whatever rate a willing buyer will pay, free from Commission scrutiny with respect to prices, terms and conditions. The AG ignores or misses these important provisions of the Restructuring Law, and accordingly misreads and misapplies the provisions of Section 16-103(c). (See AG IB, pp. 8-10)

Section 16-103(c) of the PUA is an exception to the general ability of an electric utility to (i) refuse to offer or (ii) charge a market rate for certain retail services declared competitive. Section 16-103(c) provides, in full, as follows:

> (c) Notwithstanding any other provision of this Article, each electric utility shall continue offering to all residential customers and to all small

> commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer's premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997. Upon declaration of the provision of electric power and energy as competitive, the electric utility shall continue to offer to such customers, as a tariffed service, bundled service options at rates which reflect recovery of all cost components for providing the service. For those components of the service which have been declared competitive, cost shall be the market based prices. Market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility's cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process.

(220 ILCS 5/16-103(c))

Thus, Section 16-103(c) of the PUA requires electric utilities to continue to offer traditional bundled electric service on a tariffed basis for residential and small commercial retail customers, notwithstanding the declaration of such services as competitive. Further, Section 16-103(c) restricts the general ability of electric utilities to charge market rates for competitive retail services, and instead requires that rates for competitive residential and small commercial retail services "reflect recovery of all cost components for providing the service."[2] (*Id*.) Section 16-103(c) also provides a limitation on allowable costs, and mandates that "cost shall be the market based prices . . . " which are specifically defined as "either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility's cost of

[2] Further evidencing that Section 16-103(c) of the Act expresses a limitation on the general deregulation of competitive services for residential and small commercial customers (rather than a grant of market based rate authority as suggested by the AG), the exemption of competitive services from various Articles of the PUA (including Article IX) in Section 16-116(b) is limited to "[n]on-tariffed, competitive services" – i.e., excluding competitive services for residential and small commercial customers which must be "tariffed" under Section 16-103(c). (220 ILCS 5/16-103(c); 220 ILCS 5/16-116(b))

obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process." (*Id.*)

While Section 16-103(c) does refer to "market based prices", this phrase is used in defining "costs" and the statutory language of Section 16-103(c) discloses that the Legislature did not consider "market based prices" and "cost based rates" to be mutually exclusive concepts. Thus, it is clear from the language of Section 16-103(c) that "market based prices" as used in Section 16-103(c) may be determined based on the utility's actual cost of obtaining such power and energy through any arms-length acquisition process – including a competitive bidding process. As a result, the AG's reference to "market based prices" is improperly used to suggest that market based prices are inconsistent with cost-based rates under Section 16-103(c). Equally erroneous is the AG's assertion that setting cost based retail rates for services not declared competitive based on market based wholesale costs is inconsistent with Section 16-103(c) and beyond the Commission's authority. Section 16-103(c) of the Act imposes a limitation on an electric utility's ability to charge market rates for residential and small commercial customer competitive services, requiring instead cost based rates specifically defined to include an electric utility's cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process. The AG's argument that Section 16-103(c) prohibits the Commission from setting rates according to the cost based methodologies set forth therein is based on a flawed reading of Section 16-103(c) that fails to recognize (1) that the reference to "market based prices" is in the context of cost based rates and (2) that Section 16-

103(c) is a limitation on the ability to charge retail market rates rather than a grant of a specific rate authority.

The AG concludes by offering additional generalizations regarding the Commission's ratemaking authority, which are identified as "essential elements of rate of return/cost-based regulation in Illinois . . . ." (AG IB, pp. 10-12) Like many of the statements in the AG's Initial Brief, the ratemaking principles articulated here are not offered in the context of a specific argument explaining why or how the auction-based procurement proposal under review is inconsistent with these principles. As demonstrated in Staff's Initial Brief and other sections of this Reply Brief, the auction-based procurement proposal with the revisions recommended by Staff is consistent with applicable ratemaking principles. Given the general failure of the AG to make specific arguments, there is nothing to which Staff can specifically respond. The closest the AG comes to making a specific argument is to state that "markets are not required to consider" these various ratemaking principles. (*Id*., p. 12)

The AG's statement says nothing about whether the auction-based procurement proposal should be accepted or rejected, as all applicable ratemaking principles can and are being considered in this docket. Further, the AG's statement is nonsensical in that it implies that there is some means of acquiring wholesale energy other than through the wholesale market. As explained above, any such assertion ignores the fact that the Restructuring Law authorized the Ameren Companies to divest themselves of their generation assets and that they own no significant generation assets at this time. As a result, any possible procurement method will necessarily rely on the wholesale market. Finally, while "markets" obviously do not function in the same procedural context as the Commission in a docketed proceeding, there is no reason to believe that markets will be oblivious to the prudence of management decisions or other sound business practices underlying various ratemaking principles. To summarize, the AG's statement in no way supports rejection of the auction-based procurement proposal.

### B. ICC authority under Article IX and Article XVI to approve the filed tariffs

Response to AG

The AG contends that "Ameren's proposal seeks to radically shift risks to consumers and to insulate the Company from any financial responsibility for power procurement decisions." (AG IB, p. 13) The AG further asserts that this is a "change in regulatory, consumer protections" that is not authorized by the Restructuring Law or the PUA. (*Id*.) While the AG goes on in the balance of this section of its Initial Brief to make an argument that the Ameren Companies' proposed tariffs are deficient based on the ruling in Citizens Util. Bd. v. Illinois Commerce Comm'n, 275 Ill. App. 3d 329 (1st Dist. 1995) – which Staff addresses below – it offers no further explanation or analysis to support its initial contentions. Staff will not speculate as to the unarticulated bases for the AG's contentions. The Commission clearly has the authority under the PUA to approve rider recovery of certain costs through formula based rates. (See Staff IB, pp. 12-13) Similarly, the Commission has broad authority to make appropriate prudence findings based on the evidence presented, and to incorporate those findings into tariffs providing for recovery through a rider mechanism. (*See* Central Ill. Light Co. v. Illinois Commerce Comm'n, 255 Ill. App. 3d 876, 881-883 (3rd Dist. 1993) (Rejecting challenge to Commission fact determination requiring presumption of prudence in operations giving rise to current remediation expenses in generic proceeding approving rider recovery of certain environmental clean-up costs), *affirmed in part and reversed in part on other grounds*, Citizens Util. Bd. v. Illinois Commerce Comm'n, 166 Ill. 2d 111, 121 (1995) (Commission determination that Illinois utilities prudently operated and decommissioned manufactured gas plant sites not contested before Illinois Supreme Court.))

The Ameren Companies' auction-based procurement proposal fully articulates the criteria and method by which they will enter into contracts for wholesale power and energy to serve their retail customers – removing their discretion in all material respects, incorporating the resulting wholesale costs, with no mark up, into a formula based translation mechanism to determine retail rates. This proposal is not properly characterized as an attempt to avoid regulatory scrutiny or nefariously avoid or transfer risk. To the contrary, the Ameren Companies have placed their procurement decision cards on the table and seek a fact based finding that the criteria and process by which they propose to acquire wholesale power and energy constitute prudent management decisions that, when implemented, will result in just and reasonable rates. Staff's Initial Brief fully articulates why – with certain modifications to the Ameren Companies' auction proposal -- the record supports the prudence finding that the Ameren Companies seek with respect to their auction-based procurement proposal.

The AG also argues that the Commission cannot approve a blank rate, and cites Citizens Util. Bd. v. Illinois Commerce Comm'n, 275 Ill. App. 3d 329 (1st Dist. 1995) for the proposition that tariffs with "rates that do not exist" violate the PUA. (AG IB, pp. 13-14; see also AG IB, pp. 49-53) The AG misapplies the holding in *Citizens* and mischaracterizes the proposed tariffs. *Citizens* involved the Commission's approval of Commonwealth Edison Company's ("ComEd's") Rate CS (Contract Service), a tariff designed to allow ComEd to retain load that would otherwise leave its system by providing discounted rates to certain commercial and industrial users pursuant to negotiated agreements. (*Id*., p. 332) Rather than setting forth criteria or formula by which the discounted rates would be determined, "the tariff merely indicated that revenues from the discounted rates could not be less than the incremental costs of providing service to the customer, thereby ensuring a positive contribution to the utility's fixed cost." (*Id*., p. 333) Although the contracts and work papers deriving the negotiated rates were to be filed with the Commission for informational purposes, both the contracts and supporting work papers would be automatically treated as proprietary and thus would be neither published nor made available for public inspection. (*Id*.)

The Court in *Citizens* noted that Section 9-102 of the Act mandates that utilities file with the Commission and keep open for public inspection schedules showing all rates and other charges or classifications for all services provided by it. (*Id*., p. 338) The Court found that these publication requirements require a utility to "file and publish a schedule of rates and charges, including any contracts which may affect the same." (*Id*.) The Court held that ComEd's Rate CS did not comply with these requirements because the actual charges were "not included in the proposed tariff on file with the Commission nor open to the public for inspection." (*Id*., p. 339) Rather, the Court found that Rate CS simply granted ComEd "the prospective right to set rates in the future" based on contracts that did not yet exist, and thus did "not comply with section 9-102 of the Act." (*Id*.)

The Court also considered the argument that since Rate CS provided a "'parameter' of possible rates" it satisfied the requirement for a schedule of rates. (*Id.*) The Court rejected this argument because Rate CS did "nothing more than limit Edison's otherwise unfettered right to establish any rate it so desires as long as that rate is not below its marginal cost." (*Id.*) The Court made clear, however, that it was not holding that the Commission did not have authority to approve a tariff that "truly contains a 'parameter of rates'", such as a rider "containing a mathematical formula under which rates would fluctuate with the wholesale cost of natural gas". (*Id.*, pp. 339-340) The Court also went on to find that even if the failure to contain a rate were not at issue, Rate CS still violated the Act because the rates negotiated pursuant to contracts would be treated as proprietary and not kept open to public inspection. (*Id.*, pp. 340-341)

The foregoing analysis of *Citizens* discloses that its holding is far more narrow than the AG and other parties suggest and, most importantly, inapplicable to the instant case which presents a tariff that is clearly distinguishable from the Rate CS tariff. First and foremost, although *Citizens* did strike down a tariff for the failure to contain a rate, *Citizens* did not involve the Commission's authority to allow rider recovery of specific costs through a formula based rate. Indeed, the Court itself confirmed that it was neither presented with nor ruling upon the Commission's authority to adopt formula based rates based on established parameters. (*Id.*, pp. 339-340) Thus, contrary to the AG's assertion, *Citizens* in no way stands for the proposition that any tariff failing to state rates in terms of dollars and cents violates the Act. Indeed, the law in Illinois has long been held to be to the contrary. (City of Chicago v. Illinois Commerce Comm'n, 13 Ill. 2d 607, 611 (1958) (Rejecting challenge to Commission's approval of automatic adjustment clause providing for changes in retail rates based on future changes in the price of wholesale gas because, *inter alia*, the Commission's "statutory authority to approve rate schedules embraces more than the authority to approve rates fixed in terms of dollars and cents.")) Second, unlike Rate CS, the tariffs at issue here do contain clearly articulated parameters and do not allow each of the Ameren Companies the "unfettered right to establish any rate it so desires." (*See* Citizens, 275 Ill. App. 3d at 339) Rather, the extremely detailed auction proposal establishes rules and procedures for the marketing of each solicitation, bidder eligibility, credit requirements, contract terms, and bidder conduct to assure a fair and competitive auction; and requires the Ameren Companies to enter into supply contracts with the suppliers that offer the lowest prices for the needed supply. Finally, unlike Rate CS, both the formulas used to calculate retail rates pursuant to the resulting wholesale contracts as well as the retail rates so calculated will be open to public inspection.[3]

### C. Relationship of Illinois and federal law and jurisdiction

Response to AG

The AG recognizes in this section of its Initial Brief that the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over wholesale electricity sales in interstate commerce. (AG IB, p. 14) Relying on Pike County Light & Power Co.

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[3] The Ameren Companies have accepted Staff's recommendation that the informational filings containing the calculated retail rates as well as the supporting work papers be postmarked by the 20th of the filing month, and that any informational filing not meeting this deadline be accepted only if correcting a prior filing or submitted as a special permission filing under the provisions of Section 9-201(a) of the Act and 83 Ill. Adm. Code 255. (*See* Staff IB, pp. 182-183; ICC Staff Exhibit 10.0, pp 3-4, lines 53-72)

v. Pennsylvania Public Utility Comm'n, 77 Pa. Commw. 268, 465 A.2d 735 (1983), the AG also seeks to establish that states retain jurisdiction to examine the prudence of utility purchases of wholesale energy at FERC approved rates. (*Id.*) Staff agrees that state utility commissions are not prohibited from reviewing the prudence of a utility's purchases of wholesale power at FERC approved rates. However, as explained in more detail below, the ability of the Commission to review the prudence of wholesale power purchases subject to FERC jurisdiction is limited. The Commission should take this limitation into account in considering the Ameren Companies' proposal.

In this regard, the auction-based procurement proposal tends to maximize the Commission's authority and jurisdiction to impact wholesale procurement decisions for inclusion in retail rates. This proceeding provides the Commission an extensive opportunity to have binding input into the rules, practices and procedures that will be utilized to procure wholesale power and energy for the provision of retail services. As these decisions will be made prior to the consummation of the wholesale purchases, they necessarily avoid any conflict with the federal filed rate doctrine explained below. Further, these rules, practices and procedures identify the criteria the Ameren Companies' management will utilize to procure wholesale electric supply, and allow the Commission to engage in an upfront prudence determination. Conversely, rejection of the auction-based procurement process in favor of some other process that involves after-the-fact prudence reviews automatically raises the issue of whether there has been a violation of the filed rate doctrine if and when the Commission finds a wholesale purchase to be imprudent. While the Commission has authority to make such prudence determinations, those determinations must fit within the allowable parameters of the

“Pike County” exception to the filed rate doctrine discussed below. Staff submits that the Commission’s ability to exercise its regulatory authority is likely to be more constrained and limited in the after-the-fact review and rejection process than under the upfront development and approval process proposed here.[4]

The federal "filed rate" doctrine is a rule of preemption that requires state utility commissions to give binding effect to wholesale rates filed with or approved by FERC. See Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962 (1986); General Motors Corp. v. Illinois Commerce Comm'n, 143 Ill. 2d 407, 416-417 (1991), cert denied 504 U.S. 908 (1992), 112 S.Ct. 1936 (1992). Under the filed-rate doctrine, states are required to give effect to determinations made by FERC. Thus, state utility commissions may not question or alter a FERC approved wholesale rate or deny recovery of FERC-mandated costs that the utility cannot avoid. In setting intrastate rates, state public utility commissions must therefore permit regulated companies to recover costs and expenses that FERC has already established or approved. The court in Pike County Light & Power Co. v. Pennsylvania Public Utility Comm’n, 77 Pa. Commw. 268, 465 A.2d 735 (1983), recognized an important limitation on this aspect of the filed-rate doctrine, however, and determined that a state regulatory commission, in setting local rates, was not automatically required to use the cost of acquiring energy under a FERC-approved power purchase contract if the company had other supply options available to it. Cases applying what has been termed “the Pike County exception” have thus permitted state regulatory commissions to consider the prudence

[4] The auction-based procurement process also provides the Commission an ongoing opportunity modify and improve that process based on experience and new developments.

of utility companies' decisions to enter into the underlying contracts and agreements, including transactions with affiliates.

In Nantahala Power and Light Company v. Thornburg, 476 U.S. 953 (1986), the United States Supreme Court held that under the filed rate doctrine, the North Carolina Utility Commission ("NCUC") could not reexamine in a retail rate proceeding the reasonableness of a FERC-mandated allocation to two affiliated companies of low-cost "entitlement" power from the Tennessee Valley Authority ("TVA"). The Supreme Court concluded that the filed rate doctrine applied to state action by virtue of the Supremacy Clause; and that once FERC sets a rate or makes a decision affecting such a rate, a State cannot conclude that the FERC-approved wholesale rate is unreasonable or interfere with FERC's plenary authority over interstate wholesale rates. (Nantahala, 476 U.S. at 963, 966-967) Citing the Pike County decision, the Court noted that a utility's purchase of a particular quantity of power at FERC-approved rates could be deemed unreasonable if lower cost power were available from another source. (*Id.*, 476 U.S. at 972) However, because Nantahala's calculation of costs for retail rates already included all the low-cost power that FERC determined it was entitled to receive from the TVA, the determination that Nantahala had purchased an unreasonably large quantity of high-cost power from TVA conflicted with FERC's order no differently than a refusal to recognize a FERC-approved rate as reasonable. (*Id.*, 476 U.S. at 973)

The Supreme Court reaffirmed its view of the filed rate doctrine and the plenary authority granted FERC in Mississippi Power & Light v. Moore, 487 U.S. 354, 101 L.Ed 2d 322, 108 S.Ct. 2428 (1988). In Mississippi, a nuclear generating plant, Grand Gulf 1, was constructed to serve as a source of base load capacity for Mississippi Power and

Light Company ("MPL") and three other affiliated operating companies which participated in an integrated electric system. (*Id*., 487 U.S. at 358) FERC held that an agreement submitted to it by the affiliated companies for allocating the costs of Grand Gulf's power was discriminatory, and ordered MPL to purchase 33% of the output of Grand Gulf to achieve just, reasonable and non-discriminatory rates among the operating companies. (*Id*., 487 U.S. at 356, 361-363) The Mississippi Public Service Commission ("MPSC") subsequently granted MPL a rate increase to recover those costs, but was reversed on appeal by the Mississippi Supreme Court for not having first conducted its own review of the prudence of those costs.

The Supreme Court reversed the decision of the Mississippi Supreme Court and found that there was no room under the filed rate doctrine for the MPSC to make its own determination of reasonable costs after a mandatory allocation of those costs had been established by FERC:

> … States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair. FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates.

(*Id.*, 487 U.S. at 371) The Court also held that it was not presented with the factual situation identified in Nantahala (i.e., the Pike County exception) where a state utility commission could find a utility's purchase of power to be unreasonable despite the fact that it was purchased at FERC-approved rates:

> [I]t might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power. But if the integrity of FERC regulation is be preserved, it obviously cannot be unreasonable for MP&L to procure the particular quantity of high-priced Grand Gulf power that FERC has ordered it to pay for. Just as Nantahala had no legal right to obtain any more low-cost TVA power than the amount allocated by FERC,

> it is equally clear that MP&L may not pay less for Grand Gulf power than the amount allocated by FERC.

(*Id.*, 487 U.S. at 373-374)

The Illinois Supreme Court has also endorsed the Pike County exception, but recognizes its limitation. In General Motors Corporation v. Illinois Commerce Comm'n, 143 Ill. 2d 407 (1991), the Illinois Supreme Court upheld the Commission's determination that it had no authority under the filed rate doctrine to conduct a prudence review of unavoidable FERC-mandated take-or-pay costs. The Court acknowledged, however, the ability of the Commission to conduct prudence reviews and deny recovery of gas costs incurred pursuant to FERC-approved rates in certain circumstances:

> [Under the Pike County] exception to the filed rate doctrine [acknowledged by the Supreme Court] . . . States retain the authority to review the prudence of distributor's actions in incurring FERC-approved supply charges when the distributor had a choice whether to incur the charge. For example, a State regulatory agency could find that purchase of a particular quantity of power from a particular source was unreasonable if lower cost power was available elsewhere, even if the cost of the purchased power had been approved by FERC and therefore deemed reasonable.
>
> That exception to the filed rate doctrine does not apply here, for the distributors in this case cannot avoid the current take-or-pay charges. As the appellate court acknowledged, the FERC-approved take-or-pay costs and the FERC-approved allocation of those costs are mandatory. Under orders issued by FERC, the distributors are liable to the pipelines for the take-or-pay costs regardless of any actions the distributors may take now or in the future, even if they cease purchasing gas from the pipelines imposing the charge.

(General Motors, 143 Ill. 2d at 422) (citations omitted))

The Illinois Supreme Court subsequently considered the filed rate doctrine in United Cities Gas Co. v. Illinois Commerce Comm'n, 163 Ill. 2d 1 (1994), where the Commission had denied recovery of certain FERC-approved gas costs based on its finding that the utility's allocation of demand charges between its Illinois and Tennessee service areas was imprudent. After reviewing its holding in General Motors, the Court rejected the argument that the Commission's decision violated the filed rate doctrine by trapping FERC-approved cost:

> In the present case, the Commission did not rule that the Texas Eastern demand rate, which was approved but not mandated by FERC, was excessive or unreasonable. Rather, it was the percentage of that rate which United Cities allocated to its Illinois customers that the Commission did not approve. The filed rate doctrine does not require the Commission to allow United Cities to charge Illinois customers for costs exceeding those which are properly and prudently allocable to them. Had United Cities properly tracked its customers and sales, and updated the allocation percentages assigned in 1984, it would not face the potential of recovering less than 100% of its total costs of providing gas to its Tennessee and Illinois customers.

(*Id*., p. 27)

The U.S. Supreme Court's decisions in Nantahala and Mississippi and the Illinois Supreme Court's decisions in General Motors and United Cities establish that state utility commissions have a limited ability to review the prudence of a utility's decision to purchase power at a FERC-approved rate. Federal Courts have also held that the filed rate doctrine applies to market based rates authorized by FERC. (*See* Town of Norwood v. New England Power Co., 202 F.3d 408, 419 (1st Cir. 2000)) While the AG is correct that the Commission is not prohibited by federal law from reviewing the prudence of the Ameren Companies' purchases of FERC approved wholesale costs, it is absolutely incorrect to suggest that the Commission's power to conduct such a prudence review is basically unfettered. (See AG IB, pp. 17-19) Indeed, to the extent that the AG is suggesting that the Commission should look at the costs of wholesale suppliers (including the Ameren Companies' affiliates) in determining whether wholesale supply costs were prudently incurred by the Ameren Companies, it is suggesting the very type of review (questioning the reasonableness of the FERC-approved rate itself) that is prohibited by the filed rate doctrine and not encompassed within the Pike County exception.

An after-the-fact prudence review of wholesale power purchases as suggested by the AG would necessarily require some sort of proof that "lower cost power was available elsewhere" in order for a denial of recovery of wholesale power costs to pass muster under the filed rate doctrine. Staff submits that neither it nor any other governmental or consumer party will be particularly well-situated to present such evidence given that neither Staff nor any governmental or consumer party is likely to be directly involved in negotiating such arrangements or otherwise privy to such information. It would seem that such evidence would be hard to come by even for parties with access to that type of information. Ironically, the auction process itself is designed to determine the lowest cost power available to the Ameren Companies in a fair, open and transparent process. Staff submits that the foregoing analysis of the federal law and jurisdictional considerations submitted by the AG demonstrate that there are real concerns about the effectiveness of any process that embodies an after-the-fact prudence review of FERC-approved costs, and that the auction-based procurement process is better suited to effectuate effective Commission regulation of wholesale supply procurement decisions.

## IV. SUFFICIENCY OF THE COMPETITIVE MARKET

### A. Markets' relationship to auction process

<u>Response to Ameren, AG and CUB</u>

The AG and CUB both raise concerns with respect to the sufficiency of the competitive market. (AG IB, pp. 19-43; CUB IB, pp. 12-16) As Staff anticipated, the Ameren Companies tried to demonstrate in its Initial Brief that many of these concerns were exaggerated or unfounded. Also, as Staff expected, the Ameren Companies tried to demonstrate that the electric wholesale market is competitive enough that it can be relied upon as the sole source for utilities to obtain least-cost electric supply for retail customers. (Ameren IB, pp. 27-44; Staff IB, p. 19)

However, Staff still believes that any deficiencies in the competitiveness of the ***retail*** electricity markets merely add to the urgency and importance of approving viable and appropriate procurement methods for electric utilities to implement. If consumers cannot rely on a competitive ***retail*** market, they should at least be able to rely upon their regulated public utilities to provide electric power. Deficiencies in the competitiveness of ***retail*** electricity markets, in and of themselves, are not useful in determining which procurement methods to implement. (Staff IB, p. 18)

Thus, even if the concerns of the AG and CUB with the competitiveness of the electricity market were fully justified, those concerns would not help the Commission choose a better method for procuring power and energy for retail customers. Further, the alternatives proposed by witnesses for the AG and CUB (i) still rely upon the same wholesale market, (ii) involve actions arguably outside the scope of the Commission's jurisdiction, (iii) involve actions arguably contrary to Illinois statutes, or (iv) are simply too vague and incomplete. (*Id.*, p. 20)

Finally, Staff recognizes that parties have concerns about the competitiveness of wholesale electricity markets. However, Staff does not see how those concerns eliminate the need for utilities to acquire power and energy from those wholesale markets. The concerns about the competitiveness of retail electricity markets only increase the need to approve viable and appropriate procurement methods for electric utilities to implement. Thus, Staff recommends that the Commission ensure a viable procurement approach, and in Staff's view, the only viable approaches, at least in the near term, will rely on the wholesale market. (*Id.*, pp. 21-22)

### C. Retail market conditions

Response to IIEC

The IIEC in its Initial Brief argues that "Illinois customers, and particularly large customers, currently are not getting full benefits of a competitive retail market." (IIEC IB, p. 10) The IIEC points to a disparity between the number of Retail Electric Suppliers ("RESs") serving customer in Ameren territories and the potential number of suppliers who might bid into the Ameren auctions. (*Id*.) The IIEC argues then that until retail market conditions improve sufficiently into a market that provides "economically viable" options to all customers, it is important that the utility provide an avenue to the more competitive wholesale supply market. (*Id*., p. 11) In response, Staff would add that "any deficiencies in the competitiveness of the retail electricity markets merely add to the urgency and importance of approving viable and appropriate procurements methods for electric utilities to implement, since consumers who cannot rely on a competitive retail market should at least be able to rely upon their regulated public utilities to supply them with electric power. Deficiencies in the competitiveness of retail electricity markets, in and of themselves, say absolutely nothing about which procurement methods are appropriate for electric utilities to implement." (Staff IB, p. 18)

## V. AUCTION DESIGN ISSUES

### A. General effectiveness and suitability

Response to AG

The AG claims that the Ameren Companies' proposed auction is ill-suited for Illinois because (1) AG witness Reny's proposal, which involves multilateral negotiations or an auction with a reserve price, could be expected to result in lower prices than the Ameren Companies' proposal (AG IB, p. 44), (2) low cost generation producers, such as nuclear and coal, can obtain prices based on the costs of higher priced generation (*Id.*, pp. 44-46), and (3) the Ameren Companies' auction format produces undue risks to consumers by holding a single, annual auction for multi-year supply (*Id.*, p. 46).

With respect to the AG's first argument, Staff addresses the flaws in Dr. Reny's proposal in Section V.D.. of its Initial Brief and continues to recommend that the Commission reject Dr. Reny's proposal. (Staff IB, pp. 56-58) Staff once again notes that the AG did not file Dr. Reny's testimony until the rebuttal stage, thereby depriving all parties, except the Ameren Companies, of the ability to respond to his proposal.

The AG's second argument claims that low cost generation producers, such as nuclear and coal, can obtain prices based on the costs of higher priced generation. The implication is that the low cost providers are manipulating the market to obtain prices based on the cost of higher-priced generation. However, that simply is not the case. As stated by Ameren witness Frame:

> As concerns the ownership of generation capacity, Dr. McNamara has testified in this proceeding that there are more than 121,000 MW of generating capacity within the MISO footprint that are "deliverable" throughout MISO including to Central and Southern Illinois (Resp. Ex. 9.0, Lines 15-18). Moreover, the ownership of generation capacity within the MISO footprint is "unconcentrated" when determined using the Herfindahl-Hirschman Index (HHI).[4] This large amount of generation capacity (even before including potential imports), coupled with low market concentration, is fundamentally inconsistent with any realistic market power concern.
>
> Recent pricing data as contained in the Rebuttal Testimony of William H. Hieronymus in Docket No. 05-0159 is also inconsistent with the view that market power concerns are likely. Dr. Hieronymus compares the average prices at two PJM (Chicago and AEP) and two MISO (Illinois and Cinergy) hubs for the three months (April-June 2005) that the MISO's Day 2 markets have been in operation. He finds that the AEP hub prices are the lowest, at $38.92 per MWH averaged across the three month time period, but that the prices at the other three hubs are not much greater, only 1.5 percent more at the Chicago hub, only 2.0 percent more at the Illinois hub and only 2.7 percent more at the Cinergy hub. (ComEd Ex. 15.0 at Lines 330-335) While no single piece of information is likely to dispose of important market power questions unequivocally, that these average prices are relatively close also is inconsistent with the notion that market power over generation supplies available to CPA participants is likely to be a problem. Dr. Hieronymus' pricing information suggests that the geographic market in which CPA participants can buy their requirements is relatively broad and market power concerns are simply much less likely in broader as opposed to narrower markets.
>
> …Those with load in Central and Southern Illinois that are concerned about the exercise of market power there (including entities that might be successful bidders in the proposed CPA) will have the opportunity to obtain FTRs and other hedges that can insulate them from the effects of local price disruptions, including price disruptions that would arise if local generators there were able to exercise market power. As well, market power is exercised by withholding otherwise economic generating capacity from the dispatch. However, if the withholding of generation capacity creates reactive power problems, the MISO can order the withheld generating capacity to operate to provide the needed reactive power, which in turn might defeat the expected price rise from the withholding. See the Midwest ISO FERC Electric Tariff, Third Revised Volume 1, First Revised Sheet No. 1714Z.101, at paragraph 13.4.1.

(Resp. Exhibit 13.0 Revised, pp. 14-16, lines 318-357)  Further, there is nothing in the record to suggest otherwise.

Finally, the AG's argument that the Ameren Companies' auction format produces undue risks to consumers by holding a single, annual auction for multi-year supply must be rejected.  (AG IB, p. 54)  As noted by Ameren witness LaCasse:

> Ameren has not locked in any supply for its customers for the period beginning January 1, 2007. This is an unavoidable result of the transition plan. The proposed Auction Process provides for a transition to laddering. However, Ameren's open position for January 1, 2007 cannot be changed.

(Resp. Ex. 19.0, p. 74, lines 1700-1703)  Dr. LaCasse further explains that there is no benefit to spreading out the risk over multiple auctions because it would impact how bidders bid leading to unpredictable results that do not reflect the economic value of the auction product.  (*Id.*, lines 1726-1728)  Further, it appears that the AG's complaint is with the legislation and not the auction.  Such a position is neither helpful nor useful in determining whether the Commission should approve the Ameren Companies' auction proposal with revisions supported by Staff.

<u>Response to CUB</u>

CUB claims that the Ameren Companies' auction proposal should be rejected because it is merely a means for the Ameren Companies' generating affiliate, AmerenEnergy Resources ("AER"), to receive high prices for its "low-cost, high margin electricity production".  (CUB IB, p. 18)  CUB is basically asserting a market power argument.

Staff is concerned with CUB's position recommending the rejection of the Ameren Companies' proposal without providing a well-defined alternative.  With just a year before the Ameren Companies' existing supply contracts are to expire (December 31, 2006), CUB recommends that the Commission reject the proposed auction process. However, instead of proposing a well-defined alternative, CUB witness Steinhurst proposed an active portfolio management approach. Staff discusses in its Initial Brief (Section VI.A, p. 148) and this Reply Brief (Section VI.A below) why Dr. Steinhurst's flawed approach must be rejected.

Further, CUB's argument that the Ameren's proposed auction process is deigned to benefit its affiliate, AER, must also be rejected. Although CUB asserts many options which the Ameren Companies could have and should have presented, including active portfolio management, it presents no evidence that these options would prevent the exercise of market power. As stated by Ameren witness LaCasse:

> … my primary reaction is that none of his proposals is actually geared to diminishing the impact of alleged market power in wholesale generation markets. While he [Dr. Steinhurst] offers these ideas justified based on the potential mitigation of alleged market power in wholesale markets, he never explains how his proposals would in fact help control alleged wholesale electric market power. Hence, while I believe that his contention that active portfolio management is superior for customers can and should be addressed, his rationale for active portfolio management fails and it should not be viewed as an antidote to alleged market power or disguised under the cloak of a market power justification.

(Resp. Ex. 19.0, p. 60, lines 1370-1379) Further, after reviewing a report co-authored by Dr. Steinhurst on active portfolio management, Dr. LaCasse notes

> That report does show that Dr. Steinhurst has a consistent position on the impact that Portfolio Management may have on alleged wholesale market power, **but it also shows that there is neither substance in support of these claims nor any comparative analysis between the proposed Auction Process and the Portfolio Management proposal**. In fact, the same sweeping assertions that portfolio management curbs alleged wholesale market power would also apply to the proposed Auction Process. The proposed Auction Process will result in term commitments that would reduce the profitability of exercising market power in the spot markets; similarly, Ameren's proposed Auction Process also includes a

> laddering of contracts. Any proper comparative assessment would demonstrate that the portfolio management approach offers no specific advantage in addressing alleged market power in the wholesale spot market.

(*Id.*, p. 62, lines 1417-1429) (emphasis added) Further, Staff witness Zuraski adds that Dr. Steinhurst fails to explain how a procurement process other than an auction would circumvent a less-than competitive wholesale market. (ICC Staff Exhibit 12.0, p. 8, lines 171-173)

Finally, with respect to CUB's unsupported assertion that "[t]he auction process is designed to avoid or overcome FERC scrutiny" (CUB IB, p. 18), Staff discusses FERC jurisdiction in Section III.C. above.

Thus, based on the foregoing, the Commission should reject the recommendation of CUB, and approve the Ameren Companies' auction proposal with revisions supported by Staff.

### B. Full requirements product

<u>Response to AG</u>

The AG argues that the Ameren Companies' proposal for full requirements, load following contracts would put "the risk of volume fluctuation exclusively on the supplier, and each supplier will build the risk of this uncertainty … into their bids by including a risk premium." (AG IB, p. 47) The AG recommends a more diversified contract mix, which would minimize the risk premium and provide more flexible purchasing strategy. (*Id.*)

It appears that the AG is recommending active portfolio management as opposed to the Companies' proposed full requirements product. Staff addressed the active portfolio management approach in Section VI.A of its Initial Brief. (Staff IB, pp. 144-151) Staff expresses several concerns with this approach, namely, (1) the amount of discretion that active portfolio management places with the utility company (*Id.*, pp. 148-149); (2) the fact that there is no hard evidence to support the claims made by AG witness Salgo and CUB witness Steinhurst supporting active portfolio management (*Id.*, p. 149) and (3) the flexibility that is afforded by active portfolio management is available to all suppliers and is not just a utility advantage (*Id.*, pp. 149-151).

Although the AG asserts that risk premium could be more effectively managed (AG IB, p. 47), the fact is that CUB witness Steinhurst would not even firmly recommend the use of active portfolio management under a regulated plan process. (Staff IB, pp. 146-147) The record fully supports the use of a full requirements product. (*Id.*, pp 31-32) Thus, Staff continues to recommend that the Commission approve the basic full-requirements product concept in this docket.

<u>Response to Ameren</u>

See Sections V.L.4.e and f below for a response to Ameren's Initial Brief on the issues of (a) Provision of Ancillary Services and (b) Identification of Resources.

### C. Multiple round descending clock format

#### 1. Load caps

<u>Response to Ameren</u>

The Ameren Companies, in their Initial Brief, note that Staff witness Salant recommended that large bidders be permitted to exceed the load cap if they choose to be price takers for those tranches above the load cap. (Ameren IB, p. 58) As further discussed in Section V, C., 8, of this reply brief, Staff is ambivalent of Dr. Salant's proposal at this time and therefore does not recommend that the Commission order the Ameren Companies to incorporate the price taker option into the auction. (Staff IB, p. 55)

Response to IIEC

IIEC argues that the imposition of a load cap is that efficient suppliers, who are able and willing to provide large quantities of electricity at prices lower than their competitors, would be artificially constrained in the amount of low-cost power and energy they would be allowed to supply. (IIEC IB, p. 12) However, IIEC witness Collins acknowledged different hypotheticals could be constructed under which the absence of a load cap would produce higher prices. (Tr., p. 151) Staff's Initial Brief pointed out the rationale for a load cap citing to the testimony of Ameren witnesses Nelson and LaCasse and Staff witnesses Salant and Sibley. (Staff IB, pp. 32-33) Ameren witness Nelson testified that load caps "diversify the exposure of the Ameren Companies to any one particular supplier's contract and credit risks, by preventing the supply agreements from being concentrated in a few large suppliers." (*Id.*) Ameren's Initial Brief pointed out that a 100% load cap has real costs. It would "permit unlimited over-representation of bidder interest, would remove the discipline on bidders ability to influence the auction results, and would provide no assurance whatsoever of diversification of the BGS Supplier base. (Id. at p. 30)" (Ameren IB, p. 59)

IIEC also disagrees with the Ameren Companies' assertion that a load cap is necessary to limit credit or performance exposure to any supplier. IIEC asserts that a load cap at any level would be ineffective in mitigating default risk. (IIEC IB, pp. 19-21) Staff disagrees. Similar to determining the proper level of credit requirements, imposing a load cap involves a risk trade-off, as illustrated by the following example. Imposing IIEC's proposed 100% load could result in one supplier providing 100% of the Ameren Companies' energy supply. Under the Ameren Companies' proposed SFC, a supplier rated BBB-/Baa3 by the credit rating agencies would be extended a $20 million unsecured credit limit. As power prices fluctuate, the Ameren Companies' sole supplier would be required to post margin for the total mark-to-market exposure amount in excess of the $20 million credit limit. In contrast, a 35% load cap requirement could result in three suppliers providing 100% of the Ameren Companies' energy supply. If credit rating agencies rate each of those suppliers BBB-/Baa3, then each supplier would be allowed a $20 million unsecured credit limit under the Ameren Companies' proposed SFC. That is, a 35% load cap could result in the Ameren Companies extending $60 million of unsecured credit to suppliers. Thus, under a 35% load cap, the Ameren Companies could have less collateral on hand should the suppliers default.

On the other hand, the risk that all three suppliers would simultaneously default is less than the risk of a single supplier defaulting. Since the credit requirements do not provide 100% protection to bundled service customers from rising energy prices in the event of a supplier default (ICC Staff Exhibit 1.0, p. 102, lines 2316-2325), diversification against supplier default is valuable.

In summary, on one hand, without a load cap, the Ameren Companies could have more collateral on hand than it would with three individual suppliers. On the other hand, under a 100% load cap, there is greater risk that one supplier would default than three would default simultaneously, as could occur under a 35% load cap. As far as risk is concerned, since there is a potential trade-off in benefits in imposing a load cap, judgment is required to determine which is the better policy for bundled service customers. Staff believes that diversification of supply is an important risk management tool. Thus, Staff respectfully recommends the Commission reject IIEC's proposal for elimination of the load cap and that the Commission approve the use of a 35% load cap per auction.

For these reasons, Staff recommends that the Commission reject the IIEC's proposal for elimination of the load caps, and that the Commission approve the use of a 35% load cap per auction.

### 2. Starting prices

Response to AG

The AG argues that the failure to state starting prices "renders the Ameren riders unlawful just as the Rider CS proposal, which would have allowed ComEd to negotiate certain rates without stated standards or review, was found unlawful by the court in Citizens Utility Board v. Illinois Commerce Commission." (AG IB, p. 49)

In Section III.B., above, Staff addresses the AG's flawed application of Citizens Utility Board v. Illinois Commerce Commission and why it must be rejected. Further, the suggestion to develop starting prices or a range for the starting prices a full year prior to the auction is nonsensical and perhaps demonstrates the AG's lack of understanding of the auction process. As Staff witness Salant stated in discussing risks associated with a simultaneous multiple round auction format,

> One example is the risk posed by limited bidder participation. **Bidder participation may be limited due to unrealistic starting prices** or poorly planned or executed promotion efforts.

(ICC Staff Exhibit 1.0, p. 22, lines 500-502) (emphasis added) As Ameren witness LaCasse stated with respect to the mechanics of determining starting prices:

> a. The minimum and maximum starting prices will be developed considering **recent** market data.
>
> b. These market data would include energy forward prices for standard products, capacity market data as available, congestion and wholesale transmission rates.
>
> c. The round 1 prices would take the indicative offer data into account.

(Resp. Ex. 12.0, p. 36, lines 2046-2069) (emphasis added) With respect to indicative offer data, Dr. Salant explains,

> Prior to an auction, the Auction Manager publicly posts the following information: data pertaining to the supply to be procured (e.g., historical load profiles and customer switching data), the number and size of tranches in each auction, the load cap (i.e., the maximum number of tranches a bidder can bid on and win), and the maximum and minimum starting prices (for Round 1 of an auction) for each product.
>
> …
>
> The Auction Manager provides each qualified bidder with a list of all qualified bidders. All qualified bidders are required to file "Part 2" applications that include their "indicative offers" (i.e., the total number of tranches a bidder wishes to serve at (1) the maximum starting prices for all products and (2) the minimum starting prices for all products). Each bidder's indicative offer at the maximum starting price for all products determines its "initial eligibility," i.e., the maximum number of tranches that the bidder is able to bid for in any round of the auction.
>
> …

> The Auction Manager provides each registered bidder with a list of all registered bidders, a measure of the total initial eligibility in the auction, and the Round 1 prices (i.e., starting prices) for that auction.

(ICC Staff Exhibit 1.0, pp. 23-24, lines 525-530; p. 23, lines 537-546; p. 25, lines 555-557) Dr. Salant further adds that certain types of information disclosures prior to an auction may assist an auctioneer in determining the appropriate auction starting prices. (*Id.*, p. 51, lines 1141-1143)

Thus, to provide starting prices or a range of prices a year before the auction would not only be premature but also harmful to bidder interest and participation in the auction. Therefore, Staff recommends that the Commission reject the AG's argument.

### 3. Bid decrements

Response to Ameren

The Ameren Companies, in their Initial Brief, address Dr. Salant's concern with Ameren's initial proposal to provide simple bid decrement formulas to bidders. (Ameren IB, p. 61) Dr. Salant was concerned that bidders could use the simple formulas to infer the amount of excess supply and some bidders could achieve an advantage over other bidders. (*Id.*) In response to Dr. Salant's concern, the Ameren Companies proposed a revised bid decrement formula which would not allow bidders to infer the amount of excess supply. (*Id,* pp. 61-62) The Companies later state in their brief that "the Auction Manager will develop the precise price decrement formulas and parameters in consultation with Staff after approval of the auction." (*Id.*, p. 62) They further add that the guidelines should be disclosed to registered bidders. (*Id.*) Staff in its Initial Brief endorsed the same recommendation to the Commission. (Staff IB, p. 39)

### 5. Portfolio rebalancing

Response to Ameren

The Ameren Companies argue against Dr. Salant's proposal to allow the Auction Manager to have "the discretion to increase the auction volume for products with excess supply as well as to decrease the auction volume of products for which supply offers are limited" because in the Companies' opinion it would be harmful to the auction process. (Ameren IB, p. 63) Dr. Salant while acknowledging some disadvantages to portfolio rebalancing believed the advantages outweighed them (ICC Staff Ex. 11.0 Corrected, pp. 52-57), and therefore he recommended in rebuttal that the Auction Manager be authorized to utilize portfolio rebalancing only after consultation with Staff and that there be a consensus between the Auction Manager and Staff that such action would be appropriate. (Staff IB, p. 45) Given the above, Staff recommends that the Commission not reject Dr. Salant's portfolio rebalancing proposal but rather (1) authorize the Auction Manager to utilize the option only after consulting with Staff and that Staff and the Auction Manager must reach a consensus that its use would be appropriate and (2) direct the Auction Manager, Staff and the Auction Advisor to devise prior to the auction an appropriate protocol for carrying out portfolio rebalancing. (Staff IB, p. 46)

### 6. Association and confidential information rules

#### a. The Company's proposed rules

See Section V.C.6.b, below.

### b. Dr. Salant's additional disclosure rules

Response to Ameren

The Ameren Companies proposed "association and confidential information rules" in its Illinois Auction Rules to provide an additional competitive safeguard to the auction process. (Staff IB, p. 46) The Companies take issue with Dr. Salant's additional proposed disclosure requirements and recommends that they be rejected for a number of reasons. (Ameren IB, pp. 65-67) Staff in its Initial Brief recognized that there were reasonable arguments against requiring the additional disclosure of full-requirements contract information. Staff therefore, after considering the real potential for some unintended negative consequences, recommended that the Commission adopt the "association and confidential information rules" as proposed by the Ameren Companies. (Staff IB, p. 50)

### 8. "Price taker" proposal

Response to Ameren

The Ameren Companies, in their Initial Brief, recommended that Staff witness Salant's "price-taker" option be rejected because it would harm the auction process resulting in the auction process price in some circumstances to be neither competitive nor a market price. (Ameren IB, p. 68-69) Staff, in its Initial Brief, stated that the price taker option was unlikely to have much of an effect on the auction, either in the positive or the negative and therefore, was ambivalent toward the proposal at this time. Staff further added that since suppliers could sell their power to other bidders or into the MISO organized markets, or in other bilateral markets, the price taker option is not necessary for consumers to gain access to low-cost producer's power. Staff therefore recommended that the Commission not order the Ameren Companies to incorporate the price taker option into the auction at this time. (Staff IB, p. 55)

### D. Clearing price: uniform vs. pay-as-bid

Response to AG

The AG rejects the uniform clearing price format in favor of Dr. Reny's recommendation of multilateral negotiations or a reserve price in an auction.

Staff addresses the flaws in Dr. Reny's proposal in Section V.D. of its Initial Brief and recommends that the Commission reject Dr. Reny's proposal. (Staff IB, pp. 56-58) Also, see Staff's response in Section V.A. above.

### E. Auction management

#### 1. Auction manager

Response to Ameren

As stated in Ameren's Initial Brief, the Auction Manager will be chosen/hired by the Ameren Companies. The Auction Manager will actively manage the auction process and be the sole interface between bidders and the auction. (Ameren IB, p. 71) Staff, in its Initial Brief, set forth that it had concerns over whomever the Ameren Companies along with ComEd hired as the Auction Manager. (Staff IB, p.58-64) Staff's concern was with the independence of whomever the Companies and ComEd hired as the Auction Manager. The primary cause for the concern was that the Ameren Companies and ComEd have affiliates that engage in wholesale power sales and those affiliates could be expected to be bidders in the proposed auctions. (Staff IB, p. 59) However, Staff also states that the independence/conflict of interest problem would not go away if the Ameren Companies used some other type of approach to obtain power given the same affiliates could be involved in those approaches as well. Notwithstanding its concerns over the Auction Manager's lack of complete independence from the Ameren Companies and ComEd, Staff recommends that the Commission approve the Companies' proposal to hire an independent Auction Manager. Staff comes to this conclusion because, in many respects, the Commission rather than the Auction Manager is defining the auction process through this proceeding and even where discretion can be exercised, Staff (along with its advisor) will be able to monitor and have input on various Auction Manager functions. (Staff IB, pp. 63-64)

### 2. Role of Ameren

Response to Ameren

The Ameren Companies, in their Initial Brief, states that in addition to hiring the independent Auction Manager, which is discussed above, there would be limited communications between the Auction Manager and the Companies. The Ameren Companies would receive no more information during the auction than the suppliers bidding in the auction receive. (Ameren IB, p. 74) In addition to those limitations imposed on the Companies, Staff, as it indicated in its Initial Brief, would further note that the Ameren Companies agreed that:

> … representatives of the Ameren Companies not be present "in the room" during the actual conduct of the auction, not be permitted to direct or influence the Auction Manager's conduct of the auction, and not be

> permitted to communicate with the Auction Manager during the running of the auction…

(Staff IB, p. 65) With that restriction and the measures to restrict the discretion of the Auction Manager to reinforce the independence of the Auction Manager, Staff believes that the Ameren Companies' role has been satisfactorily narrowed to minimize undue influence over the auction process. (Staff IB, pp. 65-66)

### 3. Role of Staff

Response to Ameren

In their Initial Brief, the Ameren Companies state that Staff and the Auction Manager each will independently submit auction reports to the Commission. The Ameren Companies cite to Respondents' Exhibit 11.0 Revised. (Ameren IB, p. 76) Attached to Respondents' Exhibit 11.0 Revised is Respondents' Exhibit 11.2, Auction Manager and ICC Staff Post-Auction Reports, which sets forth both the "Content of the Confidential Auction Manager Report" and the "Content of the Confidential ICC Staff Report." Ameren's Initial Brief appears to assume that the "Content of the Confidential ICC Staff Report" attached to Respondents' Exhibit 11.0 Revised was completely acceptable to Staff. While that is true for the most part, Staff does have a couple of issues with Respondents' Exhibit 11.2. Staff witness Salant had a number of proposed changes which were set forth in Appendix 1 to ICC Staff Exhibit 11.0 Corrected, Proposed Revisions to Ameren Exhibit 11.2. Although Ameren's Initial Brief does not mention it, the Ameren Companies responded to those proposals in its surrebuttal testimony. (Resp. Ex. 19.0, pp. 56-58 and Resp. Ex. 19.5) Dr. Salant, among other changes, proposed two changes that the Ameren Companies rejected in their surrebuttal testimony. Staff has concerns with their rejection of those two changes. Those proposed changes appear in Section 2, question 9 and Section 4 of Resp. Ex. 19.5. The Companies' position on Dr. Salant's proposed changes in Section 2 and Section 4, is the same position that ComEd took in its surrebuttal testimony. In fact, Resp. Ex. 19.5 is simply ComEd Ex. 19.6 with an Ameren exhibit number. While Staff's Initial Brief stated that "Staff believes that the details of the Staff Report Outline have been adequately resolved" (Staff IB, p. 67), Staff's understanding of the intent of the subject language contained in Respondents' Ex. 19.5 has become greater after Staff reviewed the Initial Briefs of CCG and MSCG on this general subject matter. (See, V.K.2 below) Indeed, Staff's entire discussion of the Content of the Confidential Staff Report was meant by Staff to indicate merely the ***type*** of report that it would be providing to the Commission after each auction and the ***type*** of information upon which it would be basing its recommendation to approve or reject the outcome of the auctions. It was not meant to prevent Staff from exercising its judgment in providing whatever information appears relevant to a Commission decision to reject any particular auction outcome by commencing a formal investigation or other proceeding. It is now clear to Staff that Ameren, CCG, and MSCG want to restrict the Commission's right to exercise discretion with respect to the approval of the auction results.

With respect to question 9 in Section 2, Dr. Salant recommended that the question read: "Did the Staff have the same access to data as the AM [Auction Manager]?" (ICC Staff Ex. 11.0 Corrected, Appendix 1) The Ameren Companies, in their surrebuttal testimony, suggest the following revision to the question, which is numbered as question 10: "<u>Did Staff receive the same round result data as the AM</u>?"

The reason for the change given by the Companies is "Staff will have full and timely access to necessary data, but it may not be practical to provide Staff with exact same method of data access." (Resp. Ex. 19.5) In order to be able to ensure the competitiveness and integrity of the auction process, Staff believes that it should have the same method of access to data as the Auction Manager. On cross examination, Ameren witness LaCasse agreed that Staff should be given access to data and that it was possible for Staff to have some sort of real time access to the same data as it is coming into the Auction Manager. (Common Tr., p. 943) The Ameren Companies' proposed change seems to be contradictory with that testimony. Their proposed language would seem to prevent Staff and the Auction Advisor from having access to the same computer screens that the Auction Manager is looking at during the course of the auction process. Furthermore, the Auction Manager's opinion of what is necessary data may differ from Staff's and its Auction Advisor's opinion and therefore, the language suggested by the Ameren Companies may impose a restriction on Staff and its Auction Advisor in their ability to assess the competitiveness and integrity of the auction process.

With respect to Section, 4, Dr. Salant recommended that the section read as follows:

> The ~~ICC~~ Staff will detail any issues or concerns and any recommendations the ~~ICC~~ Staff has regarding further action by the ICC. The ~~ICC~~ Staff will base ~~its~~ their recommendations for further action upon the answers to the questions ~~described~~ in Sections 1 through 3, as well as any other answers to questions that Staff may incorporate into its report. ~~If Section 3 indicates that no external events of a negative and potentially transient nature have occurred, and if in Sections 1 and 2, all questions have been answered in the way that is indicative of a valid result, it is expected that the ICC Staff will recommend that no further action be taken by the ICC. It is expected that if the ICC Staff recommends that further action be taken,~~

> ~~the ICC Staff will support any such recommendation by reference to a question indicating that a criterion for a valid result has not been met, and the ICC Staff would discuss the materiality of the criterion on the result.~~

(ICC Staff Ex. 11.0 Corrected, Appendix 1, Proposed Revisions to Ameren Exhibit 11.2)

The Ameren Companies in their surrebuttal testimony suggested the following modifications:

> The Staff will detail any issues or concerns and any recommendations the Staff has regarding further action by the ICC. The Staff will base its recommendations for further action upon the answers to the questions described in Sections 1 through 3, as well as any other answers to questions that Staff may incorporate into its report in connection with Section 2, the Evaluation of the Conduct and Competitiveness of the Auction.
>
> If all questions are answered as to indicate a valid result it is expected that Staff will recommend no further investigation of auction. If some questions are not so answered, Staff will review the materiality of such exceptions in the context of the entire Auction and will have the authority to recommend for or against further action.

(Resp. Ex. 19.5, (comments omitted)) The Companies' reasoning for the proposed changes to Dr. Salant's language was "to avoid giving bidders [the] impression that approval criteria are wide open[,] added question limited to this section.." The Ameren Companies fail to recognize that it is the Commission, not Staff, that is the decision maker on whether the auction results should be accepted or rejected. Staff and its Auction Monitor are not the decisionmakers; however, Staff and the Auction Monitor should have the flexibility to adopt its evaluation of the auction process as the circumstances warrant so that it can provide the Commission with all potential relevant information. Such flexibility is acknowledged by the Ameren Companies in their acceptance of the lead in language to Section 2's questions that "The questions shall include, but need not be limited to, the following:" (Resp. Ex. 19.5)

Despite their objection, the Ameren Companies' proposed language would prevent Staff from considering answers to questions that may arise during the auction process that are relevant but not in connection to Section 2 ("I believe that a) an open invitation to add any question, as the language added by Dr. Salant to Section 4 permits, would create substantial uncertainty for bidders; and that b) the change should be clarified to apply the questions that may be added in Section 2" (Resp. Ex. 19.0, p. 57)") It is impossible to foresee every circumstance that may arise during the pre-auction process and most certainly unknown outside events. Therefore, Staff should have flexibility when preparing its report for the Commission. In addition, given the fact that it is the Commission not Staff that makes the final determination concerning the auction process, Staff cannot agree that adopting its language for Section 4 of the Staff Report would some how "create substantial uncertainty for bidders" as Ameren suggests. Therefore, Staff's proposed language concerning Section 2, question 9/10 and Section 4 as set forth in Staff Ex. 11.0, Appendix 1 should be adopted by the Commission.

#### 4. Representation of consumer interests / separate consumer observer

Response to Ameren

The Ameren Companies, citing to their auction process design and a concern for ensuring confidentiality of certain bidder information, reject the proposal for a Consumer Observer. (Ameren IB, p. 77) While Staff accepts the responsibility for observing and assessing the auction as a neutral party which is a critical part of Ameren's auction process design, Staff takes no position on the proposal for a separate Consumer Observer. (Staff IB, p. 69)

### F. Date of initial auction

All parties, except CES, support or do not oppose a September 2006 auction date. However, even CES acknowledges that a September auction could be appropriate if the Ameren Companies were to adopt certain revisions that ComEd proposed to its tariffs. (CES IB, p. 25)

While the Ameren Companies may not support these revisions, there are still ample reasons to hold the initial auctions in September 2006. First, while ComEd and the Ameren Companies initially proposed different months for the initial auctions, the utilities now have agreed to hold a single auction. A single auction will likely result in the most efficient auction and the lowest rates for ratepayers. (ICC Staff Ex. 1.0, p. 8, lines 170-174) Second, holding the auction later in 2006 will provide the Auction Manager and potential bidders additional time after the Commission's order in this proceeding to complete the tasks that must be completed before the auction, such supplier training and the testing of software. (Staff IB, p. 71) Third, the September date may minimize the risk premium that suppliers may add to bids due to the duration between the auction date and the delivery date for the power procured in the auction. (Ameren IB, p. 78)

For these reasons, Staff recommends that the Commission approve an initial auction date of the first ten days of September 2006.

### G. Common vs. parallel auction

#### 4. Common deliverability test

<u>Response to IIEC</u>

The testimony of IIEC witness Dauphinais' was not clear on his recommendation regarding a 'common deliverability test applicable to Illinois generation.' In his rebuttal testimony, witness Dauphinais recommended that

> the Commission require Ameren to work with ComEd, Midwest Independent Transmission System Operator, Inc. (MISO) and PJM Interconnection, LLC (PJM) to establish a common deliverability test for capacity resources within the combined MISO and PJM footprint to the combined Ameren and ComEd load zones in Illinois (*Id.,* pp*.* 8-9) The continued lack of such a test will frustrate the promised improvement in the auction process. (IIEC Exhibit 5, p. 3, lines 33-46)

(Staff IB, p. 79) However, on cross examination witness Dauphinais testified that "I believe some type of initial auction could go forward without an accountability test. But at some point in the future at a date certain it should be there." (Common Tr., p. 126) (*Id.*)

In its Initial Brief, IIEC argues that

> [a]s a condition of approval of the Ameren auction proposal, the Commission should require that Ameren work with ComEd, the MISO and PJM to remove, as soon as practicable, impediments that preclude a single common market. This effort should start with the implementation as soon as practical of a single common deliverability test for delivery of resources in the combined MISO and PJM footprint to the combined load zones of ComEd and Ameren in Illinois. In addition, Ameren should be required to report on the status of the development of a single common deliverability test within 90 days of a Commission order in this proceeding and every 90 days thereafter, until the single common deliverability test is implemented. (Dauphinais Dir. IIEC Ex. 2 at 3:33-45).

(IIEC IB, p. 29) Based upon the foregoing it is now clear that IIEC wants conditional approval of the auction process for the Ameren Companies and ComEd. IIEC's recommendation should be rejected. As Staff pointed out in its Initial Brief, "[t]he testimony of numerous witnesses indicates that there are benefits to a common auction, even if the seams between MISO and PJM are not completely eliminated." (Staff IB, p. 80)

## H. Blended, Fixed Price Auction Products

### 2. Proposed 1-year fixed price product for 400kW-1MW customers

CES recommends that the Ameren Companies create a new annual auction product for 400 kW-1 MW customers. According to CES, the Companies' proposal to offer 400 kW-1 MW customers the blended price derived from three-year contracts under the BGS-FP auction would be detrimental to residential and small commercial customers and harm the development of a competitive retail market. (CES IB, p. 29)

The Ameren Companies do not support the CES proposal. They would prefer only to offer a basic product at the lowest cost and leave RESs to offer "fined-tuned retail products." (Ameren IB, p. 85) The Ameren Companies also pointed out a very practical reason for rejecting the CES proposal. The Companies are concerned that the amount of load data they maintain on customers in the 400 kW to 1 MW demand range may be insufficient for prospective bidders to quantify risk associated with providing supply for that group. Moreover, the Ameren Companies do not have load profile metering in place for the vast majority of these customers. (*Id.*, pp. 85-86) The Companies would need about two years to install the required 1,100 meters. (Staff IB, p. 87) The costs of stalling and maintaining such metering is basically trivial, however, given the annual energy usage of customers in the 400 kW-1 MW customers demand class. (*Id.*, pp. 87-88)

According to CES, it is feasible for the Ameren Companies to develop the requisite load data, or, alternatively, to rely on ComEd for the data. (CES IB, p. 34) In Staff's opinion, CES may or may not be correct in this assertion; however, the effort to obtain the data may needlessly distract the Ameren Companies from auction preparations. Thus, while Staff is sympathetic to the CES proposal, Staff recommends that the CES proposal be rejected for the time being. The proposal should be revisited after the Ameren Companies have developed the requisite metering capability.

## K. Regulatory oversight and review

### 1. Nature of Commission review before, during, and after Auction

Response to AG

In this section of the AG's Initial Brief[5], the AG continues with its consistent refrain that the Ameren Companies' proposal improperly avoids regulatory review and exceeds the Commission's authority. (AG IB, pp. 49-53) Staff has previously addressed these arguments in Sections II and III. above, as well as in other sections of this Reply Brief, and will not repeat those arguments here. The balance of the AG's arguments are similar to arguments it raises in Section V.K.5, and Staff addresses those arguments in Section V.K.5 below.

Response to CCG and MSCG

See Section V.K.2 below.

[5] This heading was inadvertently labeled as heading "L" instead of heading "K" in the AG's Initial Brief. (AG IB, p. 49)

### 2. Post-auction Commission review of results

Response to AG

The AG asserts that the three (3) day period for the Commission to determine whether to commence a formal proceeding to investigate the auction results, and thereby prevent implementation of the auction results, is too short. (AG IB, p. 53) The AG's comments continue to ignore (i) the impact of its recommendations on the proposed auctions and (ii) the fact that this proceeding is the primary review of the auction-based procurement proposal. As testified by Staff witness Dr. Salant, a short review period will encourage bidder participation in the auctions. (ICC Staff Exhibit 11.0, pp. 73-76) Further, although the post-auction review is an important feature of the Ameren Companies' auction proposal that (i) further assures compliance with the approved process and (ii) provides a procedural mechanism to immediately address any unanticipated events or developments, the instant docket is the forum where the Ameren Companies' proposal is subject to review and approval. The AG's comments ignore these important facts, and its position should be rejected.

Response to CCG and MSCG

Both CCG and MSCG address the Post Auction Review of Results in their Initial Briefs. CCG suggests that the Commission should define the scope of the post auction review so that it focuses on ensuring the Commission's approved auction process is followed and that no "anomalies were found in the bids or process that would call into question the competitiveness of the bids received." (CCG IB, p. 17) CCG argues that by defining the scope, the potential bidders will have confidence that the auction will result in executed SFCs and that in turn would encourage suppliers to participate in the auction. (*Id.*)

MSCG takes a similar position regarding the scope of the post auction review of results. MSCG argues that the Ameren Companies should include the following language in its order:

> Ameren should include in all applicable riders, including Rider MV at the beginning of paragraph five of Original Sheet 27.028, the following new language: "The ICC will take formal action regarding the auction results as described herein only if the conduct or competitiveness of the Auction or outside events are believed to have compromised the Auction process."

(MSCG IB, p. 3) MSCG argues that "uncertainty associated with the Commission's acceptance of the results of a cleared auction puts bidders at risk of monetary loss." (*Id.*) MSCG goes onto argue "[t]he Commission can minimize this risk to bidders – and thus reduce the bidders' offer prices – by clearly affirming the scope of its review to include only whether or not the competitiveness of the auction has been compromised." (*Id.*) MSCG cites to Dr. Salant's testimony and CCG witnesses testimony as support for its position that revisions to the tariff language are necessary. (*Id.,* p. 9)

The Commission should reject CCG's and MSCG's arguments. First, MSCG takes Dr. Salant's testimony out of context. Dr. Salant never testified that the Ameren Companies' tariff language needed to be revised so that the Commission's scope of review was more defined. The testimony that MSCG relies upon, which actually appears at lines 1793 to 1795 of ICC Staff Exhibit 11.0 Corrected, was made in the context of a discussion that the Commission should not engage in some external benchmark assessment of the resulting auction process. (ICC Staff Exhibit 11.0 Corrected, p. 78) Clearly, Dr. Salant never testified that the Ameren Companies' "rider" needed further direction in terms of the Commission's options to review the auctions result as MSCG argues in its brief. (MSCG IB, p. 9)

Second, there would be a significant disadvantage to accepting CCG's and MSCG's general position that the Commission should limit its scope of review so that it is more defined. While it is true that Dr. Salant testified that "the Commission should focus on ensuring that the approved auction process was followed and that there were no anomalies in the bids or process that would call into question the competitiveness of the auction" (ICC Staff Exhibit 11.0, Corrected, pp. 77-78), he further testified that he did not believe "that the Commission can pre-specify all questions and contingencies that can arise during the auction that could have a material bearing on the acceptability of the auction results. There are also pre-auction activities as well as external events that also should be examined to gauge whether the auction results should be accepted or rejected." (ICC Staff Exhibit 11.0, Corrected, p. 72) In order for the Commission to have the flexibility that is necessary to address the unknown, CCG's and MSCG's arguments should be rejected.

### 4. Formal proceeding(s) to consider process

Response to Ameren and IIEC

The Ameren Companies and IIEC reached an agreement with respect to the formal review of the Ameren auction process. (IIEC IB, p. 38 and Ameren IB, p. 96) Under the stipulation between the Companies and IIEC, there would be an annual review after the first and second auction. The first formal review would take place after September 2006 and the second formal review would take place after February 2008.

After the first two annual reviews the reviews would be biennial. The first biennial review would take place after February 2010. (IIEC IB, p. 38)

Staff recommends that the Commission not accept the agreement reached between IIEC and the Ameren Companies. Staff recommends that the Commission establish informal workshops after the conclusion of the auction, rather than establish formal annual proceedings. Those workshops would be sponsored by the Commission, which should alleviate any concern that any party that wishes to comment on the conduct (and the results) of the auction would not have an opportunity to be heard in an open forum. While Staff understands that the results from the workshops most likely would be initiated by the Ameren Companies, rather than intervenors, parties have the right to petition the Commission to open proceedings for the purpose of examining the tariffs or for the purpose of evaluating the auction process. (Staff IB, p. 105)

In the event that the Commission accepts the agreement reached between Ameren and IIEC, given the nature of the proposed auction process, Staff recommends that the Commission make ComEd a part of the same formal proceeding. IIEC and ComEd were unable to reach an agreement similar to the IIEC/Ameren agreement.

### 5. Other processes and proceedings

Response to AG

The gist of the AG's argument in this section of its Initial Brief is that the Ameren Companies' proposal avoids regulatory review of the rates it charges consumers for electricity. (AG IB, pp. 54-55) Staff fails to see how the Ameren Companies' request for an upfront review rather than an after-the-fact review avoids regulatory review. As noted in Section III.B above, the Ameren Companies' proposal fully articulates the criteria and method by which the Ameren Companies will enter into contracts for wholesale power and energy to serve their retail customers. The Ameren Companies' proposal deprives neither parties nor the Commission of an opportunity to assess the Ameren Companies' decisions. The Ameren Companies' proposed tariffs were filed pursuant to Section 9-201, and the Commission has and will review that filing consistent with applicable requirements under the PUA. The AG's real complaint appears to be its reluctance to be placed in the same position as utility management – i.e., having to make decisions based on the information available at the time of its decision. To that extent, Staff notes that prudence determinations with respect to management decisions must be based on facts and information "available at the time they occurred or were made." (<u>Illinois Power Co. v. Illinois Commerce Comm'n</u>, 245 Ill. App. 3d 367, 371 (3rd Dist. 1993); *see also* <u>Illinois Power Co. v. Illinois Commerce Comm'n</u>, 339 Ill. App. 3d 425, 428 (3rd Dist. 1993) ("When a court considers whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible."))

The AG also refers to Section 9-220 of the PUA (220 ILCS 5/9-220) in support of the above-described arguments. (AG IB, pp. 54-55; see also AG IB, pp. 50-51) But as the AG has already recognized, the Ameren Companies' filings were not made under Section 9-220 of the PUA. (*See* AG IB, p. 50) Further, the ability to recover certain costs through the rider mechanism outlined in Section 9-220 rather than through a tariff under Section 9-201 of the PUA is optional; Section 9-220 provides that "the Commission <u>**may**</u> authorize the increase or decrease of rates and charges based upon .

. . changes in the cost of purchased power . . . through the application of fuel adjustment clauses or purchased gas adjustment clauses." (220 ILCS 5/9-220 (emphasis added)) Here, the Ameren Companies have sought recovery of wholesale power costs through a formula based rider proposal within the Commission's authority under Section 9-201 of the PUA. Finally, Section 9-220 is clearly inapplicable to the Ameren Companies' auction-based procurement proposal. Section 9-220 addresses the recovery of purchased power through a rider in the situation where management retains the ability to make such purchases in any manner it deems fit – thus requiring the after-the-fact prudence review contemplated by Section 9-220. The auction-based procurement proposal under review in the instant proceeding, however, fully identifies the bases for the Ameren Companies procurement decisions, including the criteria, parameters and method by which they will enter into contracts for wholesale power and energy to serve their retail customers. The Ameren Companies' auction-based procurement proposal also removes management's procurement discretion in all material respects, incorporating the resulting wholesale costs, with no mark up, into a formula based translation mechanism to determine retail rates. Such a proposal is undeniably different and distinguishable from the type of purchased power rider contemplated by the legislature under Section 9-220 of the PUA.

The AG's position elevates the "motivation" that it believes would result from intentionally unpredictable after-the-fact disallowances to a regulatory construct under the PUA. As a preliminary matter, Staff notes that the AG ignores the cost associated with the regulatory uncertainty embodied in its position. Moreover, the PUA embraces no such regulatory gaming principle with respect to the recovery of operating expenses.

To be sure, the Ameren Companies must provide the details of the criteria and parameters they propose to utilize and an adequate factual record to support the prudence of their auction-based procurement proposal – which they have done.[6] However, it is improper in Staff's view to propose to withhold judgment under the misguided theory that such an act will somehow motivate more advantageous procurement results through the fear of non-recovery. The Ameren Companies have proposed a procurement process that results in selection of the lowest cost supply offered in an open, transparent and competitive process in which all participants interact on an arms-length basis. At the very least, the record in this proceeding demonstrates the prima facie prudence of this proposal, and the AG's arguments to the contrary do nothing to undermine this showing.

### L. Supplier forward contracts

#### 2. Credit requirements

Response to Dynegy

The Ameren Companies' proposed credit requirements require suppliers to post collateral when the cost to purchase replacement energy supply exceeds the price for energy under an existing supplier contract, but do not impose a similar collateral requirement on the Ameren Companies should current market prices fall below contract prices for energy. Dynegy recommends modifying the Ameren Companies' proposed collateral requirements so that they apply to both suppliers and the Ameren Companies.

[6] The testimony of Staff and others addressing the Ameren Companies' proposal on the merits provides further support for a prudence finding.

(Dynegy IB, pp. 11-13)  Although the Ameren Companies' proposed supplier contracts provide for unilateral collateral requirements as do proposed supplier contracts in the ComEd procurement case (*i.e.*, Docket No. 05-0159), Dynegy distinguishes the Ameren Companies' unilateral collateral requirements from those proposed by ComEd because "Dynegy was able to reach an accommodation with ComEd on several aspects of the case, which led to Dynegy's decision not to raise credit-related issues in ComEd's case".  (*Id.*, pp. 14-15)  Nonetheless, the Ameren Companies' proposed credit requirements and those proposed by ComEd in Docket No. 05-0159 (i.e., the ComEd procurement proceeding) are more alike than different, with the difference being in the amount of the dollar caps.  (Staff IB, p. 109)  Except for the Ameren Companies' proposal to eliminate the provision in Section 6.1 of the Ameren Companies' proposed supplier contracts (<u>See,</u> V, L, 4, b), Staff does not object to the credit requirements proposed by the Ameren Companies.  (Staff IB, pp. 108-111)  Additionally, Staff agrees with the Ameren Companies' rationale for not including bilateral credit requirements. (Resp. Ex. 14.0, pp. 9-10, lines 192-209; Resp. Ex. 21, pp. 5-6, lines 106-130) Specifically, Staff agrees that the supplier contracts are distinguishable from contracts between two unregulated entities because the Ameren Companies are subject to the continuous scrutiny of the Commission in order to protect the interests of Illinois ratepayers, thereby reducing the likelihood of an Ameren Company defaulting on a supplier contract.  Thus, Staff does not support including bilateral credit requirements in the Ameren Companies' supplier contracts.

Dynegy also objects to the Ameren Companies' proposed collateral requirements because of the Ameren Companies' position relating to joint and several liability.

(Dynegy IB, p. 15) As Staff discussed in its Initial Brief (Staff IB, pp. 116-123) and as discussed below in V, L, 4, d, given that there can be no joint and several liability between the Ameren Companies, the SFC's need to be further revised.

Dynegy also argues that if the Commission does not adopt bilateral credit requirements, then it should reject the Ameren Companies' proposed 1.1 mark-to-market multiplier. (Dynegy IB, pp. 16-19) Staff disagrees with Dynegy's alternative proposal. Staff does not object to the 1.1 mark-to-market multiplier provided in the Ameren Companies' proposed supplier contracts. As Dr. Salant testified, the 1.1 multiplier is intended to more accurately estimate the financial exposure associated with the additional products and services beyond energy supply that are required by the supplier contract (*e.g.*, capacity, capacity reserves, load shape, basis, odd lot and illiquidity premium). However, the 1.1 market multiplier is not intended to insulate the lag between supplier default and contracting of replacement supply; customers will bear that risk. Thus, eliminating the 1.1 multiplier would place additional risk on customers for the cost of products and services beyond energy supply that are required by the supplier contract. (ICC Staff Exhibit 1.0, pp. 102-103, lines 2310-2328)

### 4. Proposed clarifications and modifications not accepted by Ameren

#### a. Compliance Filing

<u>Response to Ameren</u>

In their Initial Brief, the Ameren Companies stated that they are willing to work with potential bidders to resolve SFC concerns before the contracts are finalized. The Ameren Companies, in bullet point fashion, indicate what process they envision.

(Ameren IB, pp. 97-98) Their process includes a compliance filing made ten days after the Commission approves the auction and Staff reviewing the filing for compliance with the order and seeking bidder comments. (*Id.*) Staff, as set forth in its Initial Brief, is concerned that the process should allow bidders sufficient time to provide input on the final SFCs, and for that reason Staff recommends that a 60-day compliance filing for SFCs should be required. (ICC Staff Exhibit 11.0 Corrected, p. 21) (Staff IB, pp. 107-108) Staff further recommends that the Commission's Order set forth additional details regarding the process for the compliance filing, such as identifying unresolved issues and directing the Ameren Companies, ComEd and the Auction Manager to file a petition with the Commission to resolve any open issues within 21 days of the compliance filing, with notice of such filing to the service list in Docket Nos. 05-0160/0161/0162 (Consol.). (*Id.*)

### b. Credit Requirements

Response to Ameren

According to the Ameren Companies, if unforeseen circumstances warrant establishment of less restrictive creditworthiness standards, the Ameren Companies would seek review of any proposed changes to the credit worthiness standards by the Commission or Staff in advance of implementing changes. (Ameren IB, p. 100) That is, the most recent draft of the Ameren Companies' proposed SFC does not include the credit provision in Section 6.1, which would allow the Ameren Companies to unilaterally reduce their credit requirements. (Resp. Ex. 18.2, p. 49) As set forth in Staff's initial brief, Staff was persuaded by the Ameren Companies' original argument for the inclusion of the credit provision. In Staff's opinion the provision could potentially benefit both customers and suppliers. (Staff IB, p. 111) For these reasons the credit provision allowing the Ameren Companies to unilaterally reduce their credit requirements should remain in Section 6.1 of the SFCs and Ms. Phipps' proposed reporting requirement in connection with this credit provision should be adopted. In addition, the Ameren Companies should be required to revise their SFCs to clarify that following any reduction in credit ratings pursuant to Section 6.1 of the SFCs, the Ameren may restore their credit requirements to their initial level as circumstances permit. (Staff IB, pp. 110-111)

Response to MWGen

According to MWGen, Section 9.3 of the Ameren Companies' proposed supplier contract could operate in a way that is substantially adverse to suppliers by allowing the Ameren Companies to withhold from suppliers any disputed amount billed under a supplier contract. MWGen asserts that Section 9.3 of the Ameren Companies' supplier contract does not restrict the Ameren Companies' ability to act arbitrarily and capriciously with respect to withholding from suppliers any disputed amount billed under a supplier contract. Under the Ameren Companies' proposed supplier contracts, if it is ultimately determined that the party withholding the amount in dispute did so improperly, then that party must pay to the other the amount due, plus interest at the Federal Funds rate, which MWGen asserts is "hardly a compensatory rate". Thus, MWGen recommends modifying Section 9.3 of the Ameren Companies' proposed SFC so that the Ameren Companies cannot withhold at their discretion without being required to justify that withholding promptly and paying a compensatory interest rate (*i.e.*, in Appendix A to its Initial Brief, MWGen recommends using the prime rate, but the record contains no testimony supporting this proposal) if it is determined that the withholding was improper. (MWGen IB, pp. 11-12)

As Illinois public utilities, the Ameren Companies are subject to continuous scrutiny by the Commission, who will be closely monitoring the auction process, including the Ameren Companies' actions in connection with the auction process, as well as the Ameren Companies' financial condition in order to protect the interests of Illinois ratepayers, thereby reducing the likelihood of the Ameren Companies defaulting on supplier contracts. Hypothetically, if power prices would decline, then the Ameren Companies may withhold payment from a supplier in order to purchase cheaper power in the spot market than it would under supplier contracts. However, under the Ameren Companies' proposed SFC, if the Commission does not reject an auction, then the Ameren Companies charge their customers the cost of power purchased during the auction without any mark-up and the Ameren Companies do not earn a return on those power costs. Thus, it is unclear what motivation, if any, the Ameren Companies would have to withhold payments for power under a supplier contract in order to purchase cheaper power in the spot market. Moreover, should the Ameren Companies purchase replacement supply under the Rider MV due to a supplier default caused by the Ameren Companies' actions (*e.g.*, withholding payments to suppliers), the language proposed by Staff witness Dr. Eric Schlaf for the Limitations and Contingencies portion of Rider MV would provide an opportunity for the Commission to investigate and order appropriate relief, including refunds of amounts collected by the company that would not have been collected but for such imprudence and are not otherwise owed to the Ameren Companies. Thus, the Commission will have the opportunity to investigate the prudence and reasonableness of any action or inaction by the Ameren Companies that contributed to the need for, or the amount charged to customers for, purchases of electric supply outside the auction pursuant to the Limitations and Contingencies portion of the Ameren Companies' Rider MV. (Ameren IB, p. 93) Thus, Staff recommends approval of the language put forth by Staff witness Dr. Eric Schlaf in rebuttal testimony, and agreed to by the Ameren Companies, which addresses MWGen's concerns regarding sanctions should the Ameren Companies wrongfully withhold payments to suppliers.

#### d. Joint and Several Liability

Response to Ameren

Ameren in its Initial Brief indicates that "[t]he Ameren Companies cannot undertake to commit themselves to assuming joint and several liability to the BGS Suppliers because they are not authorized by the Commission to pay or guarantee each others' debt or obligations. Resp. Ex. 18.0, p. 6. The Ameren Companies have not sought such authorization from the Commission. *Id.*" (Ameren IB, pp. 106-107) Thus, Ameren rejected Staff's proposal that the Ameren Companies be jointly and severally liable for each other's SFC obligations. (*Id.,* p. 107) Staff does not dispute "that it would be impermissible for the SFCs to contain provisions directly or indirectly amounting to a guarantee by the individual Ameren Companies of each others' obligations under the SFCs." (Staff IB, p. 120) However, the fact that Staff agrees with Ameren that there should not be joint and several liability for the individual Ameren Companies does not address the fact that there are inconsistencies between the position that there should be no joint and several liability and the specific language contained in the SFCs setting forth the right and obligations of the Ameren Companies on a collective basis. Ameren needs to redraft its SFCs as provided in Staff's Initial Brief, which set forth the relevant changes. (*Id.*, pp. 121-123)

### e. Procurement of Ancillary Services

Response to Ameren

The Ameren Companies recommend that Staff witness Ogur's proposal that BGS Suppliers be permitted to supply ancillary services to the Ameren Companies as part of the provision of BGS services should be rejected. (Ameren IB, p. 49) The Companies are against the proposal for a number of reasons. First, the Ameren Companies argue that if Mr. Ogur's proposal is adopted it might permit BGS Suppliers to gain a competitive advantage over other BGS Suppliers. (*Id.*) Second, the Companies argue that certain metering must also be in place and there is not sufficient time to put those meters in place between a September auction and January 2007. (*Id,* p. 50) Third, they argue that the customer benefits are limited. Finally, the Companies argue that if "self supply" of ancillary services were permitted the SFCs would have to be revised. (*Id.,* pp. 51-52)

Staff, in its Initial Brief, detailed the three bases for Staff witness Ogur's recommendation. First, there would be no costs associated with the option. Second, there may be increased participation in the auction and lower bids by bidders due to lower expected ancillary services procurement costs or higher certainty about such costs. Third, the MISO tariff has explicit provisions that would allow the Ameren Companies to give suppliers the option of "self-procuring" ancillary services. (Staff IB, p. 124) Further, Staff, in its Initial Brief, responded to all of the Ameren Companies' criticisms of Mr. Ogur's proposal and therefore those arguments will not be repeated here. (*Id.,* pp. 125-132) For these reasons and all those stated in Staff's Initial Brief, Staff recommends that the Commission order the Ameren Companies to modify the SFC language to include a provision to give suppliers the option of self-supplying MISO Schedule 3 (regulation service), Schedule 5 (spinning reserve) and Schedule 6 (supplemental reserve) ancillary services. (*Id.,* p. 132)

### f. Identification of Resources

<u>Response to Ameren</u>

The Ameren Companies, despite Staff witness Ogur's objection, continue to recommend that the SFC require BGS Suppliers to identify the specific capacity resources being used to fulfill their SFC obligations. (Ameren IB, p. 53) Staff witness Ogur testified that:

> Placing an obligation on suppliers to provide to the Companies potentially commercially sensitive information, such as physical resources from which capacity will be provided, would have detrimental effects on participation in and competitiveness of the auction. To the extent information revelation is required by the suppliers for the Companies to meet their obligations to MISO or MAIN, it should be done in such a way that the Companies do not obtain such commercially sensitive information. (ICC Staff Exhibit 4.0, p. 40, lines 871-877)

(Staff IB, p. 133) Staff's Initial Brief set forth Mr. Ogur's basis for his recommendation and a thorough reply to Ameren's reasons for not agreeing to

Mr. Ogur's recommendation. For all of the reasons previously set forth in Staff's Initial Brief, Staff recommends that the Commission order the Ameren Companies to:

i. Remove the references in the SFCs to the Companies' resource adequacy obligations to MISO in connection to acquiring capacity resource information from the suppliers;

ii. Remove from the SFCs the "December 1" date the Companies are obligating the suppliers to submit capacity resource information to Ameren on; and

iii. Contact the RFC with ICC Staff to propose to the RFC to satisfy the Ameren Companies' resource adequacy obligations to MAIN/RFC by direct information submittal from the suppliers to the RFC.

(*Id.*, p. 142)

## VI. PROCUREMENT PROCESSES ALTERNATIVES

<u>Response to AG</u>

The AG argues that the Ameren Companies' proposal for procurement must be rejected because (1) it presumes an effectively competitive market and (2) it ignores the reality that functioning markets are made up of buyers and sellers with opposing interests. (AG IB, pp. 56-57)

Once again, the AG raises the competitiveness of the markets as a reason to reject the Ameren Companies' proposal. Staff addresses this issue not only in Section IV above but in Section IV of its Initial Brief. (Staff IB, pp. 17-22) Staff continues to recommend the Commission approve the Ameren Companies' auction proposal with certain modifications advocated by Staff.

### A. Active portfolio management

Response to AG and CUB

The AG appears to recommend that the Commission reject the Ameren Companies' auction proposal in favor of active portfolio management or Dr. Reny's multilateral negotiation approach. (AG IB, pp. 57-63)

CUB asserts that the Ameren Companies could have initiated a proceeding presenting the ICC with a full range of options for procuring energy, which would have "allowed a reasoned determination of which approach would have best satisfy the needs of ratepayers and other parties." (CUB IB, p. 22) CUB recommends Dr. Steinhurst's managed portfolio approach over the Ameren Companies' proposed auction. (CUB IB, pp. 22-25)

First, Staff notes that CUB argues that the Ameren Companies "should have presented the ICC with a full range of options for procuring resources to serve default service customers, comparing them objectively in terms of their impact on the costs and risks." (*Id.*, p. 22) However, in 2004, the Commission already initiated such a debate, the Post-2006 Initiative, whereby it invited representatives from utilities, consumer groups and governmental agencies to engage in discussions about procurement options for Illinois following the end of the transition period.

Second, Staff addresses the flaws of both active portfolio management in Section V.B. above and Dr. Reny's approach in Sections V.A. and V.D. above. (Also see Staff

IB, pp. 56-58 and pp. 144-151) Staff continues to recommend that Commission adopt the Ameren Companies' proposal with certain modifications advocated by Staff and reject both active portfolio management and multilateral negotiation. However, Staff would like to address several statements made by the AG in its Initial Brief.

The AG contends that the Ameren Companies' current supply contracts expire on December 31, 2006 and "[t]his abrupt discontinuity is a significant risk factor for customers." (AG IB, pp. 61-62) However, as noted by Ameren witness LaCasse:

> Ameren has not locked in any supply for its customers for the period beginning January 1, 2007. This is an unavoidable result of the transition plan. The proposed Auction Process provides for a transition to laddering. However, Ameren's open position for January 1, 2007 cannot be changed.

(Resp. Ex. 19.0, p. 74, lines 1700-1703) Thus, it appears that the AG's complaint is with the legislation and not the auction. Such a position is neither helpful nor useful in determining whether the Commission should approve the Ameren Companies' auction proposal.

The AG further states that "[a]lthough no one can claim to know exactly when to buy to obtain [sic] the lowest long term price, spreading purchases over time minimizes the risk that any one purchase will have a major, disruptive impact on prices." (AG IB, pp. 61-62) However, there is nothing in the record to support the AG's contention. In fact, the record supports the opposite. When addressing single auctions as opposed to serial auctions, Ameren witness LaCasse states,

> There has been substantial research done comparing a single auction to serial auctions. This research identifies the strategic scope for gaming opportunities that exist with serial auctions and the problems that this engenders, which do not exist in the case of a single auction.
>
> Serial procurements mean that suppliers have a choice of auctions and that suppliers can pass up the first procurement and have the same economic opportunity in a future procurement. The existence of multiple

> procurements for the same product creates confusion for bidders, and leaves them with uncertainty regarding *how to bid* and *when to bid* (i.e., in which auction). A NERA study on serial capacity auctions found:
>
> > A bidder will need to consider two opposing effects. On the one hand, in later auctions, other bidders may have already sold all, or some, of the capacity that they intended to sell; a bidder selling in later auctions can then face less competition and potentially be able to obtain a better price. On the other hand, in later auctions, there may be fewer or no future opportunity to sell capacity; a bidder selling in later auctions will then face more aggressive bidding and potentially get a worse price. (E. Meehan, C. LaCasse, P. Kalmus, and B. Neenan. "Central Resource Adequacy Markets for PJM, NY-ISO and NE-ISO: Final Report." NERA February 2004:40.Meehan et al., page 40.)

(Resp. Ex. 19.0, pp. 74-75, lines 1705-1725)  Dr. LaCasse concludes that such a complexity leads to "unpredictable bidding in serial procurements, which in turn leads to prices that do not necessarily reflect the economic realities of the market for the product being procured."  (*Id.*, lines 1726-1728)  Further, as noted by Dr. Salant, nothing prohibits bidders in the auction from hedging risks associated with temporary market conditions.  (ICC Staff Exhibit 11.0 Corrected, p. 69, lines 1585-1590)

The AG also alleges that as a result of the proposed auction, the Ameren Companies lose the economies of scale that large utilities like themselves have traditionally captured for their customers.  Thus, the AG concludes the Ameren Companies are failing to exercise its bargaining power.  (AG IB, p. 62)  However, once again, there is nothing in the record to support this allegation.  In fact, CUB witness Steinhurst acknowledges that

> Q. And in fact is that why you testify in your rebuttal at lines 690 to 692 that you were not opposed in principle to auctions as part of a procurement methodology and auction-based procurements can have benefits?
>
> A. What was the line number again?

Q. 690 through 692 in the rebuttal.

A. That is correct.

Q. Do those benefits include transparency?

A. An auction or competitive procurement can include transparency as a benefit if done correctly.

…

Q. What benefits did you mean besides transparency and diversity when you said that auction-based procurement can have benefits?

A. Competition among vendors, with bidders.

Q. Which will tend to have the effect of driving price down?

A. Yes.

Q. Any others?

A. Competitive procurement processes can provide useful market intelligence to a utility. It can stimulate demand for product -- it can stimulate supply of products that the utility feels would be useful but might not otherwise appear on their own. It can in some situations with some products reduce transaction costs. I don't have a complete list in mind but that's a selection.

(Common Tr., pp. 487-489) As Ameren witness LaCasse notes "… the proposed Auction Process itself takes advantage of buying power by pooling all load purchases." (Resp. Ex. 19.0, p. 71, lines 1636-1638)

Finally, the AG argues that the Ameren Companies' procurement process should be "reviewed in a cost of service rate filing, or in an after-the-fact prudence review… ." (AG IB, p. 63) Staff addresses this argument in Section V.L. above.

Thus, based upon the foregoing, Staff continues to recommend that the Commission approve the Ameren Companies' proposal with certain modifications advocated by Staff and reject the active portfolio management approach.

### B. Request for proposal

Response to AG

To the extent the AG is recommending that the Ameren Companies utilize the Request for Proposal ("RFP") approach for procuring energy and power after the end of the transition period, Staff discusses the flaws in the RFP approach in Section VI.B. of its Initial Brief. (Staff IB, pp. 151-153). Staff continues to recommend that the Commission approve the Ameren Companies' proposal with certain modifications advocated by Staff and reject the RFP approach.

### C. Affiliate contract

Response to AG

The AG argues that the Commission should reject Ameren Companies' proposed auction and order the Companies to use its substantial buying power to negotiate with its Generation Affiliate to purchase low-cost nuclear power from the generating plants that Ameren customers paid to build and maintain.

Staff addresses the AG's argument in Section VI.C. of its Initial Brief. (Staff IB, pp. 153-155) Staff recommends that the Commission take no action to direct the Ameren Companies to acquire power from their affiliate, but that the Commission recognize and accept that the proposed auction may result in the Companies' affiliate supplying part of the Companies' full-requirement needs.

However, Staff would like to note once again the AG's quarrel actually appears to be with the Restructuring Law. The Ameren Companies divesting themselves of their generation assets was permitted by the Restructuring Law. In fact Section 16-111(g)(4)(vi) of the Act states:

> The Commission shall not in any subsequent proceeding or otherwise, review such a reorganization or other transaction authorized by this Section, but shall retain the authority to allocate costs as stated in Section 16-111(i).

(220 ILCS 5/16-111(g)(4)(vi)) Therefore, the Commission cannot now in hindsight review the Companies' divesture of their generation assets. The AG's argument is neither helpful nor useful in analyzing whether the Commission should approve the Ameren Companies' proposal. Further, it is unclear how the Commission can compel the generation affiliate to sell power to the Companies if the affiliate has better opportunities to sell to other buyers.

## VII. TARIFF AND RATE DESIGN ISSUES

### A. General tariff and rate design issues

The discussion presented in the Initial Briefs filed by the parties to this case serve to underscore that the Staff rate design proposals in this proceeding are eminently reasonable and should be approved by the Commission.

Opposition to the Staff position is limited to two areas. The first concerns the rate migration issue. CES continues to advocate the adoption of a rate migration factor for the Ameren Companies that closely resembles its proposal in the ComEd docket.

The second issue that drew dissent was the Staff rate mitigation plan. Three parties, the Ameren Companies, CCG and Dynegy, continue to voice limited reservations about the plan.

The arguments in opposition to the Staff proposals on both fronts are ill-timed, narrow and poorly conceived. Their deficiencies only serve to underscore why the Commission should approve the Staff rate design proposals in this proceeding.

### B. Matters concerning Rider MV

#### 4. Rider MV – Retail customer switching rules

##### a. Enrollment window

The determination of the appropriate length of the enrollment period represents a trade-off between encouraging retail switching and recognizing that the longer the enrollment period, the larger the risk premium that bidders may add to their bids. If there were reasonable grounds to believe that no risk premium would be added by suppliers bidding for BGS-L load, then it might not be necessary to impose an enrollment window requirement on larger customers.

However, there has been an appreciable amount of switching among customers with a peak demand over 1 MW, and therefore suppliers will add a risk premium to their bids. Staff witness Schlaf, the only witness to present empirical information about the potential size of the risk premium, used an option pricing model to demonstrate that bidders can be expected to add about 0.4% of the forward to their bids for every additional 10 days of the enrollment period. (Staff IB, p. 166) Thus, the difference between the 30-day enrollment period advocated by the Ameren Companies and the IIEC and the 75-day enrollment period supported by CES, is about 1.8% of the forward price. Staff would consider a 1.8% generation cost increase to be significant, and would moreover be paid by the customers that are the least able to attract offers from RESs.

Staff therefore recommends that the Commission adopt an enrollment period of no more than 45 days, which, based on Dr. Schlaf's analysis, would result in a increase of only 0.6% above the risk premium associated with a 30-day enrollment window. As Staff noted in its Initial Brief, Staff also recommends that the Commission direct the Ameren Companies to study the issue of the appropriate length of the enrollment period prior to the next auction. (*Id.*, p. 168)

### 6. Rider MV – Translation to retail charges

#### a. Customer Supply Group Migration Risk Factor

Response to CES

The only party that supports the concept of a migration risk factor in this proceeding is CES. CES begins its discussion of the issue by criticizing the failure of the Ameren Companies to propose a migration risk factor for their auction prism. (CES IB, p. 49) It goes on to argue that CES has presented unrebutted evidence on behalf of its proposed migration risk factor. (*Id.*) Then, despite its contention that its evidence was unrebutted, CES proceeds to respond to arguments made by Ameren against its original proposal for a migration risk factor. (*Id.*, pp. 49-51)

The key point made by CES is that wholesale suppliers are likely to consider the migration risk posed by different customer groups in formulating their bids for power and that this cost should be reflected in the migration risk prism. (*Id.*, p. 50) However, as Staff has explained, CES provides no meaningful evidence to demonstrate it is a meaningful cost for suppliers that should be factored in the equation. (ICC Staff Exhibit 14.0, pp. 8-9, lines 184-188)

Staff is not the only party to identify deficiencies in the migration risk factor proposed by CES. The Ameren Companies note that there is little switching activity in Ameren's service territory on which to develop a migration risk factor. In addition, they find the CES approach of relying on ComEd data to develop a migration risk factor for the Ameren Companies to be problematic. (Ameren IB, pp. 130-131) These arguments serve to further demonstrate why the CES proposal to adopt a migration risk factor for the Ameren translation prism is fundamentally flawed.

### 8. Rider MV – Market Value Adjustment Factor

#### b. The SPA and Uncollectible Adjustment Should Not be Tracked Through the MVAF

Response to Ameren and CES

The Ameren Companies state that they are adamant that the SPA costs should be tracked through Rider MV. Ameren is concerned that customer switching between RES service and utility bundled service would cause it to recover an amount different from the absolute dollar amount approved in its most recent rate case. Ameren also cites changing customer consumption levels from month to month as a contributing factor to this difference. (Ameren IB, pp. 132-133)

Staff strongly recommends against this proposal and has explained why it is both inappropriate and unnecessary. (ICC Staff Exhibit 17.0, pp.5-6, lines 96-125; Staff IB pp. 176-179) The arguments the Ameren Companies present in their brief only serve to highlight that this proposal is based upon a novel ratemaking theory and is not supported by facts in evidence. What the evidence actually shows is that the Company seeks to apply a novel ratemaking theory based upon facts that it has not established in evidence in order to recover what it expects to be an insignificant amount. Furthermore, the evidence shows that this proposal would not even accomplish its intended purpose of preventing over or under recovery.

First, the proposal to track SPA costs through the MVAF reflects ratemaking theory that is novel at best. When a rate is set in a rate case, that rate reflects a relationship between a given level of service and the cost to provide that level of service. Going forward, as the level of service (sales) changes, the utility recovers the cost that corresponds to the level of service (sales) the utility actually provides. (ICC Staff Exhibit 17.0, p. 6, lines 119-125) In comparison, the Ameren Companies emphasize that the proposal to track SPA costs through the MVAF would force recovery to the absolute dollar amount reflected in the test year from the most recent rate case. (Ameren IB, p. 133) This would be true regardless of either the costs actually incurred or sales actually made. Such an approach is not consistent with the way rates are set, because it does not in any way relate the cost recovered by the utility to the cost of the service provided by the utility.

Second, the Ameren Companies have presented no factual support for this proposal. They contend that, "Without the MVAF mechanism to also true-up the collection of the authorized level of SPA coasts, the Ameren Companies will always be in an over or under recovery position with respect to such costs, <u>due mostly to the level of customer switching between RES service and utility bundled service</u>." (Resp. Ex. 23.0, p. 4, lines 84-87) (Emphasis added) The Companies also cite the difference in consumption levels from month to month as a contributing factor as well. (Tr., pp. 225-226, lines 21-9) The Ameren Companies' primary concern here is that the level of customer switching between RES service and utility bundled service could cause an over or under recovery. (Tr., p. 225, lines 5-20)

The Companies asserted that the level of customer switching could cause over or under recovery, but failed to present any facts about the effect of customer switching or the expected level of customer switching in order to support this assertion. The proposal assumes facts that are not in the record. The Ameren witness addressing this proposal was unable to indicate whether the Ameren Companies had presented any evidence about its expectations about the level of customer switching between RES service and utility bundled service. (Tr., pp. 226-227) However, the Companies clarified their expectations about customer switching in their Initial Brief when arguing against a migration risk factor:

> [I]t is <u>undisputed that there has been little switching by customers</u> in the Ameren Companies' service territories. Resp. Ex. 15.0, p. 19. Therefore, there is <u>no justifiable basis</u> on which to establish a migration risk premium for input into the rate prism. Any number that would be incorporated into the rate prism would be <u>unsupportive and speculative</u>.

(Ameren IB, p. 130) (Emphasis added) Clearly, the proposal to track the SPA through the MVAF because of customers switching concerns is not supported by any factual analysis presented in the record.

Third, the evidence that the Ameren Companies did present indicates that the Companies themselves do not expect the magnitude of the SPA to be significant. (Resp. Ex. 23.0, pp. 6-7, lines 131-141; Tr., p. 227, lines 13-17) Thus, the Ameren Companies apply a novel ratemaking theory, based on facts that are not in evidence, in order to recover an insignificant amount.

Fourth, the evidence shows that this proposal to track the SPA through the MVAF would not accomplish its intended purpose of ensuring that the Ameren

Companies neither over nor under recovers the SPA costs. In order to accomplish the kind of true-up intended by CES's proposal (CES IB, p. 54), one must reconcile costs incurred in a particular period with recoveries for that same period. Tracking the SPA through the MVAF would not accomplish this because it would reconcile recoveries for the Determination Month (Period A) with the absolute dollar amounts from the test year in the last rate case (Period B). This would result in a mismatch of costs and recoveries from two different periods. These two different periods would likely reflect different levels of sales and different levels of costs. Thus, this kind of mismatch would not accomplish the true-up of costs and recoveries CES desires. (ICC Staff Exhibit 17.0, pp. 5-6, lines 105-118)

The proposal to track the SPA through the MVAF is both inappropriate and unnecessary. For all these reasons, the Commission should reject the proposal to track SPA costs through the MVAF.

### C. Additional tariff and rate design issues

#### 1. Staff's rate increase mitigation proposal

The complaints registered by various parties about the Staff rate mitigation plan provide no substantive basis for the Commission to reject the proposal.

<u>Response to Ameren</u>

The Ameren Companies for their part begin the discussion by stating that they "do not necessarily object" to the Staff proposal. (Ameren IB, p. 137) However, they go on to argue that the Staff proposal would be more appropriately considered in the utilities' upcoming delivery service rate cases. (*Id.*, pp. 137-138) They argue that the delivery service case is more appropriate because the Staff proposal is intended to apply to the totality of both power and delivery costs. (*Id.*, p. 138) Furthermore, because those cases will set the delivery service revenue requirements, the Ameren Companies argue that that will provide the Commission with further guidance concerning bill impacts issues. (*Id.*)

This argument is fundamentally flawed. To begin with, the Ameren Companies argument incorrectly states that the Staff rate mitigation proposal applies to both power and delivery costs. While the proposal does take into consideration overall bills, the only component of those bills that it adjusts is the cost of power. The Staff proposal does not seek to adjust delivery costs in any way. In addition, leaving the issue to the delivery services case will not provide Staff with any further information to shape its proposal. Staff's testimony on bill impacts issues will have to be filed before the delivery revenue requirement is set and before the auctions are conducted. (ICC Staff Exhibit 14.0, p. 4, lines 72-78)

The Ameren Companies also seek to rebut the Staff argument that delaying the issue to the rate case will leave suppliers in the dark about the rate migration formula adopted by the Commission. They claim that suppliers will learn the mechanics but not the actual bill numbers. (Ameren IB, p. 138) However, the Ameren Companies are inconsistent on this issue because they consider it necessary to present the "mechanics" of the translation tariff in this proceeding, rather than in the subsequent delivery services case. If the Ameren Companies sincerely believed that suppliers do not need to know the mechanics, they should have postponed the entire discussion of the translation prism to the upcoming delivery service rate case. In addition, it should be noted that Dynegy, a potential supplier, opposes the Ameren proposal to delay the issue until the delivery service rate case. Dynegy states "[a]lthough more information might be known then (in terms of the rate impact from any delivery services rate increase sought by the Ameren Utilities), that information will still be incomplete because of the likely timing of the auctions (early September) vis-à-vis the timing of the upcoming rate case…Given this, there is no reason to cause Suppliers even more uncertainty as to the effect (if any) of final, approved rate mitigation plan(s). (Dynegy IB, pp. 31-32)

Response to CCG

CCG begins its discussion of the issue with a brief argument that: (1) there is uncertainty about the impact of the Staff plan because it must await the implementation of the auction; and (2) there is no need for such a plan. (CCG IB, p. 20) With regard to the uncertainty issue, clearly all aspects of procurement costs are uncertain before the auction is run. However, this uncertainty only underscores the importance of adopting a plan that limits the adverse impacts that may befall ratepayers. The Staff proposal limits the potential exposure to rate shock and, thereby, serves to reduce the uncertainty facing bundled customers. If, as CCG suggests, uncertainty is a concern, then the Staff rate mitigation addresses that concern by limiting the uncertainty that ratepayers face.

CCG's second argument is a simple unsupported statement that the Staff plan is not needed. (CCG IB, p. 20) Staff's only response is that it disagrees strongly with this statement.

In sum, the arguments by CCG fail to hold water and do not undermine in any way the reasons why the Staff proposed mitigation plan should be approved by the Commission in this proceeding.

Response to Dynegy

Dynegy makes a single argument regarding the Staff rate mitigation proposal. Dynegy claims that the process of adjusting power costs under the rate mitigation process could raise prices for some groups and, thereby, cause them to migrate to alternative service. Dynegy goes on to claim that this additional switching risk could be regarded by suppliers as an additional cost and they would be inclined to raise their power cost bids as a result. (Dynegy IB, p. 31)

This argument amounts to empty speculation by Dynegy. It is not clear at this time whose rates will rise and fall as a result of the Staff rate mitigation plan. Nor is the magnitude of any adjustment evident. It could serve to either raise or lower the power costs of the customers most susceptible to migrate to RES-supplied power. Thus, the uncertainty for suppliers could either rise or fall. In other words, there is no evidence for Dynegy to assert that the Staff mitigation plan will increase prices offered by suppliers in the auction process. That conclusion is pure guesswork on Dynegy's part. The fact remains that the benefits of the Staff rate mitigation plan far outweigh any drawbacks Dynegy might imagine would take place.

### 3. Rider D – Default Supply Service Availability Charge

The Ameren Companies propose that the Default Supply Service Availability Charge ("DSSAC") be imposed on all RES customers eligible for BGS-L service (all customer with a peak demand that exceeds 1 MW) and all customers in that same demand class that choose the Ameren Companies' proposed real-time pricing service BGS-LRTP. (Staff IB, p. 191) DSSAC revenues collected by the Companies would not be retained by Ameren, but rather would be forwarded to the winning bidder(s) in the BGS-LRTP auction. Thus, the DSSAC is essentially an incentive to encourage prospective suppliers to bid. (*Id.*, p. 192) According to the Ameren Companies, if the DSSAC is not levied on RES customers, there is potential that no suppliers will bid. (*Id.*) This is due, at least in part, to the fact that presently only two customers are taking the Ameren Companies' current real-time pricing service (ICC Staff Exhibit 13.0, p.6, line 132), and it is difficult to determine whether any customer will take the service in the future. (*Id.*, lines 134-136)

Staff acknowledged in its Initial Brief that the Ameren Companies' plan could very well succeed in encouraging at least one supplier to bid because the winning bidder or bidders will share approximately $1 million dollars, the current amount that RES customers would pay to winning bidders. (Staff IB, p. 193) Moreover, this amount would be collected even if the winning bidders do not have to furnish the capacity to serve BGS-LRTP customers. (ICC Staff Exhibit 13.0, p. 6, lines 126-128) However, Staff also pointed out the inequity of requiring RES customers to pay for a service that they are not receiving and most likely will never have any interest in receiving. (Staff IB, p. 193) In recognition of this point, Staff recommended that the Ameren Companies devise another solution that does not have the drawback of penalizing RES customers that the Companies' proposal would entail. (*Id.*) Since it is clear that the Ameren Companies will not accept responsibility for the charge (Ameren IB, p. 141), the only apparent option would be to charge RTP-L customers for all costs related to taking the service.

## VIII. CONCLUSIONS AND MIXED LEGAL/FACTUAL ISSUES

### A. Legality of Rider MV

Response to AG

The AG first argues that Riders BGS, BGS-L, D and MV not only violate the PUA by imposing market based rates on consumers but also by allowing the utility to charge rates that have not been subject to Commission review. Second, the AG argues that the Commission cannot lawfully approve Riders BGS, BGS-L, D and MV because they do not contain rates but instead contains unlawful blank authorization to change rates. (AG IB, pp. 69-71)

With respect to the AG's first argument, Staff addresses why it is without merit and must be rejected in Section III.A. above as well in Section III.B. of its Initial Brief. (Staff IB, pp. 9-17) With respect to the AG's second argument, Staff addresses why it is without merit and must be rejected in Section III.B. above.

Staff continues to recommend that the Commission find that Riders BGS, BGS-L, D and MV (as modified by Staff) would result in just and reasonable rates.

## IX. Other issues

### B. Additional other issues

<u>Response to CUB</u>

CUB argues that "every Ameren witness has a personal financial stake in this matter that calls into question his or her ability to testify objectively about the proposed auction." (CUB IB, pp. 25)

In terms of the auction, Staff also expressed its concern with respect to the significant levels of executive compensation in the form of Ameren Corporation stock options or other Ameren securities received by certain Ameren witnesses. (Staff IB, pp. 64-65) However, as Staff noted in its Initial Brief, the Ameren Companies have made a significant concession that addresses the conflict of interest issue. They agreed to not be present in the room during the actual conduct of the auction so that they cannot be permitted to direct or influence the Auction Manager's conduct of the auction. Further, the Ameren Companies agreed not to communicate with the Action Manager during the conduct of the auction. (*Id.*, p. 65) With this restriction along with the measures described to limit the discretion of the Ameren Companies-employed Auction Manager and to reinforce the Auction Manager's independence, Staff believes that the Companies' role in the auction has been satisfactorily narrowed to minimize any undue influence over the auction. (*Id.*, pp. 65-66)

## X. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in this proceeding.

Respectfully submitted,

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