**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

| | | |
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| **Central Illinois Light Company d/b/a AmerenCILCO** | : | |
| | : | **05-0160** |
| **Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV. (Tariffs filed on February 28, 2005)** | : | **(Cons.)** |
| **Central Illinois Public Service Company d/b/a AmerenCIPS** | : | |
| | : | **05-0161** |
| **Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV.(Tariffs filed on February 28, 2005)** | : | |
| **Illinois Power Company d/b/a AmerenIP** | : | |
| | : | **05-0162** |
| **Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV.(Tariffs filed on February 28, 2005)** | : | |

**<u>PROPOSED ORDER</u>**

DATED: December 9, 2005

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| **Central Illinois Public Service Company d/b/a AmerenCIPS** | : | |
| | : | **05-0161** |
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| **Illinois Power Company d/b/a AmerenIP** | : | |
| | : | **05-0162** |
| **Proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV.(Tariffs filed on February 28, 2005)** | : | |

**PROPOSED ORDER**

By the Commission:

## I. PROCEDURAL HISTORY

On February 28, 2005, Central Illinois Light Company d/b/a AmerenCILCO, Central Illinois Power Company d/b/a Ameren CIPS and Illinois Power Company d/b/a AmerenIP (jointly the “Ameren Companies” or “Ameren”) filed III. C. C. No. 4, Original Sheet Nos. 244 through 303; 6th Revised Sheet No. 151.1; 8th Revised Sheet No. 151.13; and 7th Revised Sheet No. 151.14, (collectively, the "Procurement Tariffs" or the "Procurement Tariff Sheets"). This tariff filing contained a proposal to implement a competitive procurement process by establishing Rider BGS, Rider BGS-L, Rider RTP, Rider RTP-L, Rider D, and Rider MV. The tariff filing was accompanied by direct testimony and other Exhibits.

Notice of the proposed tariff changes was posted in the Ameren Companies' business offices and published in a secular newspaper of general circulation in the Ameren Companies' service area, as evidenced by publisher's certificates, in accordance with the requirements of Section 9-201(a) of the Public Utilities Act (the "Act" or "PUA"), 220 ILCS 5/9-201(a), and the provisions of 83 Ill. Adm. Code Part 255.

The Illinois Commerce Commission (the "Commission" or "ICC") issued a Suspension Order on March 9, 2005, suspending the Procurement Tariff Sheets and opened dockets 05-0160, 05-0161, and 05-0162. Thereafter, the Commission issued a Resuspension Order on July 13, 2005, suspending the proposed tariffs to and including January 27, 2006.

Pursuant to due notice, a pre-hearing conference was held in this matter before the duly authorized Administrative Law Judge (the "ALJ") of the Commission, at its offices in Springfield, Illinois, on April 8, 2005. At least 10 days prior, notice of the prehearing conference had been provided by the Chief Clerk of the Commission to municipalities in the Ameren Companies' service area in accordance with the requirements of Section 10-108 of the Act, 220 ILCS 5/10-108. An additional prehearing conference was held before the ALJ at the Commission's Springfield office on August 24, 2005.

Petitions to intervene were filed by Dynegy, Inc.; the Illinois Industrial Energy Consumers ("IIEC"); the Citizens Utility Board ("CUB"); BlueStar Energy Services, Inc.; the People of the State of Illinois through the Attorney General ("AG"); Midwest Generation EME, LLC ("Midwest Generation" or "MWGen"); Constellation Energy Commodities Group, Inc. ("CCG"); Commonwealth Edison Company ("ComEd"); Midwest Independent Power Suppliers; Local Unions 15, 51 and 702 of the International Brotherhood of Electrical Workers ("IBEW"); Morgan Stanley Capital Group Inc.; the Electric Power Supply Association; the Illinois Energy Association; Ameren Energy Marketing Company; J. Aron & Company; the Environmental Law and Policy Center ("ELPC"); and the entities comprising the Coalition of Energy Suppliers ("CES"), including U.S. Energy Savings Corporation ("USESC"), Constellation NewEnergy Inc., Direct Energy Services ("DES"), LLC, MidAmerican Energy Company, and Peoples Energy Services Corporation (collectively, all of the foregoing parties are the "Intervenors").

Evidentiary hearings were held on September 1, September 6-9, September 12-14, and September 20, 2005, at the offices of the Commission in Springfield, Illinois, in coordination with hearings on similar tariffs that were filed by ComEd in Docket No. 05-0159 (the "ComEd Docket"). At the evidentiary hearings, the Ameren Companies, the Staff of the Commission ("Staff"), the AG, CES, CUB, CCG, DES-USESC, Dynegy, IIEC, and Midwest Generation entered appearances and presented testimony. Appearances were also entered for J. Aron, Morgan Stanley, Midwest Independent Power Suppliers, and Electric Power Supply Association. At the conclusion of the hearings, the record was marked "Heard and Taken."

The following witnesses testified on behalf of the Ameren Companies: Warner L. Baxter, Executive Vice President and Chief Financial Office for Ameren Corporation; Craig D. Nelson, Vice President - Strategic Initiatives of Ameren Services Company and Vice President of AmerenCIPS; James C. Blessing, Managing Supervisor, Power Supply Acquisition in the Strategic Initiatives Department of Ameren Services Co.; Robert J. Mill, Director of the Regulatory Policy and Planning Department of Ameren Services Co.; Wilbon L. Cooper, Manager - Rate Engineering and Analysis - Regulatory Policy and Planning of Ameren Services Co.; Dr. Chantale Lacasse, Vice President with National Economic Research Associates, Inc. ("NERA"); Johannes P . Pfeifenberger, Principal and Director of The Brattle Group; Steven M. Fetter, President of Regulation UnFettered; Ronald R. McNamara; Vice President of Market Management and Chief Economist for the Midwest Independent Transmission System Operator, Inc.; Rodney Frame, Managing Principal of Analysis Group, Inc.; and Timothy I. Maloney, Managing Supervisor in the Credit Risk Management Department of Ameren Services Co.

The following witnesses testified on behalf of the Staff: David J. Salant, Principal, ERS Group and Research Professor, Clemson University; David S. Sibley, Professor of Economics, the University of Texas at Austin; Scott A. Struck, CPA, Supervisor, Accounting Department, Financial Analysis Division; Richard J. Zuraski, Senior Economist, Policy Program, Energy Division; Serhan Ogur, Economic Analyst, Federal Energy Program, Energy Division; Eric P. Schlaf, Senior Economic Analyst, Energy Division; Peter Lazare, Senior Rate Analyst, Financial Analysis Division; Cheri L. Harden, Rate Analyst, Rate Department, Financial Analysis Division; Mary E. Selvaggio, CPA, Manager, Accounting Department, Financial Analysis Division; Steven R. Knepler, CPA, Supervisor, Accounting Department, Financial Analysis Division; and Rochelle Phipps, Senior Financial Analyst, Finance Department, Financial Analysis Division.

The AG's witnesses were Kenneth Rose, Ph.D, consultant, lecturer, Institute of Public Utilities, Michigan State University; Harvey Salgo, Esq., Principal Consultant, La Capra Associates; David Effron, CPA, Regulatory Consultant, Berkshire Consulting Services; and Philip Reny, Ph.D., Professor of Economics, the University of Chicago.

CCG's witness was Michael D. Smith, Vice President, Regulatory and Legislative Affairs.

CES' witnesses were Philip R. O'Connor, Ph.D., Vice President, Illinois Market, NewEnergy; Mario Bohorquez, Director of Supply, Illinois Market, NewEnergy, and Wayne Bollinger, Director of Energy Supply, People Energy Services (jointly); and John L. Domagalski, NewEnergy, and Richard S. Spilky, Director of Electric Products, MidAmerican (jointly).

CUB's witnesses were Robert M. Fagan, Senior Associate, Synapse Energy Economics, and William Steinhurst, Senior Consultant, Synapse Energy Economics, Inc.

DES-USESC's witness was James Steffes, Vice President, US Government & Regulatory Affairs and Chief Compliance Officer, DES.

Dynegy's witnesses were Barry Huddleston, Senior Director, Governmental and Regulatory Affairs; and Heather Dornbusch, Senior Analyst, Credit Risk Management.

IIEC submitted testimony of Robert R. Stephens, Consultant, Brubaker & Associates, Inc.; James R. Dauphinais, Consultant, Brubaker & Associates, Inc.; and Brian C. Collins, Consultant, Brubaker & Associates, Inc.

Midwest Generation submitted testimony of Frank C. Graves, Principal, The Brattle Group.

With regard to other pre-hearing matters, on April 22, 2005, the ALJ issued a ruling and Case Management Order, enumerating procedures to govern the case. Concurrently, the ALJ set forth the Coordinated Schedule. In a separate ruling, the three Ameren dockets were consolidated.

On May 17, 2005, the AG, CUB, and ELPC filed a Motion to Dismiss the portion of the proceeding related to the Ameren Companies' Rider MV (the "Motion to Dismiss"). On May 25, 2005, Locals 15, 51, 702, IBEW filed a response supporting the Motion to Dismiss.

On May 25, 2005, the Ameren Companies and ComEd filed Oppositions to the Motion to Dismiss. Also on May 25, 2005, Staff filed a response opposing the Motion to Dismiss.

Also on May 25, 2005, Midwest Generation and CES filed responses to the Motion to Dismiss, opposing the Motion. On May 26, 2005, Midwest Independent Power Suppliers and Electric Power Supply Association filed responses to the Motion to Dismiss, opposing the Motion.

On May 31, 2005, the Ameren Companies filed a reply opposing IBEW's response to the Motion to Dismiss.

On June 1, 2005, the AG, CUB, and ELPC filed a reply in support of the Motion to Dismiss.

On June 1, 2005, the ALJ issued a Ruling denying the Motion to Dismiss.

On June 22, 2005, the AG, CUB, and ELPC filed a Petition for Interlocutory Review of the ALJ's Ruling denying the Motion to Dismiss (the "Petition for Interlocutory Review").

On July 5, 2005, the Commission held oral argument on the Petition for Interlocutory Review. On July 13, 2005, the Commission denied the Petition for Interlocutory Review.

Following the hearings, initial briefs were submitted respectively by the Ameren Companies, Staff, the AG, CUB, IIEC, Morgan Stanley, CES, CCG, DES-USESC, Dynegy, and Midwest Generation. Subsequently, draft orders were submitted by DES-USESC, Midwest Generation, the AG, CES and Ameren.

On November 2, 2005, CCG, Staff, CUB, IIEC, Midwest Independent Power Suppliers, Midwest Generation, DES-USESC, CES, the AG, the Ameren Companies and Dynegy filed post-hearing reply briefs.

On December 9, 2005, a proposed order was served on the parties.

## II. OVERVIEW OF PROPOSED AUCTION MECHANICS

The Ameren Companies have proposed what is known as a vertical tranche multi-round descending clock auction for purposes of acquiring power and energy after the end of the mandatory transition period on January 1, 2007. The Ameren Companies' proposed auction proceeds in rounds. During the bidding phase of a round, a bidder for the Fixed Price Section indicates the number of tranches of each product that the bidder wishes to supply at the prices announced by the Auction Manager. A bidder for the Hourly Price Section indicates the number of tranches of each product that the bidder wishes to supply at the prices announced by the Auction Manager.

After the bidding phase of a round, the Auction Manager reduces the price for the tranches of a product if the number of tranches bid on that product by all bidders is greater than the number of tranches that are needed for that product. The Auction Manager then announces new prices for each product before bidding in the next round opens. The Auction continues and the prices drop down until, for each product, the total number of tranches subscribed falls to the point where it equals the number of tranches needed.

All winners for a given product receive the same price. The prices in the Fixed Price Section will be expressed in $/MWh rounded to the nearest cent while the prices in the Hourly Price Section will be expressed in $/MW-day rounded to the nearest cent.

Under the auction proposal advanced by the Ameren Companies, the Commission would monitor the auction with the assistance of Staff and an independent Auction Advisor retained by the Commission. After the auction, the Commission has three business days to review the conduct and results of the Auction. Under the proposal, if the Commission does not open an investigation prior to the close of the three-day review period, the auction results are deemed approved.

## III. LEGAL ISSUES

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

For the most part, the Section III.A of the parties' briefs is titled, "Background: the Illinois Electric Service Customer Choice and Rate Relief Law of 1997," 220 ILCS 5/16-101 et seq. The parties' comments are summarized below. Unless otherwise indicated, assertions contained in these summaries of parties' positions, and other summaries of parties' arguments appearing elsewhere in this order, are intended to represent the positions of the parties, not findings by the Commission.

#### 1. Ameren

Section III.A of Ameren Companies' brief is titled, "Background: the Illinois Electric Service Customer Choice and Rate Relief Law of 1997." (Ameren brief at 5-8)

The Illinois Electric Service Customer Choice and Rate Relief Law of 1997, referred to by the Ameren Companies as the "Restructuring Act," fundamentally changed the electricity industry in Illinois. The General Assembly recognized that "[c]ompetitive forces are affecting the market for electricity as a result of recent federal regulatory and statutory changes and the activities of other states," and that "[l]ong-standing regulatory relationships need to be altered to accommodate the competition that could fundamentally alter the structure of the electric services market." (220 ILCS 5/16-101A(b)) Accordingly, the General Assembly enacted new regulatory provisions for electric service in Illinois, and instructed the ICC that it "should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers," 220 ILCS 5/16-101A(d), while continuing to allow utilities to recover costs plus a fair return on investment. (220 ILCS 5/16-101A(a), (c))

The Restructuring Act instituted immediate benefits for electric utility ratepayers during the "mandatory transition period" (220 ILCS 5/16-111), defined as "the period from the effective date of this [Act] through January 1, 2007" (Id. at 16-102) During this time period, the Restructuring Act froze residential electricity rates and authorized (and, in many ways, encouraged) electric utilities to reorganize their businesses and to divest generation assets, subject to ICC approval. (Ameren brief at 6, citing 220 ILCS 5/16-111(g) (authorizing a utility to "implement a reorganization" and to "sell, assign, lease or otherwise transfer assets to an affiliated or unaffiliated entity"))

The Restructuring Act's authorizing provisions streamlined the existing procedures for a utility's sale or transfer of its generation assets, and limited the ICC's authority over approval of such transactions. (220 ILCS 5/16-111) The statute also explicitly limits the ICC's ability to revisit or reexamine the approval of such reorganization: "The Commission shall not in any subsequent proceeding or otherwise, review such a reorganization or other transaction authorized by this Section." (220 ILCS 5/16-111(g))

In addition, the Restructuring Act established disincentives for utilities to choose not to restructure. Section 16-111(i) altered the traditional provision for actual cost recovery and established a future (post-2006) cap on the generation component of rates, measured as the "market value" (a proxy for market electricity prices calculated pursuant to the terms of Section 16-112) plus 10%. Accordingly, a utility choosing not to restructure, i.e., to streamline operations and bring costs in line with market competitors, would face the prospect of disallowances of costs. (Ameren brief at 6-7)

The Restructuring Act requires electric utilities to continue to provide "bundled" retail service, consisting of both electricity and the delivery of that electricity to the customer's premises, until the service is declared competitive under Section 16-113. (220 ILCS 5/16-103) That is, the Ameren Companies are required to continue selling electricity at retail even though they have divested their generation assets and must purchase that electricity at wholesale. (*Id*.)

When the Ameren Companies divested their former generation facilities following the 1997 Act, and as part of those divestiture transactions, the Companies entered into power purchase agreements that allowed the Companies to be supplied by the new owners at established prices for a set period of time. All those agreements expire by the end of 2006, which is also when the "mandatory transition period" of the 1997 Act expires. (220 ILCS 5/16-102) Accordingly, if the Ameren Companies wish to provide electric service after December 31, 2006, they must go into the marketplace to obtain that supply. Hence, the cost of wholesale electric power – which the Ameren Companies now must procure in order to serve customers, 220 ILCS 5/16-103(a) – is necessarily a key determinant of retail rates.

The Ameren Companies' tariff proposal addresses these concerns. They (1) define future generation services in compliance with the PUA, (2) establish a procurement process by which the Companies will obtain the power supply necessary to provide the generation services, and (3) establish a methodology that will "translate" the auction prices paid by the Companies (i.e., their actual costs) for the essential power supply into rates to end users. (Resp. Ex. 1.0 at 3-4) Customers will pay only the actual price of power and energy as determined by a competitive full requirements reverse auction held under the watchful eye of the Commission. (Ameren brief at 8)

**2. AG**

In Section III.A of its brief, "The Illinois Electric Service Customer Choice and Rate Relief Law of 1997" (referred to by the AG as the "1997 Amendments"), the AG asserts that the 1997 Amendments reiterated and preserved consumer protections for electric utility customers. (AG brief at 4-12)

The PUA is based on the premise that the "health, welfare and prosperity of all Illinois citizens require the provision of adequate, efficient, reliable, environmentally safe and least-cost public utility services at prices which accurately reflect the long-term cost

of such services and which are equitable to all citizens." (AG brief at 4-5, citing 220 ILCS 5/1-102) The public has a strong interest in utility services that are affordable, efficient and reliable. The Act establishes a comprehensive regulatory scheme to review the costs incurred by utilities and to set rates paid by consumers so that consumers of essential, monopoly utility services are protected from unfair pricing. (AG brief at 5)

The 1997 Amendments reiterated and confirmed these goals. In section 16-101A, the General Assembly found that "[w]ith the advent of increasing competition in this industry, the State has a continued interest in assuring that the safety, reliability, and affordability of electrical power is not sacrificed to competitive pressures, and to that end, intends to implement safeguards to assure that the industry continues to operate the electrical system in a manner that will serve the public's interest." (220 ILCS 5/16-101A(c)) While noting that the ICC should act to promote effectively competitive electricity markets, the General Assembly also concluded, "Consumer protections must be in place to ensure that all customers continue to receive safe, reliable, affordable, and environmentally safe electric service." (AG brief at 5, citing 16-101A(d))

In Section III.A.1 of its brief, the AG argues that "consumer protections do not end with the end of the mandatory Transition Period." (AG brief at 7-8)

In Section III.A.2, the AG argues that "the PUA does not authorize market-based rates for electric service that has not been declared competitive under Section 16-113." (AG brief at 8-12) This argument is discussed below.

**3. Staff**

The Electric Service Customer Choice and Rate Relief Law of 1997 (the "Restructuring Law") implemented an unprecedented restructuring of the State's electric utility industry. Among other things, the Restructuring Law "initiated: (1) the opportunity for customers to purchase power from the supplier of their choice; (2) a restructuring of the State's electric power industry; and (3) a transition toward delivery service unbundling and greater reliance on market forces to determine how electric power and energy would be provided to retail customers who remain with the utility." (Staff brief at 6-8, citing Resp. Ex. 2.0 Corrected at 5) According to Ameren witness Nelson, this transition, brought on by the Restructuring Law, has had the following results so far:

- Residential customers have benefited from one of the largest and longest rate reductions, and today are paying 20% less than they paid for electricity in 1994. The total savings statewide are estimated to be 3.5 billion dollars.

- Many new entities have entered Illinois to compete for electric supply. Customers have been given the power of choice, and have selected these alternative retail electric suppliers ('ARES').

- Many industrial and commercial customers have realized significant savings from selecting the Power Purchase Option ('PPO') or an ARES.

- Statewide service reliability has improved.

- Over 9000 MWs of new generation has been built in Illinois by private investors.

(Resp. Ex. 2.0 Corrected, pp. 5-6, lines 104-124)

However, the transition period, during which retail rates have been frozen, is scheduled to end December 31, 2006. December 31, 2006 also marks "the end of the long-term supply contracts that most Illinois utilities entered into when, consistent with the Customer Choice Law's requirements and/or ICC rules, they sold or spun off their generating assets as part of the restructuring process." (*Id*.) Like other utilities, the Ameren Companies divested themselves of most of their generating assets

Presently, each Ameren Company is served under a full requirements contract that expires at the end of 2006. Accordingly, each of the Ameren Companies must purchase its supply into order to provide any generation service.
(Resp. Ex. 1.0 at 4-5)

**4. IIEC**

In Section III.A of its brief (IIEC brief at 8-10), IIEC offers various observations on The Illinois Electric Service Customer Choice and Rate Relief Law (referred to by IIEC as the "Customer Choice Law") signed into law on December 15, 1997. (220 ILCS 5/16-101 et seq.)

Under the Customer Choice Law, utilities are required to offer delivery service, so that end-use customers could choose suppliers, other than the electric utility, for their electric power and energy requirements. (220 ILCS 5/16-104)

Base rates were frozen for all customers. (220 ILCS 5/16-111(a)) Rates were reduced by as much as 20% for residential customers in the Ameren service territories. (220 ILCS 5/16-111(b)) Also, utilities were given the option to avoid the rate decrease and rate freeze but if they did they were required to file biennial rate case proceedings without regard to whether the filing would produce a rate increase or decrease. (220 ILCS 5/16-101(b))

Utilities were given the option to reorganize and restructure their businesses and the right to collect transition charges to allow them to collect the cost of investments they believed would be stranded or otherwise unrecoverable, if customers were allowed to choose a supplier other than an electric utility. (220 ILCS 5/16-108(f) and 16-111(g))

The General Assembly also granted the utilities the right to request that the Commission declare a tariffed service or services competitive. (220 ILCS 5/16-113)

Utilities on the other hand, were required to ". . . continue offering to retail customers each tariff service that it offered as a distinct and identifiable service on the effective date of the Amendatory Act of 1997 until the service . . ." was declared competitive or abandoned. (220 ILCS 5/16-103(a))

Pursuant to Section 16-111(g) of the Act, AmerenIP voluntarily sold its nuclear generating capacity to AmerGen Energy Company, LLC and transferred its fossil generating capacity to an affiliate. (*Illinois Power Company*, 1999 Ill. PUC Lexis 467 (July 8, 1999); *Illinois Power Company* 1999 Ill. PUC Lexis 809 (Oct. 26, 1999)) AmerenCILCO transferred its generating assets to an affiliate. (*Central Illinois Light Company*, 2002 Ill. PUC Lexis 414 (April 10, 2002)) AmerenCIPS also transferred its generation assets to an affiliate. (*Central Illinois Public Service Company*, 1999 Ill. PUC Lexis 766 (Oct. 12, 1999))

In adopting the Customer Choice Law, the General Assembly expressed the intention that all customers benefit, in an equitable and timely fashion, from "lower costs" of electricity that would result from "retail and wholesale" competition. (220 ILCS 5/16-101A(e)) The General Assembly intended that the ". . . competitive wholesale and retail market . . ." benefit "all Illinois citizens." (220 ILCS 5/16-101A(d))

The retail market in the Ameren service territory has not developed in a manner that ensures all citizens there will receive the benefits of effectively competitive wholesale and retail markets. The Ameren proposal in its present form has the potential to allow its 1 MW and over customers (citizens of the State of Illinois) to possibly benefit from the wholesale and retail markets. Ameren specifically proposes to allow its largest customers (1 MW and over) access to the lowest discoverable wholesale price, which it claims will be produced by its recommended auction process. (IIEC brief at 9-10)

**5. CES**

In Section III.A of its initial brief, CES addresses certain directives and features in the Customer Choice Law of 1997. (CES brief at 8-10)

Enactment of the Customer Choice Law in 1997 signaled the beginning of a complex, multi-faceted transformation of the electric industry in Illinois. The scope of this ongoing transformation has affected all stakeholders, including consumers, utilities, alternative retail electric suppliers, governmental agencies, and other interested parties.

Through the Customer Choice Law, the General Assembly provided a clear policy directive to the Commission: "The Illinois Commerce Commission should act to promote the development of an effectively competitive market that operates efficiently and is equitable to all consumers." (220 ILCS 5/16-101(d)) Thus, the General Assembly has endorsed the concept that the Commission, in establishing just and reasonable rates, must take affirmative action to ensure the development of an effectively competitive market for retail electricity in Illinois. (CEC brief at 9)

The Customer Choice Law reflects the General Assembly's belief that Illinois retail electric customers will benefit from competition because competition will lower rates more effectively than regulation. (See ILCS 5/16-101(e)) The goal of restructuring the electric industry is to introduce competition to a formerly noncompetitive, monopolistic market so that consumers will experience the benefits of competition. Only if the Commission continues to foster a competition-enabling environment will consumers have meaningful choices and reasonable opportunities to achieve savings over the rates derived through a traditional rate of return regulatory process.

The Customer Choice Law provides that, in the event that utilities do not own generation and must acquire supply in the wholesale market, the price of the wholesale supply should have a reasonable relationship to the costs indicated by the Commission approved market value energy charge ("MVEC") methodology. (220 ILCS 5/16-111(i); CES Ex. 1.0 at lines 136-141) The Choice Law further provides that the MVEC methodology can rely on a variety of inputs, including contracts applicable to the utility's service areas. (220 ILCS 5/16-112(a)) The auction proposed by Ameren would yield such energy contracts. (CES Ex. 1.0 at lines 119-122)

As Coalition witness Dr. O'Connor explained, a properly designed auction should produce wholesale energy prices that reflect market conditions at the time the auction is conducted and should also help to keep the costs of the utility's operation of the delivery network free of commodity related risk and cost. (CES Ex. 1.0 at lines 110-113) The auction method also should improve the calculation of the MVEC component of the Power Purchase Option ("PPO") rates that Ameren must continue to offer after the transition period.

In conclusion, the Customer Choice Law envisions the development of a competitive market for electricity in Illinois, in which each consumer will have choices to determine the most advantageous way to obtain electricity to service the customer's own needs. The instant proceeding represents a critical step toward achieving the General Assembly's goals. (CES brief at 8-9)

In its reply brief, Section III.A, CES responds to arguments by AG and CUB who each raised issues regarding the legal authority of the Commission to approve Ameren's procurement proposal. (CES reply brief at 8, citing AG brief at 4-19, CUB brief at 5-12)

The Commission deliberated and rejected most, if not all, of the AG and CUB substantive legal issues. The Commission appropriately decided that the General Assembly granted authority to the Commission to oversee the current procurement proceeding and ultimately approve the Company's procurement proposal.

By enacting the Customer Choice Law, the General Assembly formalized its belief that Illinois retail electric customers will benefit from competition because competitive pressures lower rates more effectively than regulation. (See ILCS 5/16-101(e)) As the steward of the competitive retail electric market in Illinois, the

Commission, guided by the provisions of the Customer Choice Law, has been given the authority to approve a market-based structure for all customers served by Ameren's default rates. (CES reply brief at 8)

**6. DES-USESC**

In Section III.A of its brief, "Background: the Illinois Electric Service Customer Choice and Rate Relief Law of 1997," DES-USESC comment that the Customer Choice Law requires the Commission to promote "an effectively competitive electricity market that operates efficiently and is equitable to all consumers." (220 ILCS 5/16 101A(d)) The Customer Choice Law also states that "Competitive forces are affecting the market for electricity" such that "Competition in the electric services market may create opportunities for new products and services for customers." (220 ILCS 5/16 101A(b); 220 ILCS 5/16-101A(e))

Also, the Customer Choice Law requires that "all consumers must benefit in an equitable and timely fashion from the lower costs for electricity that result from retail and wholesale competition and receive sufficient information to make informed choices among suppliers and services. (Id.) Thus, the General Assembly has endorsed the concept that the Commission, in establishing just and reasonable rates, must take affirmative action to ensure the development of an effectively competitive market for retail electricity in Illinois. (DES-USESC brief at 5-6)

The Customer Choice Law reflects the General Assembly's belief that Illinois retail electric customers will benefit from competition because competition will lower rates more effectively than regulation. (See 220 ILCS 5/16-101(e)) The goal of restructuring the electric industry is to introduce competition to a formerly noncompetitive, monopolistic market so that consumers will experience the benefits of competition. Only if the Commission continues to foster a competition-enabling environment will consumers have meaningful choices and reasonable opportunities to achieve savings over the rates derived through a traditional rate of return regulatory process. The instant proceeding represents a critical step toward achieving the General Assembly's goals.

**7. CCG**

In Section III.A of its brief, CCG comments on the Customer Choice Law of 1997, sometimes referred to by CCG as the "Restructuring Law." (CCG brief at 5)

The Restructuring Law created a new regulatory structure that would promote a competitive wholesale and retail electric market in Illinois. (220 ILCS 5/16-101 et seq.) Recognizing that "[c]ompetitive forces are affecting the market for electricity as a result of recent federal regulatory and statutory changes and the activities of other states" and that "[a] competitive. . . market must benefit all Illinois citizens" (220 ILCS 5/16-101A(b) and (d)), the Restructuring Law stated that the "Commission should act to promote the

development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." (CCG brief at 5, citing 220 ILCS 5/16-101A(d))

In order to bring about the new regulatory structure, alternative electric retail suppliers ("ARES") were permitted to compete with utilities. A mandatory transition period was established, residential rates were reduced by as much as 20% for AmerenIP and by lesser amounts for AmerenCILCO and AmerenCIPS, and all rates were frozen for the duration of the mandatory transition period. Utilities were permitted to restructure their businesses and divest assets, including generating assets. In addition, private investors have built over 9,000 MWs of new generation. (Ameren Ex. 2.0 at lines 117-118) While the restructuring continues to evolve, several issues will need to be resolved, including the issue of how utilities that no longer own generation will procure power and energy so that they can meet their obligations for tariffed service. The proposed tariffs, if approved, would address this issue. (CCG brief at 5)

**8. Dynegy**

In Section III.A of its brief, Dynegy offers certain background comments with respect to the 1997 Customer Choice Law. (Dynegy brief at 3-4)

The Mandatory Transition Period ("MTP") provided for in the Customer Choice Law, Section 16-102, ends on January 1, 2007. Without action by the Commission or the General Assembly, at that time many changes will occur within the rules governing electric utilities in Illinois by operation of law. Key among these is the end of the rate freeze. (See 16-111(a)) Although the precise contours are not definitively set forth in the PUA, the General Assembly has laid out certain policy goals and provided utilities and the Commission with certain options if nothing more were to occur. The Customer Choice Law includes certain policy goals in Sections 16-101A(b), (d) and (e).

To help implement these goals, the PUA permits utilities to file general rate cases for rates that will be effective after the expiration of the MTP. In examining such requests, the Commission has been provided some guidance in such sections as Section 16-111(i), which provides for a comparison between the market value for power and energy and the rate component for such services in a utility's proposed rates.

Within this context, Ameren filed the present case as a means to determine the method by which it will procure wholesale FRS after the MTP and then translate the cost for that service into retail rates. Several parties have raised the issue of whether the Commission has the authority to approve Ameren's proposal for any customer class that has not been declared competitive pursuant to Section 16-113. Assuming that legal hurdle is cleared, several parties have also raised the issue of whether the proposal should nonetheless be approved as a matter of policy. On these two threshold issues, Dynegy currently takes no position. While generally supportive of an auction format as a means to accomplish the General Assembly's goals set forth above, Dynegy's basic concern is on ways to improve that process, and not on the more fundamental issues raised by other parties. (Dynegy brief at 4-5)

### B. ICC Authority under Articles IX and XVI to Approve the Filed Tariffs

For the most part, "ICC authority under Articles IX and XVI to approve the filed tariffs" was addressed in Section III.B of the parties' briefs. Certain other arguments relating to the legality of the proposed auction process were presented in Section VIII of the parties' briefs. The parties' arguments on these issues are summarized below. "Relationship of Illinois and federal law and jurisdiction" was discussed in Section III.C and is summarized in Section III.C of this order. Unless otherwise indicated, assertions contained in these summaries represent the positions of the parties, not findings by the Commission.

#### 1. Ameren

In Section III.B of their initial and reply briefs, the Ameren Companies address the ICC authority under Article IX and Article XVI to approve the filed tariffs. (Ameren brief at 8-20; Ameren reply brief at 3-10)

The PUA allows the ICC to approve the tariffs, which set retail rates to recover the actual market-based wholesale costs the Companies incur to provide retail service. No matter what procurement method is ultimately used, the Ameren Companies' retail rates will inevitably reflect their costs of purchasing power from the wholesale market, because the Ameren utilities do not own power plants to generate their own power. (Ameren brief at 8-9)

Nothing in the PUA suggests that in such circumstances, the ICC must ignore the Ameren Companies' costs of procuring power in establishing retail rates. To the contrary, the PUA requires the ICC to establish retail rates that reflect the Ameren Companies' reasonable and prudent costs of providing retail service. (220 ILCS 5/9-101, 9-211) Accordingly, if one of the Ameren Companies' reasonable and prudent costs of providing retail service is purchasing power at wholesale, then the ICC is required to approve retail rates that reflect those costs, pursuant to Article IX. (See *Citizens Utility Board v. Illinois Commerce Comm'n*, 166 Ill.2d 111, 121 (1995) ("[i]n setting rates, the Commission . . . must allow the utility to recover costs prudently and reasonably incurred"))

In Subsection III.B.1, Ameren addresses "**Commission Authority under Article IX**." (Ameren brief at 9-12)

The Ameren Companies filed the tariffs pursuant to Article IX of the PUA, 220 ILCS 5/9-101 et seq. Article IX requires the ICC to ensure that tariffed rates for non-competitive electric services are just and reasonable, and reflect the utility's prudently incurred costs. Accordingly, as long as the Ameren Companies' costs of purchasing wholesale electricity in a reverse auction process are reasonable, prudently incurred costs, the ICC has the authority to approve retail rates that incorporate those costs. (Ameren brief at 9)

The Act establishes different standards against which an electric utility's competitive and non-competitive service retail rates are to be assessed. Retail rates for non-competitive services are subject to the traditional ratemaking provisions of Article IX of the PUA, which requires that such rates be "just and reasonable" in light of the utility's costs of providing service. (220 ILCS 5/9-101; See also 220 ILCS 5/16-103(a) (providing that Article IX shall continue to apply to rates for non-competitive services)) As the Illinois Supreme Court has explained, "The determination of whether a cost is includable in or disallowable from the utility's rate base is the essence of Commission's ratemaking duties," and "costs which the Commission has found to be reasonable are included in [a utility's] rate base, while costs found to be unreasonable are disallowed." (*People ex rel. Hartigan v. Illinois Commerce Comm'n*, 148 Ill.2d 348, 368 (1992))

Regardless of what other parties may argue, the Ameren Companies have not asked the Commission to determine whether their proposal satisfies the market-based cost requirements of Section 16-103(c) of the PUA. That section addresses ratemaking for competitive services. Rather, the issue here is whether, in accordance with the requirements of Article IX, the Ameren Companies' tariffs reflect "just and reasonable" retail rates based on reasonable, prudently incurred costs. The Ameren Companies have asked the ICC to approve and oversee a competitive bidding process that by its nature will produce the least-cost source of supply, thereby satisfying the requirements of Article IX. (Ameren brief at 10)

Nearly 50 years of Illinois Supreme Court precedent confirms that, under the traditional ratemaking standards of Article IX that continue to apply to the Ameren Companies' non-competitive service rates, the ICC may approve tariffs that automatically pass through to retail customers the prudently incurred costs a utility incurs purchasing commodities in the wholesale market, as the Companies' proposed tariffs provide.

For example, in *City of Chicago v. Illinois Commerce Comm'n*, 13 Ill.2d 607 (1958), the Supreme Court reviewed an ICC order approving a Peoples Gas tariff for retail rates "providing for an automatic adjustment from time to time . . . to reflect changes in the wholesale cost to Peoples of natural gas purchased." (13 Ill.2d at 608-09) The Court explained that the gas utility's tariff "provides for increases or decreases in the charges for gas sold by Peoples . . . to the extent of increases or decreases in the wholesale price of such gas" (*Id*. at 609), similar to the Ameren Companies' tariffs at issue here.

The Court rejected claims that the ICC had no authority to approve such a tariff, and that "an automatic increase in the charge to consumers, based on an increase in the wholesale cost of gas, is illegal since there is no provision for a public hearing when each additional increase becomes effective" (*Id*. at 611, 612), and held that the ICC "acted reasonably and within the ambit of its statutory authority." (*Id*. at 619) As the Court explained, the ICC's "statutory authority to approve rate schedules embraces more than the authority to approve rates fixed in terms of dollars and cents," but

encompasses the authority to approve a rate "formula," including an "automatic adjustment clause" whereby retail rates depend on the utility's wholesale costs. (*Id*. at 611)

The Supreme Court faced a similar issue in *Citizens Utility Board*, 166 Ill.2d 111 (1995). In that case, CUB challenged an ICC order approving a utility tariff "rider" allowing the utility to automatically pass through to retail customers certain costs incurred by the utility. The Court, citing *City of Chicago* with approval, rejected CUB's challenge. (*Id*. at 138-39)

Similarly, under the traditional ratemaking standards of Article IX that apply to the Ameren Companies' retail rates, the ICC has the authority to approve retail rates that reflect market-based wholesale costs incurred by the Companies. (Ameren brief at 11) The ruling of the ALJ, which was upheld by the Commission, reached this very conclusion in denying the motion to dismiss in the ICC proceeding, noting, "In addition, as several parties have commented, it is difficult to see by what means Movants envision the cost of procuring power and energy being determined for non-competitive services in a manner consistent with Movants' theory that market based prices may not be used to establish costs on which to base rate components for non-competitive services." (Administrative Law Judge's Ruling, Docket Nos. 05-0160 et al. (consol.), June 1, 2005)

Otherwise stated, if the Ameren Companies are going into the market to buy power their customers need, and the PUA both assures total cost recovery, but precludes the use of the actual cost paid for wholesale power to develop rates, how then are rates to be determined? Thus far, opponents to the Ameren Companies' proposal have no answer for this. As discussed below, because the ICC has no authority to set wholesale rates, opponents to the Ameren Companies' tariffs would leave the ICC with no ratemaking option. (Ameren brief at 12)

In Section III.B.2, **Commission Authority under Article XVI**, the Ameren Companies argue that the Commission also has ample authority to approve the proposed tariffs under Article XVI, which charges the Commission with "promot[ing] the development of an effectively competitive electricity market that operates efficiently and is equitable to all customers." (Ameren brief at 12-14, citing 220 ILCS 5/16-101(d))

The General Assembly envisioned greater reliance on market forces in the setting of just and reasonable electricity rates following passage of the Restructuring Act. Section 16-112 of the Act explicitly empowers the Commission to determine the price of electric power and energy based on its "market value." Specifically, the Commission may approve "a tariff that has been filed by the electric utility with the Commission pursuant to Article IX of the Act and that provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy." (Ameren brief at 12)

By its terms, Section 16-112(a) does not mandate a particular method for determining market value, but broadly allows a range of measures that objectively establish the market-based price for electricity in the particular market in which the utility sells and the customers in its service area buy. Any method that provides for a determination of market value as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the utility's retail electricity market is permitted. See *In re Commonwealth Edison*, 2001 WL 682088 (explaining that General Assembly intended "market value" in Section 16-112 to reflect the "value of power and energy at the retail level"). As applied in previous "market value" determinations under Section 112(a), see *In re Commonwealth Edison*, 2001 WL 682088, the touchstone is identifying the market value for electric power in the specific "market in which the utility sells, and the customers in its service area buy, electric power and energy." (220 ILCS 5/16-112(a))

Under Section 16-110 of the Act, the market value determined pursuant to Section 16-112 will establish post-transition period power purchase option prices. The proposed tariffs provide that the same market value be the basis for a restructuring and unbundling of the prices to be charged to the Ameren Companies' retail customers for electric power and energy after the mandatory transition period expires. Section 16-109A of the Act expressly authorizes the Commission to approve such a restructuring and unbundling of prices, providing that "the Commission shall have the authority to investigate the need for, and to require, the restructuring or unbundling of prices for tariffed services, other than delivery services, offered by an electric utility." (Ameren brief at 13)

The Act also contemplates the use of the market value of power and energy determined under Section 16-112 as the basis for the price of power and energy charged to bundled service customers. Section 16-111(i) provides, "In determining the justness and reasonableness of the electric power and energy component of an electric utility's rates for tariffed services subsequent to the mandatory transition period and prior to the time that the provision of such electric power and energy is declared competitive, the Commission shall consider the extent to which the electric utility's tariffed rates for such component for each customer class exceed the market value determined pursuant to Section 16 112 . . . ."

The Ameren Companies' tariffs propose what Section 16-112 endorses -- that customers in the post-mandatory transition period in Illinois pay a price for electric power and energy that is determined by reference to one of the statutory methods for establishing market value. No alternative method for establishing the unbundled price of electric power and energy could more closely adhere to the letter and spirit of the Act than the proposed process. (Ameren brief at 14)

In Section III.B.3 of their brief, Ameren Companies address **Rider MV**. (Ameren brief at 14-15)

Each of the Ameren Companies seeks Commission approval for a tariff, Rider MV, that determines the "market value of electric power and energy" based on the results of an open, multi-party competitive procurement auction process for standard products and contracts (as provided for in Rider MV) that, in fact, define the actual market value of power and energy in the Ameren Illinois footprint. There can be no doubt that is appropriate to determine the "market value" of electric power and energy as a function of contracts resulting from a fair and open auction for full requirements load in the Ameren Illinois footprint area in which the lowest bidder wins.

Tranche-specific forward contracts to supply power in the future at fixed prices, obtained in the market defined by the competitive bidding of the vertical tranche auction described in Rider MV, satisfy the "market value" determination methods in Section 16-112(a). Of necessity, the auction mechanism generates contracts "applicable to the market in which a utility sells, and the customers in its service area buy, electric power and energy." (220 ILCS 5/16-112(a))

Under the auction process, the Ameren Companies divide their actual combined bundled retail electricity load obligation into tranches; the lowest bidder for a given tranche is selected for the contract. Thus, the "applicab[ility]" of the resulting power supply contracts to the Ameren Companies' retail market could not be more direct. As discussed above, the auction process is set forth in a tariff filed pursuant to Article IX, just as envisioned in the statute, and thereby subject to extensive review and control by the Commission. (Ameren brief at 15)

In Section **III.B.4** of its brief, Ameren Companies address "**Prudence**." (Ameren brief at 15-20)

CUB, through its witness Dr. Steinhurst, argued that, through their auction proposal, the Ameren Companies are "effectively side-stepping the possibility of a prudence review of certain past actions regarding divestiture taken after passage of [the Customer Choice Act.]" (CUB Ex. 4.0 at 4) CUB's contention is both legally and factually wrong. (Ameren brief at 15)

Each of the Ameren Utilities sought and received appropriate Commission approval of a transfer of generating assets pursuant to Section 16-111(g) of the Customer Choice Law. The Commission in each case found, as Section 16-111(g) requires, that the transfer did not create a significant likelihood the utility would require an electric rate increase during the mandatory transition period and that the transfer would not render the utility unable to provide safe and reliable service. (See 220 ILCS 5/16-111(g))

CUB's contention is that the prudence of those transfers needs to be considered now. In Ameren's view, the Commission may not revisit the generation transfers. Section 16-111(g) states that the Commission "shall not in any subsequent proceeding or otherwise, review such a . . . transaction authorized by this Section . . . ." (220 ILCS 5/16-111(g)) What CUB is suggesting is that the Commission revisit the transaction,

which is exactly what the statute says the Commission cannot do. (Ameren brief at 15-16)

Further, the Commission may not, after the fact, impose a new standard on a transaction that exceeds its statutory authority for two reasons. First, the Commission has only that authority that is granted to it by statute. (Ill. *Commerce Comm'n et al. v. N. Y. Centr. R.R. Co. et al.,* 398 Ill. 11, 16 (1947) ("The Commission has no arbitrary powers . . . . It derives its power only from the statute and has no authority except such as is expressly conferred upon it.") The Commission was authorized only to review two aspects of the transaction and it did so. It cannot undertake some additional review, even if the statute did not expressly bar such an inquiry. Second, constitutionally, the Commission cannot change the rules after the fact. The Commission approved the transfer without condition and cannot impose additional conditions now.

CUB could have intervened in any of the divestiture proceedings; and, in fact, did so in IP's case (99-0209). CUB raised no objections to any of the so-called divestiture actions that the Ameren Companies took at the time they took them – which is the appropriate time frame in which one should examine prudence. (Ameren brief at 16)

Moreover, the Commission conditioned Ameren's acquisition of CILCO and IP on a competitive bidding process when the existing supply contracts expire. In reliance on those conditions, Ameren closed on the transactions. The Commission cannot now impose additional conditions on power procurement that are inconsistent with the competitive bidding that the Commission insisted on, and to which CUB and the AG agreed. (Ameren brief at 16)

The evidence also shows that there was nothing imprudent about the actions taken by the Ameren Companies. In the Commission order approving the transfer of CIPS' generation, the Commission concluded, in part, "After the [Power Supply Agreement, or "PSA"] expires, AmerenCIPS plans to acquire power and energy from market sources. According to evidence presented by the Company, a relatively large amount of new generating capacity is expected to be available in the market by the conclusion of the PSA and AmerenCIPS should have access to sufficient capacity and energy to meet the requirements of its customers." (CIPS Transfer Order, Docket 99-0398 at 22)

In the CILCO matter, the Commission's conclusion included the following statement, "After the PSA expires, CILCO plans to acquire power and energy from market sources. According to evidence presented by the Company, CILCO should have access to sufficient capacity and energy to meet the requirements of its customers." (CILCO Transfer Order, Docket 02-0153 at 14)

The Commission's approval of the transfers and the Commission's specific findings noted above demonstrate the prudence of the decisions to make the transfers, based on the information at hand at the time of the transfers. The Commission reviewed the facts available at the time, and, based on those facts, concluded there would be

ample generation in the market to supply the power needs of the Ameren Companies' customers. (Ameren brief at 17)

CUB witness Steinhurst's claim that "Illinois law . . . allowed divestiture. It did not mandate it," (CUB Ex. 4.0 at 8) is misleading. As previously discussed, the Customer Choice Act contained strong **incentives** for the utilities to transfer out generation facilities. The Act contained a provision which capped utilities' retail rates at the "market value" of electricity plus 10%. The Ameren Companies knew, at the time that they made their respective decisions to transfer generation facilities, that failing to divest could lead to rates being capped below their actual, total generation production cost. (Resp. Ex. 17.0 at 16) This provision in the Act was a strong legislative and regulatory incentive to divest, and a disincentive to retain generation capabilities. This was a major factor in the Companies' decisions to transfer generation. (*Id*.)

At the time of the generation transfers, the Ameren Companies had a reasonable belief that market forces, such as new capacity additions, would place downward pressure on the market value of electricity. (Resp. Ex. 17.0 at 16) This was not an uncommon belief. As recently as last year, CUB shared that same belief, and opposed any extension of existing power supply agreements because wholesale prices were heading down. (ComEd Cross Ex. 9)

It would not be reasonable to expect that each of the Ameren Companies would have been able to forecast today's power prices and, based on that foresight, have made the decisions not to transfer generation. The market conditions that exist today did not exist at the time that these divestiture decisions were made. The Ameren Companies cannot predict and do not claim to be able to predict the price of power in future years. (Resp. Ex. 17.0 at. 16-17) As Dr. Steinhurst acknowledged, the prudence of a utility's actions (for purposes of cost recovery) must be evaluated from a forward-looking perspective. (CUB Ex. 4.0 at 9) Hindsight is never an appropriate perspective to use when evaluating prudence. (Ameren brief at 18, citing Resp. Ex. 17.0 at 17; Joint Tr. 504 (Steinhurst))

What is relevant is the information available to the utilities at the time they made their transfer decisions. Mr. Nelson explained that the facts that were known during the time period of the transfer proposals include: (1) a very large amount of announced new generation in Illinois, and the surrounding region, (2) relatively low natural gas prices, (3) relatively low and stable coal prices, and (4) the likelihood that a regional transmission organization would be formed. (Resp. Ex. 17.0 at 17) All of these facts would reasonably lead one to believe that there would be downward pressure on the price of electricity. The prices for power supply components were low and stable enough that the Ameren Companies (and ComEd) voluntarily filed to cancel their fuel adjustment clauses. (*Id*. at 18)

Accordingly, at the time the Commission reviewed these transactions, the information available to the utilities indicated that wholesale competition would develop further and that increasing supply and low input prices would hold prices down. Also,

the utilities knew that they could run the risk that their generation facilities could become idle or stranded, due to switching. Indeed, in combination with the specific provisions in 16-111(i) of the Restructuring Act (which effectively capped the utilities' retail rates at market value plus 10%), these determinants weighed heavily on each of the Ameren Companies' decisions to divest their generation. (Ameren brief at 20)

Lastly, CUB does not raise any concerns of questions that could be legitimately raised in a prudence review of the transfers, even if the Commission could revisit those transactions now. For example, Dr. Steinhurst suggests that the Commission should determine whether, in hindsight, the Ameren Utilities could have, or should have, better predicted future electricity prices or retail rates, or managed its business differently. (CUB Ex. 4.0 at 10) The issue would only be whether the Companies acted reasonably, not whether they made the perfect decision. Dr. Steinhurst acknowledged that the test is whether management made a reasonable decision, not the "best possible decision." (Joint Tr. 504-505 (Steinhurst)) The evidence is overwhelming that the Companies acted reasonably. (Ameren brief at 20)

In Section III.**B** of their **reply brief**, Ameren Companies respond to arguments in the initial briefs filed by AG and CUB. (Ameren reply brief at 3-10)

CUB and AG argue that the ICC does not have authority to approve the tariffs under the Act, because (1) service has not been declared competitive and the Commission may not approve "market-based" rates; (2) the Commission does not have authority to approve a "blank" rate; and (3) the Commission may not "pre-approve" auction results without the possibility of an after-the-fact prudence review. (CUB brief at 5-10; AG brief at 8-13)

First, regardless of what CUB and AG argue, the Ameren Companies have not asked the Commission to determine whether their proposal satisfies the market-based cost requirements of Section 16-103(c) of the PUA. That section addresses ratemaking for competitive services. Rather, the issue here is whether the Ameren Companies' tariffs reflect "just and reasonable" retail rates based on reasonable, prudently incurred costs. The Ameren Companies have asked the ICC to approve (and oversee) a competitive bidding process that by its nature will produce the least-cost source of supply, thereby satisfying the requirements of Article IX. (Ameren reply brief at 4-5)

Second, despite CUB and AG's arguments to the contrary, the Ameren Companies are not asking the Commission to approve a so-called "blank" rate. CUB and AG argue that "[t]he ICC cannot approve proposed tariffs that contain no actual rates or charges and that grant a utility the prospective right to establish rates in the future," citing *Citizens Utility Board v. The Illinois Commerce Commission*, 275 Ill. App. 3d 329, 655 N.E.2d 961 (1st Dist. 1995).

This argument propounds an incorrect characterization of the proposed tariffs at issue and incorrectly interprets the *Citizens* holding. In *Citizens*, the Court struck down a tariff based on yet-to-be determined negotiated agreements, *Id*. at 332-333, but made

it clear that it did not bar riders containing a mathematical formula under which rates would fluctuate with wholesale power costs." (*Id*. at 339-340) To the contrary, the Illinois Supreme Court has pointed out that an adjustment mechanism can provide a more "accurate and efficient means of tracking costs and matching such costs with recoveries" than would a general rate case. (Ameren reply brief at 5-6, citing *Citizens Util. Bd. v. Ill. Commerce Comm'n.*, 166 Ill. 2d 111, 121 (1995))

The proposed tariffs in this case, like the tariffs in *City of Chicago*, contain a "parameter of rates" - a formula based on the actual wholesale cost of supply. Here, the Ameren Companies' proposed tariff, Rider MV, determines the "market value of electric power and energy" based on the results of an open, multi-party CPA process for standard products, and contracts that, in fact, define the actual market value of power and energy in the Ameren Companies' footprint. The auction process at issue does not allow the Ameren Companies to set their own rates, based on discretionary negotiations between interested parties, but is set forth in a tariff filed pursuant to Article IX, and is subject to extensive review and control by the Commission to ensure that the process is objective, transparent, fair and wholly independent of the Ameren Companies.

Under Article XVI, Section 16-112 of the Act explicitly empowers the Commission to determine the price of electric power and energy based on its "market value." Specifically, the Commission may approve "a tariff that has been filed by the electric utility with the Commission pursuant to Article IX of the Act and that provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy." (Ameren reply brief at 6-7)

Third, CUB contends that the proposed tariffs would violate the PUA because there will have been no determination as to whether costs were prudently incurred. (CUB brief at 5-6) Ameren Companies preliminarily note that there is not now, nor has there ever been, any requirement that the Commission hold a hearing to determine the prudence of every cost incurred by a regulated utility. Typically, good faith is presumed on the part of a utility's business managers, and a prudence review is only necessary where facts and circumstances present a question as to the propriety of a cost incurred by a utility. (Ameren reply brief at 7, citing *W. Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio*, 294 U.S. 63, 72 (1935) ("Good faith is to be presumed on the part of managers of a business. In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay.") (internal citations omitted))

Establishing before-the-fact Commission approval of the Ameren Companies' proposed method for procurement is reasonable and appropriate, as the prudence of any given expenditure is determined from a forward-looking perspective, based on knowledge available to the utility at the time of purchase:

> Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.
> (*Ill. Power Co. v. Ill. Commerce Comm'n*, 245 Ill. App. 3d 367, 371 (1993))

This framework for a proper prudence analysis is based upon Supreme Court precedent establishing that a utility has the right to recover its prudently incurred expenses and earn a fair return on its investments of capital used to provide service to ratepayers. (Ameren reply brief at 8, citing See *Fed. Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 391 (1944))

Contrary to CUB's assertions, the Ameren Companies' proposed auction process removes virtually all discretion from the utility in the procurement process, as well as any possibility of an inefficient or otherwise imprudent outlay. The CPA process would provide "comparable terms and methods" for determining least-cost service, through a set of rules intended to isolate a single variable – price – in the process. As long as the auction's rules are followed, there would be no discretionary action by the utility for the Commission to review after the auction process is completed and contracts are executed. (Ameren reply brief at 8-9)

A prudence review is intended only to determine whether a utility exercised its discretion reasonably. Here, because the proposed auction process would eliminate virtually all discretionary procurement decision-making, a post-auction prudence review is unnecessary. (Ameren reply brief at 10)

**2. AG**

In Section III.A.2, the AG argues that "the PUA does not authorize market-based rates for electric service that has not been declared competitive under Section 16-113." (AG brief at 8-12)

The 1997 Amendments authorize the Commission to use "market based prices" to set utility rates only for services that consumers have the option of purchasing from their utility's unregulated competitors and that have been "declared competitive" pursuant to Section 16-113 of the PUA. (AG brief at 8-12) Specifically, Section 16-103 provides in part:

> . . . 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 . . . .

There is no language in the 1997 Amendments or other Articles of the PUA that authorizes market-based rates for customers who do not have access to electric service that has been declared competitive.

The Commission can declare electric service "competitive" only when comparable service is available from at least one non-utility supplier, as stated in section 16-113(a):

> The Commission shall declare the service to be a competitive service for some identifiable customer segment or group of customers, or some clearly defined geographical area within the electric utility's service area, if the service or a reasonably equivalent substitute service is reasonably available to the customer segment or group in the defined geographical area at a comparable price from one or more providers other than the electric utility or an affiliate of the electric utility, and the electric utility has lost or there is a reasonable likelihood that the electric utility will lose business for the service to the other provider or providers . . . .

The 1997 Law contains express criteria to determine whether there is sufficient competition to declare electric service competitive and the Commission can approve market-based rates only for services that meet these criteria. By structuring the transition to competition in this manner, the General Assembly allowed the "self-generating regulatory force" of the market to set rates only where there is sufficient competition -- but retained regulated rates for those services that do not yet meet the criteria to be declared competitive. In the absence of competition, rates must continue to be determined by the Commission through a process of regulatory review defined by the PUA, rather than by passing through prices from wholesale markets. (AG brief at 9-10)

In the regulatory review process, the Commission is required to determine whether rates proposed by electric utilities are "just and reasonable." (AG brief at 10; 220 ILCS 5/9-101) The Commission must also ensure that electric rates for a utility's captive customers are based on the actual cost of providing service – and no more. (*State Public Utilities Comm'n v. Springfield Gas & Electric Co*., 291 Ill. 209, 217-18; 125 NE 891 (1919)) "In setting rates, the Commission must determine that the rates accurately reflect the cost of service delivery and must allow the utility to recover costs prudently and reasonably incurred." (AG brief at 10, citing *Citizens Utility Board v. Illinois Commerce Commission,* 166 Ill.2d 111, 121, 651 N.E.2d 1089, 1095 (Ill. 1995))

Captive customers, who do not have access to service that has been declared competitive, have a right to the continued consumer protections afforded by the procedural and substantive standards that the General Assembly, the Courts and the Commission have articulated as essential elements of rate of return/cost-based regulation in Illinois:

- rates based on a review of the prudence of management decisions (see Business and *Professional People for the Public Interest v. Illinois Commerce Commission*, 279 Ill.App.3d 824, 831, 665 N.E.2d 553, 558 (1st Dist. 1996));

- rates based on a direct review of profits;

- rates determined through public proceedings with procedural safeguards that ensure the right of the citizens to participate, investigate, present evidence, and cross-examine witnesses (see 83 Ill. Admin. Code 200);

- rates determined to be just and reasonable through a deliberative decision-making process based on the evidence in the record and applicable law (see 220 ILCS 5/9-101; see also 220 ILCS 5/10-103, "any finding, decision or order…shall be based exclusively on the record . . . .");

- rates determined by an independent Commission whose ratemaking decisions are subject to scrutiny by the Courts and can be reversed or voided for violations of the PUA and ethics laws.

Unlike the Commission, markets are not required to consider the prudence of management decisions, excess profits, citizens' right to be heard, the justness and reasonableness of rates, the credibility and weight of evidence, or ethical problems. Markets are not required to ensure that the People of Illinois have access to "adequate, efficient, reliable, environmentally safe and least-cost public utility services at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens." (AG brief at 12, citing 220 ILCS 5/1-102)

For captive customers, the General Assembly made clear, in Section 16-103(c), that consumers do not have to give up these protections until they have competitive choices in fully-functioning retail markets, where competition acts as a price constraining, regulatory force. (AG brief at 12)

In Section III.B of its brief, "**ICC Authority under Article IX and Article XVI**," the Attorney General argues that "the Commission has a duty to review rates for electricity to determine whether the costs were prudently incurred." (AG brief at 12-14)

The mandatory transition period does not mean an end to regulated rates, or an end to the obligation of the Commission under the PUA to ensure that utilities charge consumers rates that are just and reasonable, and based on costs that are prudent and reasonable. (220 ILCS 5/9-101, 9-201, 9-220, 16-101(a)) The 1997 Amendments specify that electric utilities' service obligations remain unchanged until there is a competitive declaration pursuant to Section 16-113 of the Act. (220 ILCS 16-103 and 16-113)

Ameren's proposal seeks to radically shift risks to consumers and to insulate the Company from any financial responsibility for power procurement decisions. The 1997

Amendments do not contemplate or authorize this change in regulatory, consumer protections. Such a change is inconsistent with the longstanding consumer protections contained in the PUA and retained by the 1997 Amendments. (AG brief at 13)

The Commission cannot approve a blank rate. In *Citizens Utility Board v. Illinois Commerce Commission*, 275 Ill.App.3d 329 (1st Dist 1995)(as modified on rehearing), the Commission approved a blank tariff (known as "Rate CS"), which the Court struck down because "the actual charges under Rate CS are not included in the proposed tariff on file with the Commission nor open to the public for inspection. In fact, there are no charges; Rate CS merely grants . . . the prospective right to set rates in the future." (275 Ill.App.3d at 339) The Court found it "most important" that the rates did not exist when the utility filed its tariff, and therefore concluded that its request violated section 9-102 of the PUA which requires that rates be filed with the Commission. (AG brief at 13)

The 1997 Amendments do not authorize utilities to file tariffs with "rates that do not exist." These Amendments preserve existing consumer protections, which include Commission review of rate changes in docketed public proceedings, and rates that are just and reasonable and that reflect the cost of service. Ameren's request to pre-approve unknown rate increases must be reviewed within this statutory framework. (AG brief at 13-14)

In Section III.B of its reply brief, ICC Authority under Articles IX and XVI, the AG argues that some parties wrongly suggest that Section 16-111(i) authorizes the Commission to approve the use of "market value" as the rate for service that has not been declared competitive. (AG reply brief at 5-10; see also AG reply brief at 49, Section VIII.A)

Proponents of the Ameren proposal argue that Section 16-111(i) of the PUA authorizes the Commission to adopt a method to set the market value of electricity because that section mandates that rates for the electric power and energy component of each customer class not exceed 10% of the market value determined pursuant to section 16-112. Section 16-111(i) does not authorize the Commission to simply pass through the market value, calculated in accordance with Section 16-112(a), to set retail rates for services that have not been declared competitive. To suggest otherwise would be inconsistent with Section 16-103(c). (AG reply brief at 7)

Rather, Section 16-111(i) directs the Commission to compare cost-based rates with the "market value" calculated using one of the methods listed in Section 16-112 to provide a check on utility cost-based rates so that the assumed benefits of competition would not be lost to consumers who lack competitive options. This consideration of "market value" is simply one step in the process of determining the justness and reasonableness of the regulated rates charged to captive customers. It is not authority to abandon cost-based ratemaking or to increase rates above what is fair, just and reasonable. (AG reply brief at 7)

When read consistently with Section 16-103(c), Section 16-111(i) is clearly a protection for non-competitive consumers, ensuring that they will not pay rates that are more than 10% higher than market rates. Basic rules of statutory construction require the Commission to "consider the entire statute and interpret each of its relevant parts together." (*People v. Joseph Maggette*, 195 Ill. 2d 336, 348, 747 N.E.2d 339 (2001))

When Section 16-111(i) is read together with Section 16-103(c), it is clear that Section 16-111(i) does not authorize the pass-through of market-based rates for service that has not been declared competitive – it only authorizes the Commission to add a market value calculation to the various analytical screens used to determine the justness and reasonableness of the regulated rates charged to captive customers and to impose a cap (market value plus 10 percent) on rates charged to captive customers. The Commission should reject arguments that would make section 16-103 a nullity as inconsistent with both the language and the purpose of Article XVI. (AG reply brief at 7-8)

In Section III.B.2 of its reply brief, the AG argues that the *City of Chicago* and *Citizens Utility Board* cases do not authorize pre-approval of rates nor do they authorize a process inconsistent with section 9-220 of the PUA. (AG reply brief at 8-10)

Ameren and Staff cite *City of Chicago v. Illinois Commerce Commission*, 13 Ill.2d 607 (1958) for the proposition that the PUA allows the Commission to approve "formula" rates and does not limit how the Commission should decide if a particular charge is reasonable or prudent. (Ameren brief at 10; Staff brief at 12-13) *City of Chicago* does not authorize the auction or the automatic, unreviewed pass-through of auction prices.

First and most importantly, the General Assembly responded to *City of Chicago* by passing section 9-220 of the PUA, which specifically addresses rate changes based on fuel, gas and purchased power costs and mandates an annual review, with public hearings, "to determine whether such purchases were prudent." (AG reply brief at 8, citing Section 9-201) When a statute specifically mandates a particular treatment of a cost item, the Commission cannot ignore it and use another, new approach to address the identical cost without violating the maxim that specific controls general. (*Hernon v. E.W. Corrigan Construction Co*. 149 Ill. 2d 190, 195 (1992)) The law requires that purchased power costs for non-competitive service be subject to the annual reconciliation and prudence review contained in section 9-220, or included in rates set pursuant to section 9-201. (AG reply brief at 9)

Ameren argues that the Court in *Citizens Utility Board* guaranteed that utilities recover all of their costs, and further, that once a utility purchases power on the wholesale market, the only basis to set the rate is to pass through the price it paid. (Ameren brief at 11-12) In *Citizens Utility Board*, the Court noted that riders may be appropriate when the utility is faced with uncertain, unexpected, volatile or fluctuating costs. (166 Ill.2d at 138) However, utilities currently have substantial latitude to manage electricity supply in a least cost and efficient manner, just as they have been doing for most of the transition period. Although Ameren's proposal casts it as a passive price

taker, accepting whatever the auction process produces, that is not the only or even the most reasonable method of obtaining electricity for consumers. A rider such as that allowed in *Citizens Utility Board* is not appropriate under these circumstances. (AG reply brief at 9)

Ameren's discretion to manage its purchasing decisions is highlighted by *Pike County Light and Power Co. v. Pa Public Utilities Com'n supra,* 465 A. 2d 735 (PA 1983), decided after *City of Chicago* and specifically applicable to electric rates, it is settled law that the Commission has the power to review the purchases the utility makes for retail customers to ensure that they were prudent and reasonable. (AG reply brief at 12)

The Illinois Supreme Court described the effect of *Pike County* in *General Motors Corporation v. Illinois Com.Comm'n,* 143 Ill 2d 407, 421-422, 574 NE2d 650, 658 (1991), where the Court stated: "Under that exception [*Pike County*], States retain the authority to review the prudence of a 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."

Ameren insists that it must use the wholesale market to obtain power, but does not assert that it has no choice as to whom it can purchase electricity from. Absent an auction, Ameren has a choice of suppliers, and the Commission has the right and duty to review its choice to insure that it is fair to ratepayers. (AG reply brief at 10)

Ameren's proposal is "neither fish nor fowl." (AG reply brief at 10) It does not recover purchased power in base rates, as is the current practice, nor does it accept the rights and responsibilities mandated for the use of a variable purchased power or fuel rate under section 9-220, which include an annual prudence review and reconciliation. (220 ILCS 5/9-220(a))

In Section VIII.A of its brief, "**Legality of Rider MV,"** the AG argues that "Riders BGS, BGS-L, D and MV violate the PUA by imposing market rates on consumers and by allowing the utility to charge rates that have not been subject to regulatory review." (AG brief at 69-70)

Ameren's proposed tariff describes a process to procure power and energy to serve its customers and "employs auctions through which . . . market-based pricing for electric power and energy supply is determined . . . ." Ameren does not need ICC approval to purchase its full requirements electric supply at market-based prices. Ameren cannot obtain ICC approval for the market-based rates in Riders BGS, BGS-L, D and MV because the Commission does not have authority to approve market-based rates for electric service that has not been declared competitive pursuant to PUA Section 16-113.

The 1997 Amendments authorize the Commission to use "market based prices" to set utility rates only for services that consumers have the option of purchasing from their utility's unregulated competitors and that have been "declared competitive" pursuant to Section 16-113 of the PUA. Ameren's 1.2 million customers receive service for which there are no competitive options. For those customers, the Commission must set fair, just and reasonable rates based on the cost of service standards that have been established to protect consumers from monopoly pricing.

In Section VIII.B of its brief, the AG argues that the Commission cannot lawfully approve Riders BGS, BGS-L, D and MV because they do not contain rates and contain an unlawful blank authorization to change rates. (AG brief at 70-71)

Riders BGS, BGS-L, D and MV and associated documents do not contain the charges that Ameren consumers can expect to pay if Ameren's tariffs are approved. This violates a basic concept of public utilities regulation: that the Commission must review all rates and charges to utility consumers and insure that they are just and reasonable. A blank tariff is unlawful, and cannot be allowed to take effect. (*Citizens Utility Board v. Illinois Commerce Commission*, 275 Ill.App.3d 329 (1st Dist 1995))

Ameren's attempt to avoid regulatory review by seeking pre-approval of the auction process is also illegal under the PUA and the 1997 Amendments. Nowhere does the law authorize the Commission to waive the consumer protections afforded by rate cases or prudence reviews. Yet, that is what Ameren is asking the Commission to do. (AG brief at 70)

The notion that this review docket, Commission or Staff participation in the auction management and post-auction review can substitute for a rate review is erroneous. This pre-auction review lacks the rate to be charged consumers, which is the key term in any rate review, and without which the review is meaningless. The truncated post-auction review proposed in this dockets is so short as to make adequate or fair review of the results impossible. Moreover, Rider CPP would limit the options available to the Commission in the event that it decided to reject the auction results. This restriction on Commission discretion is not authorized by the PUA or the 1997 Amendments, and is an additional obstacle to the approval of Riders BGS, BGS-L, D and MV.

The only lawful course for the Commission is to permanently reject Riders BGS, BGS-L, D and MV. Ameren is still free to seek a change in its delivery and power (bundled) rate if costs justify such a move. The Commission would review such a request under Article IX of the PUA. (AG brief at 71)

**3. CUB**

In Section III.B of its initial and reply briefs, CUB argues that the ICC lacks authority under the Act to approve the filed tariffs. (CUB brief at 5-12; CUB reply brief at 6-8)

The PUA provides for the general supervision of all public utilities by the Commission. The ICC's power and authority come strictly from the Act, and the ICC cannot, by its own actions, extend its jurisdiction beyond the law. (*Harrisonville Tel. Co. v. Ill. Commerce Comm'n*, 343 Ill. App. 3d 517, 797 N.E.2d 183 (5th Dist. 2003) aff'd. 207 Ill. 2d 601, 807 N.E.2d 974 (2004)) The Act does not confer the ICC with jurisdiction to approve Ameren's proposals.

Market-based rates cannot apply here. The condition precedent for the charging of such rates to Ameren's residential customers has not been met. That is because the ICC has not declared tariff services for these customers "competitive," as required under 220 ILCS 5/16-113.

Accordingly, the ICC must scrutinize Ameren's proposals under its traditional ratemaking rules. (220 ILCS 5/16-103) 16-103 provides that "[a]n 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 . . . declared competitive pursuant to Section 16-113. Among other things, the ICC must determine whether Ameren acted prudently in procuring power and incurring the costs of it, regardless of the procurement method used. (CUB brief at 6-7, citing 220 ILCS 5/9-101 & 5/9-201; See also *Pullman Co. v. Illinois Commerce Comm'n*, 390 Ill. 40, 60 N.E.2d 232 (1945))

Under applicable law, if all the cost of acquiring the power is prudently incurred, then those costs can be passed on to customers through rates. But if any cost is deemed imprudent, it cannot be included in the rates. In addition, the Act mandates that the ICC establish rates that are just and reasonable. Ameren has the burden of proving the justness and reasonableness of its proposed rates and charges and the prudence of its conduct. (CUB brief at 6)

Ameren's procurement proposals, among other things, eliminate any after-the-fact ICC prudence review or determination of the reasonableness and justness of the actual rates resulting from the auction. (CUB brief at 7)

Ameren has not filed a schedule of actual rates, charges, or executed contracts. Consequently, the ICC has no actual rates, charges or executed contracts to review for reasonableness or justness. Ameren's filings merely propose a descending clock auction procurement process that is replete with enormous non-reviewable discretion to be exercised by Ameren and its auction manager. Then, Ameren is asking the ICC, and equally important, its customers, to accept on blind faith that the resulting clearing prices will automatically be just and reasonable. Indeed, Ameren is proposing that the ICC forgo any meaningful after-the-fact prudence review of the actual, resulting auction prices. (CUB brief at 8)

Ameren has fashioned its proposal so that it is completely risk free to it. In particular, Ameren proposes that the auction prices and all of the high costs of running the auction be passed on dollar-for-dollar to its customers. The auction product being procured is full requirements electric supply, making for a back-to-back transaction whereby Ameren sells the same commodity product at retail as it procures at wholesale with adjustments for line losses and other costs, but without any margin added. Thus, even if the resulting prices are in fact unjust or unreasonable, Ameren bears no risk of not recouping all of its costs of paying for the power from its customers.

The ICC cannot approve proposed tariffs that contain no actual rates or charges and that grant a utility the prospective right to establish rates in the future. (*Citizens Utility Board v. The Illinois Commerce Commission*, 275 Ill. App. 3d 329, 655 N.E.2d 961 (1st Dist. 1995)) The question of whether the ICC has the jurisdiction to pre-approve the open-ended, type of proposals at issue here was answered in the negative in the *Citizens Utility Board* case. In that case, ComEd filed with the ICC a proposed "load retention" tariff designated as Rate CS Contract Service, Ill. C.C. No. 4, Original Sheet No. 55.50. The purpose of the tariff was to maintain existing "load" by inducing customers to remain with ComEd rather than utilize an alternative source of energy. Under the terms of the tariff, ComEd would achieve load retention by offering discounted rates to a limited number of commercial and industrial users vis-à-vis negotiated contracts.

The actual charges under the load retention proposals were not included in the proposed tariff on file with the ICC. The proposals merely granted ComEd the prospective right to set rates in the future. The tariff itself made clear that "the charges for service hereunder shall be the charges contained in the contract between the Company and the customer." (275 Ill. App. 3d at 333) As here, executed contracts did not exist at the time ComEd filed its tariff. Without the contracts, there were no rates or charges to be reviewed. The only limitation as to the future rate that could be charged was that “the revenues from the discounted rate could not be less than the incremental cost of providing service to the customer, thereby ensuring a positive contribution to the utility’s fixed costs.” (*Id*.)

The First District held that the proposal violated the Act, and consequently, the ICC did not have the jurisdiction to approve the proposal. (*Id*. at 338-339) The court noted that there were no rates set out in the proposal at the time of ComEd’s filing. The proposals, like here, merely set out the parameters under which those rates could be set by ComEd. Consequently, the Court held that the ICC could not approve a tariff that permitted a utility to establish rates in the future, subject only to the condition that the rates contribute to the utility's fixed costs. Such a condition is implied in every "just and reasonable" rate and, standing alone, does not properly constitute a "rate" under the Act, as further explained by the court. Thus, the ICC has no jurisdiction to approve proposals that grant a utility a prospective right to set rates into the future, which is precisely what Ameren is proposing here. (*Id*.)

The case relied on by Ameren as support for its assertion that the ICC can pre-approve a procurement process, *The City of Chicago v. Illinois Commerce Commission*, 13 Ill 2d 607, 150 N. E. 2d 776 (1958), does not support Ameren's position. (CUB brief at 9)

In *City of Chicago*, the ICC approved Peoples Gas' request for a cost-of-natural gas adjustment clause as part of its existing rate tariffs. The clause provided for periodic automatic adjustment of Peoples' sales price for gas, to reflect changes in the wholesale cost to it of natural gas purchased. In substance, the automatic adjustment clause provided for increases or decreases in the charges for gas sold by Peoples to the extent of increases or decreases in the wholesale price of such gas.

The Supreme Court upheld the ICC's approval noting that the automatic adjustment clause was a set formula by which the price of natural gas to the ultimate consumer was fixed by inserting in the formula the wholesale price of natural gas as established by the FPC. The court also noted that The Natural Gas Act of 1938 (U.S. Code, Title 15, sec. 717 et seq.) vested the power to fix rates for natural gas transported and sold to distributing companies in interstate commerce exclusively in the FPC and preempted any right which might have existed in the States to regulate such rates. Thus, Peoples had to pay the FPC-determined rate, and the Commission had no power over such rate. (CUB brief at 10)

The court also noted that the City did not contend that the FPC prices were unreasonable and therefore subject to disallowance by the Commission as an operating expense of Peoples. Consequently, the clause was allowed because it was simply an addition of a mathematical formula to the filed schedules of Peoples under which existing rates and charges fluctuated as the wholesale cost of gas to Peoples fluctuated. (CUB brief at 10-11)

The Ameren proposals do not involve a process that merely and mathematically adjusts existing rate schedules. Unlike the *City of Chicago* case, where the underlying adjustable rates were not challenged, here there are no underlying rates at all. Instead, at issue here is Ameren's request for pre-approval of an auction process never used or tested in Illinois before for Ameren's retail full requirements electric supply at unknown, unconstrained, uncapped and unspecified rates. New Jersey is the only state using an auction but with supply products different than Illinois. Ohio ran an auction but never used the auction prices because they were higher than the regulated rates.

Moreover, after the auction, there is no prudence review by the ICC of those rates or the procurement process itself. Instead, there is a mere three-day window in which the ICC can reject the auction, but only if the auction was not run according to the rules or if there is unambiguous evidence of foul play. Lastly, to arrive at such a "prompt decision" of whether to reject the auction prices, the ICC will primarily rely on the auction manager's report that was prepared merely one day after the auction, by a manager hired and paid for by Ameren. (CUB brief at 11)

Further, unlike the *City of Chicago* case, where the adjustment clause did not involve any discretionary conduct by Peoples in adjusting natural gas prices, the proposals here are rife with discretionary conduct by Ameren. Among other things, Ameren decides who can bid by establishing the qualifications for bidders. Ameren decides how much of its retail power requirements are being offered for bid. Ameren decides how much of that requirement can be captured by one bidder by setting a load cap. Ameren decides the maximum and minimum prices for the auction. Ameren designs and creates the "full requirements product" being offered for bid, and creates and designs different "customer groups" within the bidding system. Ameren establishes the duration of the supplier contracts, which differs for each customer group. (CUB brief at 11)

In Section III.B of its reply brief, CUB takes exception to Ameren's reliance on the *Citizens Utility Board* decision, 166 Ill 2d 111 (1995), to support the notion that its proposal to establish rates can be pre-approved. (CUB reply brief at 6-8)

The *Citizens Utility Board* case addressed the ratemaking treatment of expenses Illinois gas and electric utilities were liable for under existing Federal and State environmental law, particularly CERCLA, 42 U.S.C. Sec. 9601 et seq. and similar State environmental legislation, Ill. Rev. Stat. 1991, Ch. 111 1/2, par. 1022.2 et seq. The costs at issue were incurred to remediate environmental damage, specifically coal-tar residue found at former manufactured gas plant sites. Following lengthy hearings on the nature and treatment of the expenses, the ICC found that Illinois utilities had prudently operated manufactured gas plants (MGP) plants. The ICC also held that utilities could recover the cost of the statutorily mandated coal-tar cleanup expenses from ratepayers. The ICC ruled that the preferable recovery method was by means of a rate mechanism known as a rider. CUB challenged the ICC's ruling in the Illinois Supreme Court.

The Supreme Court never specifically addressed whether the ICC lacked the statutory authority to pre-approve the utilities' ability to recoup coal tar remediation costs from ratepayers through a rider. The court noted that CUB had not properly raised this argument before the ICC. (166 Ill. 2d at 135-136) The court held that "[b]ecause CUB's petition for rehearing did not argue a lack of statutory authority as grounds for finding the rider illegal, this contention [was] also waived in the present appeal."

Accordingly, the above case is of no assistance to Ameren in arguing the ICC has the authority to pre-approve the proposal. Indeed, as demonstrated in CUB's initial brief, the ICC lacks any such authority and Ameren has not cited any applicable or relevant law or cases to the contrary. (CUB reply brief at 6-8)

#### 4. Staff

In Section III.B of its initial and reply briefs, Staff addresses the "**ICC Authority under Article IX and Article XVI to Approve the Filed Tariffs**." (Staff brief at 9-16, reply brief at 15-19)

Prior to 1997, electric utilities such as the Ameren Companies generally owned their own generating assets that produced the power and energy needs of their customers. As a result, the tariffs filed by these utilities pursuant to Section 9-201 of the Act would seek to recover the costs incurred relating to the generating assets that were used to provide service to customers.

In 1997, the Electric Service Customer Choice and Rate Relief Law of 1997 (referred to by Staff as the "Restructuring Law") was a massive overhaul of the State's policy toward electric utility service. It began a transition toward delivery service unbundling and greater reliance on market forces to determine how electric power and energy would be provided to retail customers. The Restructuring Law was codified in Article XVI of the Act. (220 ILCS 5/16-101)

Section 16-111(i) of the Act provides in part:

> Subsequent to the mandatory transition period, the Commission, in any proceeding to establish rates and charges for tariffed services offered by an electric utility, shall consider only (1) the then current or projected revenues, costs investments and cost of capital directly or indirectly associated with the provision of such tariffed services; . . . In determining the just and reasonableness of the electric power and energy component of an electric utility's rates for tariffed services subsequent to the mandatory transition period and prior to the time that the provision of such electric power and energy is declared competitive, the Commission shall consider the extent to which the electric utility's tariffed rates for such component for each customer class exceed the market value determined pursuant to Section 16-112 . . . .

Section 16-112(a) of the Act in turn states:

> The market value to be used in the calculation of transition charges as defined in Section 16-102 shall be determined in accordance with either (i) a tariff that has been filed by the electric utility with the Commission pursuant to Article IX of this Act and that provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy, or (ii) in the event no such tariff has been placed into effect for the electric utility, or in the event such tariff does not establish market values for each of the years specified in the neutral fact-finder process described in subsections (b) through (h) of this Section, a tariff incorporating the market values resulting from the neutral fact-finder process set forth in subsections (b) through (h) of this Section.

Thus, pursuant to Section 16-111(i), it is within the Commission's authority to review a competitive procurement process-driven tariff such as the Ameren-filed tariffs. Such tariffs must clear at least two hurdles: (1) FERC regulation, including strictures governing wholesale electric transactions between sellers of electricity and affiliated wholesale purchasers, and (2) the provisions of the Public Utilities Act relevant to the setting of rates after 2006 including Article IX, and Section 16-111(i) of the Act, with its directive that the Commission consider the extent to which the power and energy component or rates exceeds the market value determined pursuant to Section 16-112 of the Act. (Staff brief at 11)

With respect to the first hurdle, the Commission "may retain jurisdiction to review rates including FERC-jurisdictional prices, as permitted by federal law, e.g. under the '*Pike County'* doctrine.'" (*Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n*, 465 A.2d 735 (Comm. Ct. of Pa. 1983))

With respect to the second, Section 16-111(i) of the Act requires the Commission to "consider the extent to which the electric utility's tariffed rates for such component for each customer class exceed the market value determined pursuant to Section 16-112." (220 ILCS 5/16-111(i)) The Commission is also authorized to impose a rate ceiling in the event the rates for that electric power and energy component exceed the market value by more than 10%. (Staff brief at 11-12)

Thus, in order for post-transition period rates to comply with Section 16-111(i) of the Act, the utility must provide or propose some method to compare its proposed rates to the market value determined pursuant to Section 16-112 of the Act. Ameren's proposal was intended to provide such a method. (Staff brief at 12)

Ameren has filed its proposed tariffs pursuant to 16-112(a). Whether those tariffs meet the requirements of 16-112(a), i.e. the tariff "provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy," is a question of fact. The Commission can only make that determination after reviewing all the evidence and briefs in this matter following hearings.

Further, the fact that Ameren's Rider MV uses formulae to establish rates does not diminish Commission authority. Formulae have been used on prior occasion by utilities in Illinois and approved by Illinois courts. (See *City of Chicago v. Illinois Commerce Comm'n*, 13 Ill.2d 607, 150 NE.2d 776 (1958)) Thus, the Commission has the authority to approve formula-based rates. (Ameren brief at 12-13)

Additionally, despite the fact that residential and small business services have not been ruled competitive, the Commission has authority to rule on the Ameren tariffs. Section **16-103(c)**, which addresses residential and small business services, provides 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.

Although Section 16-103(c) allows and addresses market-based rates for competitive services, Section 16-103(c) is a limitation on the ability of electric utilities to set market-based rates. The grant of authority to set market-based rates for all retail competitive services is found in Section 16-103(a) of the Act, which provides, in its entirety, 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.

Thus, subject to limitations stated elsewhere in the Restructuring Law, an electric utility is relieved of its obligation to provide retail services offered at the time of enactment of the Restructuring Law when "the service is…declared competitive pursuant to Section 16-113 . . . ." (Id.) Once so relieved of its provider of last resort ("POLR") obligations, an electric utility is free to charge market rates subject to any limitations stated elsewhere in the Act. (Staff brief at 14)

As stated above, one such limitation is set forth in Section 16-103(c) of the Act, which places limits on the rates that a utility may charge competitive residential and small business services by requiring the continued offering of tariffed services for such customers "at rates which reflect recovery of all cost components for providing the service . . . ." While Section 16-103(c) of the Act refers to "market-based prices," this phrase is used in defining "costs" and it is clear from the statutory language of Section

16-103(c) that the Legislature did not consider "market-based prices" and "cost-based rates" to be mutually exclusive concepts. (Staff brief at 14)

Rather, Section 16-103(c) indicates that the rates for certain competitive services must "reflect recovery of all costs components for providing the service" and that "costs 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 obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process." (220 ILCS 5/16-103(c)) 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 utilities actual cost of obtaining such power and energy through any arms-length acquisition process – including a competitive bidding process. (Staff brief at 14-15)

Thus, Section 16-103(c) of the Act imposes a limitation on market rates that allows either a market-value rate under Section 16-112 of the Act or a cost-based rate. Since Ameren no longer possesses its own generation assets, the only means for Ameren to acquire the electric supply it needs to serve its customers is through third party suppliers. Based on Section 16-103(c), the Commission may set rates based on the costs incurred through the only means available to the Ameren Companies to obtain such supply. (Staff brief at 15)

Furthermore, the explicit language contained in Section 16-103(a) provides that "[n]othing 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)) Section 16-103(c) is a limitation on the Legislature's decision to generally relieve electric utilities of their obligation to provide services that are declared competitive. The Legislature has specifically directed that nothing with respect to its decision to remove competitive services from traditional regulatory oversight shall be interpreted or construed to limit the Commission's authority or power pursuant to Article IX or Section 16-111.

Finally, the declaration of findings contained in the Restructuring Law makes clear that the Legislature acknowledged that "[c]ompetitive forces are affecting the market for electricity" and that it intended for the Commission to "promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." (220 ILCS 5/16-101A(b)) Although such provisions do not constitute substantive provisions of the Act (See *Governor's Office of Consumer Services v. Illinois Commerce Commission*, 220 Ill. App. 3d 68, 74 (3rd Dist. 1991); *Monarch Gas Co. v. Illinois Commerce Commission*, 261 Ill. App. 3d 94, 99 (5th Dist. 1994)), the language supports Ameren's proposal under investigation in this docket. The proposed Rider MV clearly acknowledges competitive developments and is consistent with the development of competitive markets and proposes protections for consumers and others. (Staff brief at 16)

In its reply brief, Section III.A, Staff responds to arguments in the AG's initial brief. (Staff reply brief at 9-15) Staff's response is intended to be equally applicable to arguments by CUB.

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." (AG brief at 6-7) This statement is misleading and confuses or ignores the difference between market retail rates and market wholesale rates. Ameren's tariffs embodying its auction-based procurement proposal do not establish market retail rates; instead, the 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 brief at 15), this is not the same as a market retail rate. (Staff reply brief at 9-10)

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, quoted above.

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." (Staff reply brief at 10)

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.

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). (Staff reply brief at 11, citing AG brief at 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.

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." (Staff reply brief at 12)

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 obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process." (Staff reply brief at 12-13)

While Section 16-103(c) does refer to "market based prices," this phrase is used in defining "costs" and it is clear from the statutory language of Section 16-103(c) 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 market retail rates rather than a grant a specific rate authority. (Staff reply brief at 13-14)

The ratemaking principles articulated in AG's brief (AG brief at 10-12) 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. The auction-based procurement proposal as modified by Staff is consistent with applicable ratemaking principles.

Further, Staff argues, 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 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. (Staff reply brief at 14)

In **Section III.B** of its reply brief, Staff responds to other arguments in the AG's initial brief, where 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." (Staff reply brief at 15-19, citing AG brief at 13)

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 its retail customers – removing its 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, Ameren has placed its procurement decision cards on the table and seeks a fact-based finding that the criteria and process by which it proposes to

acquire wholesale power and energy constitute prudent management decisions that, when implemented, will result in just and reasonable rates. With certain modifications, the record supports the prudence finding that Ameren seeks with respect to its auction-based procurement proposal. (Staff reply brief at 16)

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 brief at 13-14) The AG misapplies the holding in *Citizens* and mischaracterizes the proposed tariffs. *Citizens* involved the Commission's approval of 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. 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." 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. (Staff reply brief at 17)

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. (*Citizens* at 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*. at 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*. at 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*. at 340-341)

The foregoing analysis of *Citizens* discloses that the holding is far more narrow than the AG and other parties suggest and, more 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. (Staff reply brief at 18, citing *Citizens* at 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 Ameren tariffs at issue here do contain clearly articulated parameters and do not allow any of the Ameren Companies an "unfettered right to establish any rate it so desires." 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 Ameren 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. (Staff reply brief at 19)

In Section VIII.A of its initial brief, Staff further addresses the **legality of Rider MV**, arguing that it is clearly within the Commission's authority to approve Riders BGS and MV. (Staff brief at 196-197)

The question becomes whether, based on the record, the rates proposed under Rider MV are just and reasonable. A just and reasonable rate is a question of sound business judgment and is not the product of a legal formula. (*Governor's Office of Consumer Services v. Illinois Commerce Com.*, 220 Ill. App. 3d 68, 580 N.E.2d 920, 162 Ill. Dec. 737 (Ill. App. Ct. 3d Dist. 1991)) As articulated by Staff throughout its brief, the Commission should find that the process for establishing rates under Riders BGS and MV is indeed based on sound business judgment and would result in just and reasonable rates. (Staff brief at 197)

In Section VIII.A of its reply brief, Legality of Rider MV, Staff responds to arguments in the AG's initial brief. (Staff reply brief at 85)

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 brief at 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 of its reply brief as well in Section III.B of its initial brief. With respect to the AG's second argument, Staff addresses why it is without merit and must be rejected in Section III.B of its reply brief.

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. (Staff reply brief at 85)

In Section VIII.C of its brief, "Other conclusions and mixed legal/factual issues," Staff addresses whether market prices as determined by the Ameren Companies' proposed auction or the MISO spot market as set forth in Rider MV would meet the description of market value as set forth in Section 16-112 of the Act. (Staff brief at 200-203)

An analysis of Section 16-112 of the Act (220 ILCS 5/16-112) supports Staff witness Mr. Zuraski's position that market prices as determined in that manner would meet the description of market value as set forth in Section 16-112 of the Act. (Staff Exhibit 3.0 at 7)

Section 16-112(a) provides that:

> . . . market value . . . shall be determined in accordance with either (i) a tariff that has been filed by the electric utility with the Commission pursuant to Article IX of this Act and that provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy, or (ii) in the event no such tariff has been placed into effect for the electric utility, or in the event such tariff does not establish market values for each of the years specified in the neutral fact-finder process described in subsections (b) through (h) of this Section, a tariff incorporating the market values resulting from the neutral fact-finder process set forth in subsections (b) through (h) of this Section.

When interpreting a statute, one must first look to the plain language. (Staff brief at 201, citing *Davis v. Toshiba*, 186 Ill. 2d 181, 184-85 (1999)) The plain language of 16-112(a) provides that market value, if it is not the result of the neutral fact finder process (Section 16-112(a)(ii)), must meet three requirements. The first requirement is that the market value must be the function of one of three alternatives. Market value

must be the function of either: (1) an index; or (2) an options or futures contracts; or (3) contracts. The second requirement is that the index, or options or futures contracts, or contracts must be a function of exchange trading or market trading.

The third is that the index or the options or futures contract or the contracts must be applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy. The Commission in the past has interpreted the requirement that market value be determined "as a function of" one of the allowed indicators in a broad sense. The Commission in its order on reopening in ICC Docket Nos. 00-0259, 00-0395, and 00-0461 (Consolidated) rejected the IIEC's argument that the use of bids and offers was inconsistent with 16-112. The Commission found the use of bids and offers would produce a market value that was determined as a function of a market index. (ICC Docket Nos. 00-0259, 00-0395, and 00-0461 (Consolidated), Order on Reopening, at 162))

Based upon the plain language of Section 16-112 and the Commission's prior orders concerning market value, the Ameren Companies' proposed market value determination method meets the three requirements. (Staff brief at 201)

With respect to the first requirement, the Ameren Companies' proposed Rider MV relies on the SFCs which are the binding wholesale contracts the Ameren Companies will have with suppliers for the procurement of full requirements electric supply to serve their retail customers. (AmerenCILCO, Ill. C. C. No. 18, Original Sheet No. 27.007; AmerenCIPS, Ill. C. C. No. 16, Original Sheet No. 27.007; AmerenIP, Ill. C. C. No. 35, Original Sheet No. 27.007) Therefore, there can be no dispute that the SFCs relied upon in Rider MV are "contracts." (Staff brief at 202)

With respect to the second requirement -- that the contract be a function of exchange trading or market trading -- the Ameren Companies' witness Dr. LaCasse testified that ". . . the Auction Process can deliver reliable supply at competitive market prices." (Resp. Ex. 12.0 at 2) Accordingly, the contracts which result from the auction are a function of market trading. Staff witness Zuraski also testified that auction prices which result from a competitive procurement process would be the result of a market. (Staff Exhibit 3.0 at 6)

With respect to the third requirement, the SFCs are the contracts that will set forth the terms for the acquisition of electric power and energy by the Companies to be supplied to their customers. Accordingly, given the direct use of these contracts to provide power and energy to the Companies' retail customers, there can be no dispute that the SFC contracts are "applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy." (220 ILCS 5/16-112(a)(i)) With respect to contingency purchases, i.e., those purchases in the MISO-administered markets (AmerenCILCO Ill. C. C. No. 18, Original Sheet No. 27.029; AmerenCIPS Ill. C. C. No. 16, Original Sheet No. 27.029; AmerenIP Ill. C.C. No. 35, Original Sheet No. 27.029), those purchases undoubtedly would produce a market value which meets the three requirements of 16-112(a) since the MISO purchases would result in contracts

which are a function of market trading and the power and energy purchases would be for the Ameren Companies' customers. (Staff brief at 202-203)

**5. CCG**

In Section III.B of its brief, CCG addresses the **Commission's authority under Articles IX and XVI** to approve the proposed tariffs. (CCG brief at 6-9)

In Section III.B.1, CCG comments on Article XVI post-transition rate-setting authority. (CCG brief at 6-7) The Restructuring Law notes that "[l]ong standing regulatory relationships need to be altered to accommodate the competition that could fundamentally alter the structure of the electric services market." (220 ILCS 5/16-101A(b)) The two key provisions under the Restructuring Law that address the approval of rates after the mandatory transition period are Sections 16-112(a) and 16-111(i). First, Section 16-112(a) instructs the Commission on how to determine market rates. This, among other things, includes a determination in accordance with "a tariff that has been filed by the electric utility with the Commission pursuant to Article IX . . . and that provides for a determination of the market value for electric power and energy." (220 ILCS 5/16-112(a))

Second, Section 16-111(i) mandates that the Commission, in establishing tariffed rates and charges, is to consider "the then current or projected revenues, costs, investments and cost of capital directly or indirectly associated with the provision of such tariffed services." (220 ILCS 5/16-111(i)) This Section also mandates that "[i]n determining the justness and reasonableness of the electric power and energy component of an electric utility's rates for tariffed services . . . the Commission shall consider the extent to the which the electric utility's tariffed rates . . . exceed the market value determined under Section 16-112 . . . ." (220 ILCS 5/16-111(i))

Article XVI authorizes the Commission to establish market value through various means, and it mandates that the Commission take into account the market value in considering the justness and reasonableness of the charges for the power and energy component of the tariffed service. Ameren filed its tariffs pursuant to Article XVI and Article IX for the provision of tariffed services. Those tariffs establish a process for procuring power and energy in the wholesale market through an auction. The auction, by definition and design, is a competitive process where various suppliers will bid to provide wholesale full requirements electricity service to Ameren. The results of the bidding process will establish the market value for providing electricity service at wholesale under Section 16-112(a) and would also be the prudently incurred costs to Ameren. Clearly, Sections 16-112(a) and 16-111(i) authorize the Commission to establish market value. (CCG brief at 7)

CCG addresses the Commission's **Article IX** rate-setting authority in Section III.B.2 of its brief. (CCG brief at 7-9)

Section 16-103 requires Ameren to continue to offer bundled electric service to its customers consistent with the bundled service it provided in 1997. (220 ILCS 16-103(c)) Ameren filed its tariffs in order to recover its costs so that it can meet its obligation to continue to provide tariffed service as mandated by the PUA. In addition to Sections 16-112(a) and 16-111(i), discussed above, the tariffs filed by Ameren are subject to all of the Commission's general ratemaking authority in Article IX of the PUA. (220 ILCS 5/9-101 et seq.)

For example, the procedure for the filing of tariffs, as set forth in Section 9-201(b), provides that the Commission is authorized to suspend tariffs and "upon reasonable notice, to enter upon a hearing concerning the propriety of such rate or other charge, classification, contract, practice, rule or regulation." The tariffs that were filed by Ameren were suspended by the Commission. The case was set for hearing and the Commission has an 11-month statutory deadline within which to make a final determination on the tariffs. (CCG brief at 8)

The Commission, under Article IX, "shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed . . . which it shall find to be just and reasonable." (220 ILCS 5/9-201(c)) Accordingly, in setting rates the Commission must determine that the rates accurately reflect the cost of service delivery and must allow the utility to recover costs prudently and reasonably incurred. (*Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111 (1995)) In this case, Ameren's tariffs set forth a mechanism whereby it will purchase power and energy through a competitive process in the wholesale market through an auction. As discussed above, the actual cost of service, in this case, is the market value that will be established through the auction process. (CCG brief at 8)

Under Article IX, the Commission has discretion in setting rates. Generally, rates are set through base rates that attempt to recover a utility's costs by estimating the total revenues necessary to recover its operating costs plus a cost of investor capital. (*Citizens Utility Board v. Illinois Commerce Commission*, 124 Ill. 2d 195, 200-201 (1988)) In addition, the Commission has the authority to set rates through automatic cost recovery mechanisms. (See, e.g., *City of Chicago v. Illinois Commerce Commission*, 13 Ill. 2d 607, 618 (1958), affirming the Commission's discretionary authority under Article IX to allow rate recovery of utility's costs through a purchase gas adjustment clause, later codified at 220 ILCS 5/9-220; *Citizens Utility Board*, 166 Ill.2d at 139, affirming recovery of expenditures related to coal tar clean up through a rider mechanism.)

Taken together, the provisions under Article XVI and under Article IX authorize the Commission to approve the tariffs filed in the instant proceeding. (CCG brief at 9)

In its reply brief, Section III.B, "ICC Authority under Article IX and Article XVI to Approve the Filed Tariffs," CCG takes issue with arguments made by the AG and CUB. (CCG reply brief at 2-3)

Their theory is that until a service is declared competitive, the Commission lacks the authority under Section 16-103(c) to approve the rules for the procurement of power and energy and the mechanism under which Ameren would recover its costs for such procurement. That reading of Section 16-103(c) is simply wrong. There is no prohibition in Section 16-103(c) on how the Commission is to set rates for bundled tariffed services. The purpose of Section 16-103(c) is to ensure that electric utilities continue to offer "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 . . . ." (220 ILCS 5/16-103(c))

Section 16-103(c) does require that "[f]or those components of the service which have been declared competitive, cost shall be the market based prices." It does not prohibit the opposite, namely that if a service is not declared competitive, market based rates cannot be utilized. As correctly stated in the ALJ's ruling, "from a simple reading of Section 16-103(c), and its numerous references to cost, it is clear that market-based prices and cost-based rates are not mutually exclusive concepts . . . use of market-based pricing is identified as one method for determining such costs, not an alternative thereto." (05-0160 ALJ Ruling, June 1, 2005 at 6)

As discussed in CCG's Initial Brief, the Commission's authority for setting rates during the post transition period rests in Sections 16-111(i), 16-112(a) and Article IX. Furthermore, nothing in Section 16-103 or any other section of the Public Utilities Act ("PUA") limits the Commission's long-standing plenary authority to determine how tariffed rates are to be set under Article IX which includes the setting of rates through cost recovery mechanisms based on formulas. (CCG reply brief at 2-3)

### 6. CES

In its reply brief, Section III.A, CES responds to arguments by AG and CUB who each raised issues regarding the legal authority of the Commission to approve Ameren's procurement proposal. (CES reply brief at 8, citing AG brief at 4-19, CUB brief at 5-12)

The Commission deliberated and rejected most, if not all, of the AG and CUB substantive legal issues. The Commission appropriately decided that the General Assembly granted authority to the Commission to oversee the current procurement proceeding and ultimately approve the Company's procurement proposal.

By enacting the Customer Choice Law, the General Assembly formalized its belief that Illinois retail electric customers will benefit from competition because competitive pressures lower rates more effectively than regulation. (See ILCS 5/16-101(e)) As the steward of the competitive retail electric market in Illinois, the Commission, guided by the provisions of the Customer Choice Law, has been given the authority to approve a market-based structure for all customers served by Ameren's default rates. (CES reply brief at 8)

### C. Relationship of Illinois and Federal Law and Jurisdiction

#### 1. Ameren

In Section III.C of its brief, Ameren addresses the "Relationship of Illinois and Federal Law." (Ameren brief at 20-25)

According to Ameren, "FERC has exclusive authority to determine the reasonableness of wholesale rates." (*Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988); see also *New York v. Federal Energy Regulatory Comm'n*, 535 U.S. 1, 18-19 (2002) (the "text of the FPA gives FERC jurisdiction over . . . the sale of electric energy at wholesale in interstate commerce")) Also, "States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates." (*Mississippi Power & Light*, 487 U.S. at 372; see also *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966, 972-73 (1986) ("When FERC sets a rate between a seller of power and a [utility] wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the [utility] wholesaler-as-buyer from recovering the costs of paying the FERC-approved rate"))

As the Supreme Court explained, the FERC's exclusive jurisdiction over wholesale rates "binds both state and federal courts and is in the former respect mandated by the Supremacy Clause." (*Mississippi Power & Light*, 487 U.S. at 371. "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." *Nantahala Power & Light*, 476 U.S. at 966 (1986)) Rather, a state must "give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." (*Id*.; Ameren brief at 21)

In the realm of wholesale pricing, all that the ICC lawfully may do is determine the procedure through which a retail utility selects a particular wholesale transaction from available options. (Ameren brief at 21, citing *Mississippi Power & Light*, 487 U.S. at 372; *Nantahala*, 476 U.S. at 970; *General Motors Corp. v. Illinois Commerce Comm'n,* 143 Ill. 2d 407, 421 (1991))

For over a decade, FERC has allowed wholesale providers of electricity to sell at market-based prices, provided that the seller does not possess market power, and today most wholesale power transactions in fact occur at market-based prices. (See, e.g., *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 F.E.R.C. 61,218, 62,142-143; *Progress Power Marketing, Inc*., 76 F.E.R.C. 61,155, 61,919) The upshot of the Supreme Court's and the FERC's relevant pronouncements is that the ICC cannot (i) set wholesale prices itself, (ii) bar utilities from buying or selling electricity at market-based prices, or (iii) prevent utilities from passing on to consumers their costs of obtaining electricity at market-based rates. (See *Mississippi Power & Light*, 487 U.S. at 371-372)

As the Illinois Supreme Court has explained, under conflict preemption principles, "state law [must] yield where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' as manifested in the language, structure and underlying goals of the statute at issue." (Ameren brief at 22, citing *Orman*, 179 Ill. 2d at 296-297 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))

In the circumstances present here, those limitations mean that neither the ICC nor the General Assembly has any power to determine that wholesale prices, as determined by the proposed auction (or any other mechanism), are too high and order suppliers to reduce them. To the extent any party may advocate that the ICC adopt a construction of the PUA that would permit the ICC (or any other state official or body) to take such action, that proposed construction should be rejected because "an interpretation which renders a statute unconstitutional or otherwise invalid should be discarded." (Ameren brief at 22-23, citing *Northwest Airlines, Inc. v. Department of Revenue*, 295 Ill. App. 3d 889, 893 (1st Dist. 1998))

In Section III.C of its reply brief, Ameren Companies respond to arguments made in the AG's initial brief regarding the relationship between Illinois and FERC jurisdiction. (Ameren reply brief at 10-11)

The AG argues that the ICC has authority to determine whether the cost of wholesale electricity purchased at FERC-approved wholesale rates, was prudently and reasonably incurred, citing *Pike County Light and Power Co. v. Pennsylvania Public Utility Commission*, 77 Pa.Cmwlth 268, 465 A.2d 735, 738 (PA 1983). The AG turns the *Pike County* case on its head. In that decision, the court explained that, while the states could not adjudge the reasonableness of FERC-jurisdictional rates, the states did have authority to determine the reasonableness of the choice of available options at FERC-approved rates. (Ameren reply brief at 10)

The court made clear what a state can and cannot do. A state agency cannot undertake "an analysis of [the wholesale seller's] cost of service data, analysis within the exclusive jurisdiction of FERC"; a state agency can undertake an analysis of the utility's "cost of service and comparison with alternative costs of purchased power." The AG wants the Commission to do exactly what the Supreme Court in *Nantahala* and the court in *Pike County* said it cannot do: review the reasonableness of wholesale rates.

The ICC, the AG argues (brief at 18-19), has broad authority to obtain data from wholesale suppliers, including "generation costs and other data" that the Commission would need "to determine whether costs are reasonable and prudent." According to Ameren, the Commission would never need "generation costs" to determine whether a wholesale purchase is prudent. The Commission may only compare the purchases made by a utility with other options available to it in the market. The Commission may not determine that a wholesale supplier's price was too high in relation to the supplier's cost; the Commission may only determine whether the supplier's price was too high in comparison to other options available to the utility. Moreover, other options for

comparison purposes are what other entities are offering to sell at, not what the Commission believes they should be selling at. (Ameren reply brief at 11)

The AG's reading of *Pike County* erases any boundary between federal and state jurisdiction and would give the Commission power to determine whether a wholesale rate is reasonable. The Commission does not have that power, and any Commission order that arrogates that power to the Commission is destined for reversal. (*Id*.)

The AG tries to evade the *Edgar* standard by assuming that the Ameren Companies' generation affiliates will sell to them below market, and then arguing that the Companies could then come up with some basis for convincing FERC that the sales are reasonable. The assumption is a baseless one. There is no reason to assume the Ameren Companies have access to below-market power.

Moreover, there is little reason to believe that the FERC would bless an Ameren procurement plan that involves no competitive bidding of any sort. That is not what FERC did with the New Jersey and Maryland procurement regimes, and there is no reason to believe that FERC would change its mind now. (Ameren reply brief at 11-12)

**2. Attorney General**

In Section III.C of its initial brief, the AG addresses the relationship of Illinois and federal law and jurisdiction, arguing that Illinois retains jurisdiction over retail rates and costs notwithstanding Federal jurisdiction over wholesale sales. (AG brief at 14-19)

According to the AG, the ICC has exclusive jurisdiction over retail electricity sales by Illinois public utilities. (220 ILCS 5/4-101) The Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over wholesale electricity sales in interstate commerce and the transmission of electricity in interstate commerce. (16 U.S.C. 824(a)) Both commissions are required by their enabling statutes to ensure that the rates over which they have jurisdiction are "just and reasonable." (16 U.S.C. 824e and 220 ILCS 5/9-101)

FERC's jurisdiction extends "only to those matters that are not subject to regulation by the States." (*Id*.) FERC's wholesale ratemaking authority and the state's retail ratemaking authority "do not overlap, and there is nothing in the federal legislation which preempts [a state commission's] authority to determine the reasonableness of a utility company's claimed expenses. In fact . . . the Federal Power Act . . . expressly preserve[s] that important state authority." (*Pike County Light and Power Co. v. Pennsylvania Public Utility Commission*, 465 A.2d 735, 738 (PA 1983))

In Section III.C.1, "Federal Law and Jurisdiction," the AG asserts that FERC has a duty to ensure that wholesale rates are just and reasonable. (AG brief at 14-17)

The Federal Power Act ("FPA"), 16 U.S.C. 791a et seq., declares that ". . . the business of transmitting and selling electric energy for ultimate distribution to the public

is affected with the public interest, and that Federal regulation of . . . the sale of such energy at wholesale in interstate commerce is necessary in the public interest." (16 U.S.C. 824(a)) The FPA requires FERC to ensure that wholesale electric rates are just and reasonable. (16 U.S.C. 824e) FERC must strike a "fair balance between the financial interests of the regulated company and 'the relevant public interest, both existing and foreseeable'." (*Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984))

FERC traditionally used cost-of-service rate regulation to set wholesale electric rates but, over the past decade, has increasingly allowed electricity wholesalers to charge market-based rates. (*Louisiana Energy and Power Authority v. FERC*, 329 U.S. App. D.C. 401, 141 F.3d 364, 365 (D.C. Cir. 1998); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993)) FERC "may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy this [just and reasonable] requirement" only "where there is a competitive market." (AG brief at 15, citing *Louisiana Energy*, 329 U.S.App.D.C. at 402)

Regarding the rationale for market-based rate authority, "The principle justifying this approach as "just and reasonable" was that "in a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." (*California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012-13 (9th Cir. Sept. 9, 2004))

Applicants for market-based rate authority are required to demonstrate, on a continuing basis, that the seller and its affiliates do not have market power and cannot erect other barriers to entry by potential competitors. ". . . FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." (Id. at 1013, quoting *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir 1990))

FERC recently revoked Duke Power's market-based rate authority based on historical data and results of the Commission's pivotal supplier test, market share test, and market concentration test using the HHI. (AG brief at 16, citing *Duke Power*, 111 FERC 61,506 at 2 (June 30, 2005 Order))

The FPA contains provisions to protect electric utilities and their customers from exploitation by affiliates that generate and sell electricity, and these provisions were expressly preserved in the Energy Policy Act of 2005 stating, "Nothing in this subtitle shall limit the authority of the Commission under the Federal Power Act (16 U.S.C. 791a et seq.) to require that jurisdictional rates are just and reasonable, including the ability to deny or approve the pass through of costs, the prevention of cross-subsidization, and the issuance of such rules and regulations as are necessary or appropriate for the protection of utility consumers." (P.L. 109-58 Sec. 1267)

This provision prevents generating companies from improperly charging higher prices to affiliated utilities than they would to other buyers. (AG brief at 16)

FERC assesses the reasonableness of affiliate electric contracts using criteria set forth in *Boston Edison Company Re: Edgar Electric Co.*, 55 F.E.R.C 61,382 (1991) and *Ameren Energy Generating Co., Union Electric Co., d/b/a AmerenUE*, 108 F.E.R.C. 61,081, at n.14 (2004). (AG brief at 16-17) *Edgar* held that where a seller seeks to sell wholesale power to a utility affiliate, it must make one of three showings:

- evidence of direct head-to-head competition between the affiliate and competing unaffiliated suppliers in a formal solicitation or informal negotiation process;

- evidence of the prices which non affiliated buyers were willing to pay for similar services from the affiliate; or

- benchmark evidence that shows the prices, terms and conditions of sales made by non-affiliated sellers.

Last year, FERC held that these three options for demonstrating the reasonableness of an affiliate sale "were not an all inclusive list; the individual facts of a case could bring forth other examples not expressed in Edgar to show that a transaction is without affiliate abuse." (AG brief at 17, citing *Ameren Energy Generating Co., Union Electric Co., d/b/a AmerenUE*, 108 F.E.R.C. ¶ 61,081, at n.14 (2004))

In Section III.C.2 of its brief, the Attorney General addresses **Illinois law and jurisdiction**. According to the AG, the ICC can use its retail ratemaking authority to determine whether the cost of wholesale electricity purchased by an Illinois utility, at FERC-approved rates, was prudently and reasonably incurred. (AG brief at 17-19)

The PUA grants the ICC broad authority to supervise the “manner and method in which the business is conducted” by electric utilities in Illinois. (220 ILCS 5/4-101) The ICC regulates the rates which public utilities charge to retail customers to ensure that they are “just and reasonable.” (220 ILCS 5/9-101) The PUA specifies that retail rates charged by public utilities must “accurately reflect the cost of delivering those services and allow utilities to recover the total costs prudently and reasonably incurred.” (220 ILCS 5/1-102(a)(iv))

The ICC has supervised electric utilities, set just and reasonable rates, conducted prudence reviews and discharged other duties under the PUA for almost a century. The 1997 Amendments left these regulatory safeguards in place to protect utility customers who do not have access to electric service that has been declared competitive pursuant to Section 16-113 of the PUA. Hence, the ICC will continue to perform all of these regulatory functions until Illinois completes the transition to fully competitive retail electric markets. Although the mandatory transition period ends on January 1, 2007, the transition period is far from over. (AG brief at 17-18)

When setting retail rates, the ICC has authority to determine whether the cost of wholesale electricity purchased at FERC-approved wholesale rates was prudently and reasonably incurred. (*Pike County*, 465 A.2d 735 (PA 1983)) In *Pike County*, the court upheld a state utility commission's decision to disallow recovery, through retail rates, of a portion of a utility's expense of purchasing power from an affiliate at FERC-approved wholesale rates. (AG brief at 18, citing *Id*. at 735)

The Court concluded that the state commission's action was "regulation only of Pike's retail rates, and as such proceeded, not from an analysis of [the generation affiliate's] cost of service data, analysis within the exclusive jurisdiction of the FERC, but rather from analysis of Pike's cost of service and comparison with alternative costs of purchased power." (*Pike County* at 737-738) The Court held that "FERC approval of the [generation affiliate's] tariffs means only that, as a matter of law, it is reasonable for [the generation affiliate] to charge such rates; FERC approval does not mean that it is reasonable for Pike to incur such costs." (*Id*. at 739)

The ICC has broad authority, under Illinois law, to obtain information from electric utilities to compare alternative costs of purchased power from electric utilities. (220 ILCS 5/5-101 et seq.) The Federal Power Act further authorizes the ICC to obtain "books, accounts, memoranda, contracts and records" of electric utilities regulated by the ICC, generators that sell electricity to those utilities, and affiliates (including holding companies) of generators that sell electricity to electric utilities regulated by the ICC. (AG brief at 18)

The ICC's authority to review costs incurred by electric utilities, to determine whether they are just, reasonable and prudently incurred, extends to review of the cost of electricity procured under wholesale rates established by FERC. (See, generally, *Pike County*) The Commission has extensive powers under state and federal law to obtain information regarding generation costs and other data needed to determine whether costs are reasonable and prudent. (220 ILCS 5/5-101 et seq. and 16 U.S.C. 824) Neither Illinois electric utilities, nor their parent companies and generation affiliates, can hide behind claims that FERC jurisdiction precludes a thorough prudence review by the ICC. (AG brief at 19)

In Section III.C of its reply brief, "Relationship of Illinois and Federal Law and Jurisdiction," the AG responds to arguments made in the Staff, Ameren and CCG briefs. (AG reply brief at 11-13)

The AG cites the *Pike County* doctrine as authority for the position that the ICC's exclusive authority to assess the prudency and reasonableness of Ameren's purchases extends to Ameren's purchases of electricity at FERC-approved wholesale rates. (AG reply brief at 16) According to the Illinois Supreme Court, "States retain the authority to review the prudence of a distributor's actions in incurring FERC-approved supply charges when the distributor had a choice whether to incur the charge." (*General Motors Corporation v. Illinois Com.Comm'n*, 143 Ill 2d 407, 421-22; 574 NE2d 650, 658 (1991))

Ameren asserts that "all the ICC lawfully may do is determine the procedure through which a retail utility selects a particular wholesale transaction from available options." (Ameren brief at 21) This restrictive interpretation of *Mississippi Power*, *Nantahala* and *General Motors* is wrong. (AG reply brief at 12)

Contrary to Ameren's assertion, those cases do not limit ICC authority to review wholesale transactions to procedural matters. Indeed, in *General Motors*, the Illinois Supreme Court's discussion makes clear that the Commission's authority is substantive as well as procedural. The Court stated, " . . . [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. *Mississippi Power*, 487 U.S. at 373, 108 S.Ct. at 2440, 101 L.Ed.2d at 340; *Nantahala*, 476 U.S. at 972, 106 S.Ct. at 2360, 90 L.Ed.2d at 958." (AG brief at 12, citing *General Motors*, 143 Ill 2d at 422)

The AG also responds to CCG. CCG wrongly claims "a state commission is preempted by federal law from reviewing the prudence of power purchases . . . and to permit such a review would interfere with . . . [FERC's] plenary authority over interstate wholesale rates." (AG reply brief at 13; CCG brief at 10, citing Central Vermont Public Service Corporation, 84 FERC 61,194, 1998 WL 765497 (1998))

CCG mischaracterizes the holding in *Central Vermont*. There, FERC expressly held that FERC's approval of a rate schedule "does not preclude the Public Utilities Commission . . . from determining whether [the utility] acted imprudently by not terminating the rate schedule under its terms where lower-priced power was available to the [the utility]." (84 FERC 61,194, 1998 WL 765497)

In conclusion, the AG argues that the scope of state and federal jurisdiction, recognized in both federal and state case law and administrative decisions, reserves state authority over the retail rates that consumers must pay -- notwithstanding federal jurisdiction over interstate wholesale transactions. (AG reply brief at 13)

**3. Staff**

In Section III.C of its reply brief, Relationship of Illinois and Federal Law and Jurisdiction, Staff responds to arguments by the AG. (Staff reply brief at 19-26)

Relying on *Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n, 77 Pa. Commw.* 268, 465 A.2d 735 (1983), the AG seeks to establish that states retain jurisdiction to examine the prudence of utility purchases of wholesale energy at FERC approved rates. (AG brief at 14) 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. (Staff reply brief at 19-20)

In this regard, the auction 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 wholesale purchases, they necessarily avoid any conflict with the federal filed rate doctrine. Further, these rules, practices and procedures identify the criteria Ameren's 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 raises the issue of whether there has been a violation of the filed rate doctrine whenever 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. 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. (Staff reply brief at 20-21)

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 commissions must therefore permit regulated companies to recover costs and expenses that FERC has already established or approved. The court in *Pike County* 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 of utility companies' decisions to enter into the underlying contracts and agreements, including transactions with affiliates. (Staff reply brief at 21-22)

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 or 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. 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. 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. (Staff reply brief at 22-23)

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.
> (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. (Staff reply brief at 24) In *General Motors Corporation v. Illinois Commerce Comm'n*, 143 Ill. 2d 407 (1991), the 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*. at 27)

According to Staff, 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. (Staff reply brief at 26) 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 Ameren Companies purchases of FERC-approved wholesale costs, it is incorrect to suggest that the Commission's power to conduct such a prudence review is basically unfettered. (Staff reply brief at 26, citing AG brief at 17-19) To the extent the AG is suggesting that the Commission should look at the costs of wholesale suppliers (including Ameren Companies' affiliates) in determining whether wholesale supply costs were prudently incurred by Ameren, 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 Ameren 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 situated to effectuate effective Commission regulation of wholesale supply procurement decisions. (Staff reply brief at 26)

**4. CCG**

In Section **III.C** of its initial and reply briefs, CCG addresses the relationship of Illinois and federal law and jurisdiction, concluding that the auction is consistent with Illinois and federal law and policy. (CCG brief at 9-12; CCG reply brief at 3-5)

In Section III.C.1, CCG comments on FERC jurisdiction of wholesale power rates and costs. (CCG brief at 9) The FERC regulates the sale of wholesale power in interstate commerce under Section 201 of the Federal Power Act, 16 U.S.C.S. § 824 et seq., and as a result, wholesale rates and costs are governed exclusively by the FERC. (See, e.g., *New York v. FERC*, 535 U.S. 1, 19-20 (2002); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 370 (1988); *Nantahala Power & Light Co. v. Thornburgh*, 476 U.S. 953, 963 (1986))

Since Ameren no longer has generating facilities, the power that it needs in order to be able to supply electricity to its customers under tariffed service has to be purchased at wholesale. The terms of those purchases, including the rates and costs, are reflected in purchased power agreements that are subject to the FERC's jurisdiction. As FERC pointed out in *Central Vermont Public Service Corporation, 84 FERC* ¶61,194 (1998), "a state commission is preempted by federal law from reviewing the prudence of power purchases . . . and to permit such a review would interfere with the Commission's [FERC's] plenary authority over interstate wholesale rates."

FERC has jurisdiction over wholesale power and rates and because Ameren has to purchase power at wholesale, FERC has exclusive jurisdiction over those transactions. (CCG brief at 10)

In Section III.C.2 of its brief, CCG addresses "**FERC Authority of Wholesale Power purchased [from] Affiliates**." (CCG brief at 10-11) FERC regulates wholesale sales of power includes transactions between affiliates, and has established more stringent criteria in instances that involve affiliate transactions. (See *Boston Edison Co. Re: Edgar Electric Company*, 55 FERC ¶61,382 (1991) ("*Edgar*")) The Edgar standards set forth three methods for demonstrating lack of undue preference to an affiliate: (1) evidence of direct head-to-head competition between the affiliate and competing unaffiliated suppliers in a formal solicitation or informal negotiation process; (2) evidence of the prices that non-affiliated buyers were willing to pay for similar services from the affiliate; and, (3) benchmark evidence that shows the prices, terms, and conditions of sale made by non-affiliated sellers. FERC expanded the standards in *Allegheny Energy Supply Co., LLC*, 108 FERC ¶61,082 (2004) ("*Allegheny*").

Recently FERC found that the descending clock auction process approved by the New Jersey Board of Public Utilities met the *Edgar* and *Allegheny* standards in *Public Service Electric & Gas Company and PSEG Energy Resources & Trade LLC*, 111 FERC 61,152 (2005). In that case, FERC noted:

> [The] underlying principle when evaluating a competitive solicitation process under the Edgar criteria is that no affiliate should receive undue preference during any stage of the process. The Commission indicated the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: transparency, definition, evaluation and oversight . . . . [T]he Commission finds that the New Jersey statewide bidding process is an example of a process that meets these guidelines.

The Illinois Auction Proposal is modeled after the New Jersey auction and, if approved, would pass muster under FERC's *Alleghany* and *Edgar* standards for transactions with affiliates. (CCG brief at 11)

In **Section III.C.3**, CCG concludes that the auction proposed by Ameren is consistent with, and would meet the goals of, both Illinois and federal law and policy. (CCG brief at 11-12)

In Section III.C of its reply brief, CCG states that the AG cited to the *Pike County* exception in its Initial Brief for the proposition that states are not precluded from evaluating the prudency of a utility's decision to purchase power from a particular source. (AG brief at 14) In *Pike County*, 465 A. 2d 735, 738 (1982), all of Pike County's power supply was provided by its parent company through a Power Supply Agreement that had been filed with FERC. The court determined that under the facts of that case, the Pennsylvania Public Utility Commission could review the prudency of such purchases.

The facts in this case, however, are completely different. The proceedings in this docket are for the purpose of determining the methodologies and procedures for the purchase of power and energy through an auction which, if approved, would be a prudent and reasonable way to procure power. Hence, power and energy would be procured through a Commission-approved competitive process that the Commission would have determined is prudent and reasonable where various suppliers will be bidding against each other for the opportunity to provide power supply to Ameren. Under the facts of this case, the prudency review discussed in *Pike County* would have taken place in this docket. (CCG reply brief at 4-5)

### D. Prudency Analysis

Arguments related to the analysis of the prudency of the Auction process and Auction purchases are summarized immediately below because of the relationship of

those arguments to the Commission's authority to approve the proposed Auction process.

### 1. Ameren

The Ameren Companies address "Regulatory oversight and review" in Section V.K of their brief. In Subsection V.K.1, they comment on the "nature of Commission review before, during and after the auction." (Ameren brief at 93-95)

The Ameren Companies' retail rates will remain subject to traditional regulatory standards of justness and reasonableness, which entail a prudence review of the Ameren Companies' decisions. Under those standards, the Ameren Companies would be expected to make decisions that, without the benefit of hindsight, would be expected to lead to the lowest overall cost of service. No additional prudence review (i.e., no hindsight review) is required where the Commission has approved the prudence of the auction process and the auction process has been followed. (Ameren brief at 94)

Under the traditional regulatory standards employed by the Commission, prudence is a forward-looking test. The Commission determines whether discretionary actions taken by the utility are reasonable in light of the facts and circumstances known at the time that the action was taken. The auction process removes virtually all discretion from the utility in the procurement process. (Id.) As long as the rules have been followed, there is no discretionary action by the utility to review after the auction process has been completed and contracts executed. There is no other action the utility could have taken under the auction rules approved by the Commission, and thus no action whose prudence requires evaluation. Moreover, by the time contracts are executed, the Commission will have reviewed whether the auction rules were followed, and thus, whether the auction results should be accepted. (Id. at 94-95)

If the Auction Manager has materially deviated from the auction rules, the Staff will report this to the Commission and, presumably, the Commission could reject the auction. A prudence review should not be an after-the-fact referendum on whether other parties like the price that resulted from the auction. A prudence review is intended only to determine whether a utility exercised its discretion reasonably. (Ameren brief at 95)

In its reply brief, Ameren takes issue with arguments in the AG and CUB briefs. (Ameren reply brief at 50-51)

The Attorney General argues that the Ameren Companies' proposal violates the PUA because it does not allow the Commission to review actual rates. (AG brief at 50-53) CUB also argues that the auction proposal eliminates the Commission's obligation to perform an after-the-fact prudence review of the auction prices and to determine whether the resulting rates are just and reasonable. Section III of Ameren's initial brief contains a discussion of the Attorney General and CUB's arguments regarding the legality of the Ameren Companies auction proposal.

According to Ameren, Staff supports the Ameren position on this issue. (Ameren reply brief at 49-50, citing Staff brief at 102-104)

In Section V.J.4 of its briefs, Ameren addresses "**Subsequent Prudence Reviews of Actions in Response to Contingencies**." (Ameren brief at 92-93, reply brief at 48-49)

The Ameren Companies are seeking a prudence determination in this proceeding regarding its proposed contingency plans. The Ameren Companies, however, are not seeking a prudence determination with respect to its future discretionary actions under these plans or its future discretional actions that lead to the occurrence of a contingency. Staff is in agreement with respect to the latter. (Ameren reply brief at 48)

Staff identifies three general aspects of a prudence determination regarding the potential contingency purchases: (a) whether the proposed purchases will result in prudently incurred reasonable costs; (b) the reasons for the purchase; and (c) whether the Ameren Companies acted prudently with respect to the credit requirements. (*Id*.)

To address these concerns, the Ameren Companies adopted language proposed by the Staff that expressly reserved the Commission's ability to conduct limited prudence review as described above. (Resp. Ex. 18.0 at 32; Ameren brief at 93) With this reservation of rights, the Staff expressly supports the Ameren Companies request for a prudence determination with respect to contingency purchase under the proposed contingency plans. (Staff brief at 102) The proposed language is as follows:

> In the event that the Company purchases full requirements electric supply outside of an executed SFC for the BGS-FP Auction, the BGS-LFP, or BGS-RTP Auction pursuant to the Limitations and Contingencies part of this rider, the Company will provide to Staff a report on the circumstances of such purchases that shall include a description of the events causing the need for those purchases. A copy of the report will be provided to the Director of the Energy Division. If such report contains confidential information of any retail customer, the BGS Supplier, or the Company, the Company may designate the applicable portions of such report as confidential.
>
> Notwithstanding any other provision of this tariff, the Commission may, upon its own motion or upon complaint, in accordance with its jurisdiction and authority under applicable law, investigate in formal proceedings the prudence and reasonableness of any action or inaction by the Company that contributed to the need for, or the amount charged to customers for, such purchases. If the Commission in such proceeding finds that any action or inaction by the Company contributing to the need for, or the amount charged to customers for, such purchases was imprudent or unreasonable, then the Commission may order appropriate relief,

including refunds of incremental amounts, if any, collected by the Company on revenue that would not have been collected but for such imprudent and unreasonable action or inaction and are not otherwise owed to the Company. Notwithstanding the foregoing, nothing herein is intended to impede, limit or affect the Company's rights under applicable law to challenge any such order, decision or ruling by the Commission.

**2. Staff**

In Section V.L.K of its brief, Regulatory oversight and review, Staff addresses the Nature of Commission review before, during, and after Auction in Subsection V.K.1. (Staff brief at 102-104)

The Ameren Companies auction-based procurement proposal provides for regulatory oversight and review of the auction proposal, the auction process and the auction results. It is in this proceeding where the traditional ratemaking decisions pursuant to the Illinois PUA will be made.

Certain Intervenors appear to have concerns regarding the Companies' request for a current determination that the rider-based rates are just and reasonable. Staff submits that it is totally appropriate to make that fact-based determination in this proceeding. The Ameren Companies' auction-based competitive procurement proposal is an open and transparent process that specifies in all material and relevant respects how the Companies will procure power and energy. The Ameren Companies have provided all their decision-making criteria up-front and embodied those criteria in their tariff filing so as to effectively remove management discretion with respect to its procurement decisions. Although running an auction process may result in the independent Auction Manager taking certain actions that could be deemed discretionary, the basis upon which such determinations are to be made have been reasonably specified to the maximum extent possible. When these facts are considered, it is clear that the record supports the Companies' request for a prudence determination. (Staff brief at 102-103)

The Companies proposal provides for additional regulatory oversight in connection with the running of the auction itself. Staff and such consulting experts it selects will oversee all aspects of the auction process – including actions taken before, during and after the actual auction. This oversight will help ensure that the auction process is conducted appropriately, and that any potential problems are identified as early as possible and remedied. Moreover, Staff's oversight role will allow Staff and its experts to develop a sufficient knowledge base from which to report to the Commission on the conduct and outcome of the auction.

The Companies' proposal also allows the Commission to prevent implementation of the auction results by deciding to commence a formal proceeding within three days of the conclusion of an auction. Since all that needs to occur in this regard is a decision to commence a formal proceeding, the Commission is provided a broad and extensive tool

with which to assure that the auction process proceeds as intended. (Staff brief at 103-104)

In Section V.K.5 of its reply brief, "Other processes and proceedings," Staff responds to arguments on pages 54-55 of the AG's brief. (Staff reply brief at 56-59)

Staff fails to see how the Ameren Companies' request for an upfront review rather than an after-the-fact prudency review avoids regulatory review. The Ameren 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 proposal deprives neither parties nor the Commission of an opportunity to assess the Ameren Companies' decisions. The 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. (Staff reply brief at 57)

Prudence determinations with respect to management decisions must be based on facts and information "available at the time they occurred or were made." (Illinois Power Co. v. Illinois Commerce Comm'n, 245 Ill. App. 3d 367, 371 (3rd Dist. 1993); see also Illinois Power Co. v. Illinois Commerce Comm'n, 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 refers to Section 9-220 of the PUA (220 ILCS 5/9-220) in support of the above-described arguments. (AG brief at 50-51, 54-55) But the Ameren filings were not made under Section 9-220 of the PUA. (See AG brief at 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 may 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." (Staff reply brief at 57-58)

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. Section 9-220 is 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. (Staff reply brief at 58)

Staff concludes, "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." (Staff reply brief at 59)

In Section V.J of its brief, "Contingencies," Staff addresses "subsequent prudence reviews of actions in response to contingencies" in Section V.J.4. (Staff brief at 98-102)

It is Staff's understanding that the Ameren Companies seek a prudence determination in this proceeding for all purchases to be made pursuant to the auction proposal, including purchases to be made pursuant to the alternative procurement methods for the contingency scenarios. (Resp. Ex. 2.0. at 24-26; Resp. Ex. 6 at 66) Staff agreed in part and disagreed in part with the Ameren Companies' request for a full, complete and across-the-board prudence determination for its proposed contingency purchases. As of the close of the hearings, the Ameren Companies and Staff were in agreement that the Companies' request for a prudence determination with respect to the contingency scenarios exempted or excluded certain aspects or types of issues under those scenarios.

In general, "the Ameren Companies clarified that – with respect to the contingency scenarios – it is not seeking a prudence determination where it will be taking future discretionary action, which may or may not be prudent under applicable legal standards, that could cause the need for such purchases or impact the net amount to be charged to ratepayers for such purchases." (Staff brief at 98) With this understanding and limitation, as explained in more detail below, Staff supports the Companies' request for a prudence determination for the alternative procurement methods outlined in its contingency scenarios.

With respect to the potential contingency purchases at issue here, there are three general aspects to a prudence determination. The first area of inquiry is whether the proposed purchases themselves will result in prudently incurred reasonable costs. In other words, the first issue is whether the prices to be paid pursuant to the contingency procurement methods should be pre-approved as just and reasonable. Staff concurs with the Companies' request that the Commission find the contingency purchases to be made through the MISO or through an RFP process will result in prudently incurred reasonable costs for such supply. (Staff brief at 99)

As discussed above, these contingency supply options represent reasonable supply sources that will not negatively impact the competitiveness of the annual auctions. The use of these supply options should produce the most convenient and least costly supply, taking into account the amount of load to be procured and the cost of running the replacement procurement process. (Staff Ex. 5.0 at 17)

Although Staff supports a prudence finding for the prices to be paid through these procurement methods, there is one limitation that should be made clear. As discussed above, the Ameren Companies' contingency plan in the event the Commission rejects the results of an auction is to develop a new supply plan to be brought to the Commission for approval. It would be premature to pre-approve the prudence of supply plans that have not been developed, including the prices that would result from such unspecified plans. (Staff brief at 99)

A prudence inquiry for contingency purchases does not end with an examination of price considerations. The second area of prudence inquiry is an analysis of the reasons for the purchase. It is well established in Illinois jurisprudence that "the prudency standard [is applied] not only to the actual purchase amounts but [also] to the reasons for those purchases . . . ." (United Cities Gas Company v. Illinois Commerce Comm'n, 163 Ill. 2d 1, 17-18 (1994)) In other words, if a utility's imprudent acts or omissions cause certain costs to be incurred (i.e., the reasons for the purchase), then those costs are not prudent notwithstanding the prudence of the price paid or quantity purchased since the utility would not have incurred those particular costs if its acts or omissions causing the need for the purchase had been prudent. (Staff brief at 100)

As is obvious from the "contingency purchases" description, the present analysis focuses on how the Company will procure power in the event that certain future events develop and prevent it from procuring power and energy through the SFCs resulting from annual auctions. Since those facts will occur in the future, a full prudency determination cannot be made here, and the Commission must retain the right to review the Company's prudence in light of the facts that do develop.

The third area of prudence inquiry with respect to the potential contingency purchases at issue here is whether the Company has acted prudently with respect to the credit requirements. Again, certain facts with respect to the Company's management of its credit requirements will not be known until they occur in the future, and the Commission must maintain the ability to review those facts when they occur. (Staff brief at 101)

Thus, while Staff supports the Ameren Companies' proposed contingency plans, Staff believes that it is premature to provide an across the board finding that all purchases made pursuant to those plans will constitute prudently incurred reasonable costs because the future events and actions triggering the contingency provisions or impacting implementation of the credit requirements are relevant to a final determination of prudence and are not known at this time. These concerns with respect to prudence were discussed by Staff witness Dr. Schlaf and Staff witness Phipps. (Staff Ex. 5.0 at 17 and ICC Staff Ex. 15.0 at 4-5)

As discussed in Section VII.B.5 of Staff's brief, the Ameren Companies do not oppose tariff language proposed by Staff witness Schlaf that specifically maintains the Commission's ability to review the prudence of the contingency purchases with respect to future acts or omissions by the Ameren Companies that contribute to the need for

such purchases or impact the net amount to be charged to ratepayers for such purchases. Under this language, the Commission could commence a proceeding to determine whether the contingency purchases were required because of an act or omission by the Companies, whether the net amount charged to ratepayers was impacted by an act or omission by the Companies, whether the act or omission was imprudent, and, if so, whether the amount charged was unreasonable.

Staff submits that the record in this proceeding supports the Companies' request for a prudence determination with respect to supply charges for purchases under the contingency provisions subject to an express reservation of the Commission's ability to conduct a limited prudence review as described above. (Staff brief at 101)

**3. AG**

In Section V.L of its brief, Regulatory Oversight and Review, the AG first addresses, in Section V.L.1, the nature of Commission review before, during and after the auction. According to the AG, "Ameren's proposal for pre-approval of auction-based rates is unlawful." (AG brief at 49-53)

In asking the Commission to approve a "process" for obtaining market based rates, Ameren is attempting to avoid the responsibility to charge consumers rates that can pass regulatory review to insure they are fair, just and reasonable. Ameren suggests that once a process is in place, the resulting rates can be presumed to be fair, so long as the process is followed and the Commission does not initiate an investigation. (Ameren Ex. 10.0 at 23-24, 26) Effectively, Ameren would disavow responsibility to justify rate changes in the future, deferring instead to whatever the "process" produces. (AG brief at 49)

Ameren's focus on process does not provide an opportunity to assess whether the price resulting from the auction is fair to consumers, and does not fulfill the Commission's duty to ensure that the rates consumers actually pay are fair, just and reasonable. The Commission must assess actual rates, whether they are presented in a rate case under Part 285 (83 Ill. Adm. Code 285) and set prospectively, or presented in the context of a retrospective review under section 9-220 of the PUA and subject to refund. (220 ILCS 5/9-220, 83 Ill. Adm. Code 425) The PUA does not authorize the pre-approval of blank rates under the guise of approving a process.

The law requires that the rates consumers will actually pay be included in tariff sheets on file with the Commission, so that the public can tell what rates the utility is authorized to charge. (220 ILCS 5/9-103) Tariffs that do not contain the information necessary to enable the Commission to review the rates and to protect consumers are unlawful. (*Citizens Utility Board v. Illinois Commerce Commission*, 275 Ill.App.3d 329 (1st Dist 1995) (as modified on rehearing))

Ameren's pass-through proposal is not authorized by the 1997 Amendments. The 1997 Amendments allowed utilities to eliminate the uniform fuel adjustment clause

("UFAC"), which could have been a vehicle for passing power costs through to consumers during the mandatory transition period. (220 ILCS 5/16-111(a)(2); 5/9-220) However, the Ameren Companies eliminated their UFACs and have not asked for them to be reinstated. Further, Ameren's proposal is inconsistent with a UFAC under section 9-220, which requires annual, public hearing to determine whether the costs passed through to consumers "were prudent" and comply with Commission rules. (220 ILCS 5/9-220(a); 83 Ill. Adm. Code 425) Contrary to law, Ameren's proposal asks the Commission to forego all inquiry into the fairness and reasonableness of prices derived from the auction and most prices obtained outside the auction, leaving consumers with no regulatory protection. (AG brief at 50-51)

The 1997 Amendments directed that electric utilities' service obligations remain unchanged until a competitive declaration is made. (220 ILCS 5/16-103) Ameren's proposal to pass market prices on to consumers leaves consumers who lack competitive options with no protections. This directly contradicts the 1997 Amendments' premise that "Consumer protections must be in place to ensure that all customers continue to receive safe, reliable, affordable, and environmentally safe electric service." (220 ILCS 5/16-101A(d); 5/16-101; 5/16-103; 16-111(a)) Ameren's request to approve blank rates, and to allow it to charge prices with no regulatory review, violates both the letter of the 1997 Amendments by removing key consumer protections and its expressed goal to only expose consumers to market prices when a retail market exists to serve them.

A previous ComEd attempt to obtain pre-approval of a blank rate was rejected as unlawful in *Citizens Utility Board v. Illinois Commerce Commission*, 275 Ill.App.3d 329 (1st Dist 1995)(as modified on rehearing). In that case the Commission allowed ComEd to negotiate separate rates with certain large customers and to file them under seal with the Commission. ComEd did not provide a rate to review prior to approval of a blank tariff called "Rate CS." On review, the Court said: "the actual charges under Rate CS are not included in the proposed tariff on file with the Commission nor open to the public for inspection. In fact, there are no charges; Rate CS merely grants Edison the prospective right to set rates in the future." (275 Ill.App.3d at 339) The Court found it "most important" that the rates did not exist when Edison filed its tariff, and concluded that its request violated section 9-102 of the Public Utilities Act which requires that rates be filed with the Commission. (AG brief at 51)

Ameren's riders fail to specify the rates to be paid by consumers, and like Rate CS, "merely grants Edison the prospective right to set rates in the future." In this docket Ameren proposes an unknown, future rate based on a process that has been used in only one state. This request for authorization to set an unknown rate violates sections 9-102 and 9-201 of the Public Utilities Act and is unlawful under *Citizens Utility Board v. Illinois Commerce Commission*, supra. (AG brief at 52)

The principles underlying the Court's decision also apply to the nature of Commission review of company actions before, during and action the auction itself. In

expressing its concern about a tariff that would allow the utility to set rates without review, the Court said:

> [W]e are equally aware of the special rights and obligations arising from the regulatory compact between the public and investor owned utilities. As part of that compact, utilities must comply with the requirements of the Act and subject themselves to certain constraints, including the filing and publication of rates. Concomitantly, the Commission, as the legislatively appointed guardian of the public's interest, must carry out its statutory mission to approve of only those rates which fully comport with these requirements. Otherwise, the regulatory world is turned on its head, as in this case, where the regulated has in effect become the regulator.
> (275 Ill.App.3d at 344)

The Court's concern that the regulated could become the regulator has been given full form in Ameren's proposal in this docket. Ameren's proposal effectively would remove the Commission's regulatory function, and the public accountability it involves, and vest it in an Auction Manager, a private entity. Ameren's proposal would remove the utility's purchasing from active Commission and public oversight, and relegate review to process issues that are only indirectly related to the rates consumers will actually pay. (AG brief at 52)

In Section V.L of its reply brief, Regulatory Oversight and Review, the AG first addresses, in Section V.L.1, certain arguments made by Ameren regarding the nature of Commission review before, during and after the auction. (AG reply brief at 37-38)

Ameren cites no case law or statute for the proposition that the Commission has the obligation or the authority to approve a purchasing process before it is implemented and without the benefit of rates. Although Ameren would like to avoid the risk associated with the annual reviews required under section 9-220 for purchased power by securing pre-approval of its proposed actions, the law does not authorize such hypothetical determinations. (AG reply brief at 37)

The PUA authorizes the establishment of rates based on a <u>test year</u>, which could be a future test year, and variable rates subject to annual, retrospective prudence reviews. (220 ILCS 5/9-201, 83 Ill. Adm. Code 285; 220 ILCS 5/9-220, 83 Ill. Adm. Code 425)

The Commission should reject Ameren's request to pre-approve its proposed auction and find that (1) it lacks the authority to assess the prudence of a process in the absence of a rate case or a section 9-220 prudence review and (2) even if it could lawfully pre-approve Ameren's proposal, it does not find it to be prudent because it is designed to obtain a high cost, premium product and fails to provide the flexibility needed to insure that consumers receive least cost, reliable electric service. (AG reply brief at 38)

In Section V.L.5 of its brief, **Other Processes and Proceedings**, the AG argues that the law allows an alternative procedure for setting utility rates. Under Section 9-220, the cost of purchased power can be passed through to consumers on a monthly basis, and reconciled annually to insure that the correct amounts were charged. The annual reconciliation provides the Commission and the public with the opportunity to ensure that the utility acted prudently on behalf of its customers when incurring costs that were passed on in rates. This process protects consumers through the review of purchasing decisions to make sure that they were reasonable and prudent under the circumstances. Ameren's proposal does not afford the consumer protections equivalent to those in the PUA, and should be rejected. (AG brief at 55)

In Section V.K of its reply brief, "**Contingencies**," the AG argues in part that the purchases authorized by Ameren's proposal when electricity is purchased outside the auction should require Ameren to exercise its best judgment to obtain low cost supply for consumers, subject to a later Commission prudence review. (AG reply brief at 33-37)

Ameren and Staff both recommend that the Commission pre-approve a purchasing plan, including spot market purchases and an RFP in the event that the auction does not provide the system's full requirements due to volume reductions, supplier default or ICC rejection. (Ameren brief at 90-93; Staff brief at 93-102)

According to the AG, the law does not authorize an advanced finding of prudence. Costs can be recovered as part of base rates subject to a test year filing and other regulatory protections, or purchased power costs can be recovered in a variable Rider with an annual reconciliation and prudence review. (220 ILCS 5/9-201, 9-220; *Business and Professional People in the Public Interest v. Illinois Commerce Commission*, 136 Ill.2d 192, 201-204 (1989)) For these reasons alone, the pre-approval Ameren and Staff request for replacement power purchases should be rejected as beyond the Commission's statutory authority. (AG reply brief at 33)

The Commission should refuse to grant the pre-approval the Company seeks, and require the Company to use its best efforts, given the circumstances existing at the time replacement electricity is needed, to obtain the least cost supply for consumers. A subsequent, annual review of such purchases is necessary, as required by section 9-220 of the PUA, to protect consumers and ensure that the utility acts reasonably. (AG reply brief at 35)

Staff's Initial Brief appears to be inconsistent with the testimony of Staff witness Dr. Schlaf and with the language Ameren included in its Initial Brief at page 93, which specifically includes Commission review "the amount charged to customers for, such [contingency] purchases." In response to the Contingencies provision of Ameren's Rider, Dr. Schlaf testified that the Commission should not restrict its authority to review the prudence of a utility's actions giving rise to the need for an expense to be recovered from ratepayers pursuant to a rider. (Staff Ex. 13 at 9; Ameren Ex. 18.0 at 32)

He recommended that the Company prepare a report for the Commission, describing the circumstances giving rise to the need to obtain additional supply, and further, that the Commission, upon its own motion or upon complaint, investigate "the need for, or the amount charged to customers for, such purchases. If the ICC in such proceeding finds that any action or inaction by the Company contributing to the need for, or the amount charged to customers for, such purchases was imprudent or unreasonable, then the ICC may order appropriate relief, including refunds . . . ." (Staff Ex. 13 at 9) The tariff language Ameren includes in its Initial Brief at page 93 is identical to the language proposed by Dr. Schlaf except for the addition of final sentence (to which the AG has no objection). (AG reply brief at 36-37, citing Ameren Ex. 18 at 32; Staff Ex. 13 at 9) The language quoted by the AG on pages 36-37 is the same as that set forth in this order above under the discussion of the Ameren Companies' position.

According to the AG, should the Commission adopt Ameren's auction proposal, this language should be included to protect consumers when electricity is obtained outside the auction notwithstanding the change Staff appears to request in its Initial Brief. (AG reply brief at 37)

**4. CUB**

In Section V.K of its briefs, CUB addresses "Regulatory oversight and review." (CUB brief at 18-22, reply brief at 16-17)

The auction proposals eliminate the ICC's obligation to perform an after-the-fact prudence review of the resulting auction prices. The proposals further eliminate the ICC's obligation to determine whether the rates are in fact just and reasonable. This removes the only meaningful protections for consumers and subjects them to the substantial risk of paying unreasonable and unjust rates, all of which is contrary to the Act.

Ameren insists that the actual auction prices need not be subject to an after-the-fact prudence review of any sort or determination of their justness or reasonableness.

Ameren does not share any risk that customers are not receiving "fair market pricing" since it is proposing that its cost of power be passed on to customers dollar for dollar. "Customers paying anything other than just and reasonable prices would be in violation of the Act and in derogation of the ICC's obligations to customers." (CUB brief at 21) Because of the lack of comparably priced market products, only an after-the-fact, traditional ratemaking prudence review will detect whether the customer rates resulting from the auction prices are just and reasonable. Such a prudence review is what Ameren wants to avoid.

Ameren's true motivation is that it dislikes after-the-fact prudence reviews. The reviews put it at risk of not being able to pass on all of its costs to consumers." (CUB brief at 21, citing Tr. 102-103, Nelson)

The ICC should not abdicate its responsibility to perform an after-the-fact prudence review based on mere conjecture, disputed auction methods and Ameren's distaste for prudence reviews. (CUB brief at 21-22; CUB reply brief at 15) As asserted by Dr. Steinhurst, customers should not lose their only true protection against paying unjust and unreasonable prices, a risk that the customers only bear because Ameren intends to recover every dollar it pays for the power from its customers. (CUB brief at 22; Tr. 512)

**5. CCG**

CUB and the AG suggest that at the conclusion of the auction, after the prices are known, the Commission should hold a prudence review. (CCG reply brief at 7-9, citing CUB brief at 19; AG brief at 50) Both CUB and the AG miss the point. This proceeding is the vehicle within which to address prudence and it will establish the process by which Ameren and all parties can be assured, in advance, that the procurement practices are prudent. It is a contested case with notice and opportunity to be heard. If the Commission approves the tariffs in the instant proceeding, it would be approving the rules and the procedures under which Ameren will procure power and energy at the wholesale market and would also approve the cost recovery to Ameren for those purchases. The resulting prices would, therefore, be prudent.

"Prudence" has been previously defined by the Commission. In Illinois *Commerce Commission vs. Illinois Power Company*, Docket No. 01-0701 (Order entered Feb. 19, 2004), the Commission stated, "the Commission has previously defined prudence as the standard of care which a reasonable person would be expected to exercise under the same circumstances by utility management at the time decisions had to be made." (*Id*. at 22)

The courts have also upheld the Commission's view of prudence. In *Illinois Commerce Commission vs. Illinois Power Company*, 245 Ill. App. 3d 367 (3d Dist. 1993), the Court stated, "In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible." (*Id*. at 371)

"Prudence" is determined by the evaluation of circumstances surrounding the judgment of a utility to make purchases at the time that the decision is made. The circumstances here would be the use of a Commission-approved mechanism and governing rules for the purchase of power and energy by Ameren. As Staff noted in its Initial Brief in footnote 10, p. 100, "the record in this proceeding fully supports a finding that the Ameren Companies' auction proposal as modified by Staff will result in prudently incurred reasonable costs . . . ." Ameren would not be making any selection of suppliers independently of the approved mechanism and rules. (CCG reply brief at 8)

Once a determination is made that the utility's judgment is prudent, which in this case is the adherence to the Commission approved mechanism and rules, the utility's costs are passed on to consumers without further review. Accordingly, if the

Commission determines at the conclusion of the auction that the auction process established in this case was followed and that no anomalies in the bidding process took place, then the auction prices that result from the prudent and reasonable auction are required to be passed on to Ameren's consumers without further review by the Commission.

In order to eliminate the possibility of ambiguity and to bring about certainty with regard to the scope of the Commission's review at the conclusion of the auction, CCG urges the Commission to define the scope of its post-auction review as outlined above in its Order and to direct Ameren to modify Original Sheet No. 27.028 accordingly. (CCG reply brief at 8-9)

### E. Conclusions Relating to Commission Authority

As indicated above, the parties' arguments relating to the Commission's authority in this proceeding are summarized in Section III.B-D above. Conclusions on these overlapping issues are set forth immediately below.

#### 1. 16-103(c) Issue: Market-Based Rates for Service not Declared Competitive

One of the arguments made by AG and CUB is that the PUA "does not authorize market-based rates for electric service that has not been declared competitive under Section 16-113." (AG brief at 8-12; CUB brief at 5-6)

As indicated above, parties including Ameren, Staff, CCG and CES contend that this argument should be rejected, as it was in the ruling issued on June 1, 2005 denying a motion to dismiss jointly filed by several parties including AG and CUB. After oral argument before the Commission, an interlocutory appeal of that ruling was denied by the Commission on July 13, 2005.

The parties' arguments are summarized at some length above and will not be repeated here.

On this issue, one of the arguments made by AG and CUB is that, contrary to law, the Proposed Riders "replace cost-based rates with market-based rates" set by an auction. Much of the focus is on Section 16-103(c). It provides in part that ". . . 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."

Section 16-103(c) goes on to provide:

> 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. (Emphasis added)

Similarly, Section 16-111(i) provides for the consideration of costs in establishing rates for tariffed services subsequent to the mandatory transition period.

As argued by Staff, Ameren and other parties, it is clear from a simple reading of Section 16-103(c), and its numerous references to cost, that market-based prices and cost-based rates are not mutually exclusive concepts. To the contrary, use of market-based prices is recognized as a mechanism for or subset of, rather than an exception to or replacement of, the development of rate components based on cost. That is, use of market-based pricing is identified as one method for determining such costs, not an alternative thereto. In the instant case, Ameren's proposal is intended to recover only such costs as are actually incurred in procuring power and energy through the auction process. How well the proposal is designed to work in that regard is a different question that is addressed elsewhere in this order.

Thus, the issue is not whether use of market-based prices is inherently inconsistent with the principle of setting rate components at cost. As indicated above, it is not.

The next question is whether Section 16-103(c) prohibits the use of an auction or other market-based process in determining the costs of power and energy in setting rates for non-competitive customers, as argued by AG and CUB. A close reading of Section 16-103(c) reveals that no such prohibition exists. What Section 16-103(c) says is that "[f]or those components of the service which have been declared competitive, cost shall be the market based prices." Hence, rate components for competitive services may only be set, not surprisingly given their competitive nature, by using market-based prices to establish cost.

Implicit in the position advocated by AG and CUB on this issue is the proposition that because market-based prices must be used to establish the cost for components of competitive services, it necessarily follows that market-based prices may not legally be used to establish costs on which to base rate components for non-competitive services or customers. However, as indicated by various parties on the other side of this issue, the Act contains no such language, either in Section 16-103(c) or elsewhere. As those parties correctly observe, the presence of a statutory mandate to use a particular

method for establishing certain cost components for competitive services does not somehow mean that method is statutorily prohibited for other services or customers, particularly where, as in the instant case, use of market-based prices is expressly recognized as one means of establishing costs in Section 16-103(c).

In addition, as several parties have commented, it is difficult to see by what means AG and CUB envision the cost of procuring power and energy being determined for non-competitive services in a manner consistent with their theory that market-based prices may not be used to establish costs on which to base rate components for non-competitive services. As noted above, Section 16-103(c) contains a broad definition of "market-based prices." It provides that "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." (Emphasis added)

Since Ameren has divested itself of all generation assets pursuant to Section 16-111(g) of the Act, it is unclear how the cost of procuring power and energy would be established for non-competitive services, when existing contracts expire at the end of 2006, if all such market-based mechanisms were prohibited as AG and CUB contend. In other words, prohibiting procurement alternatives that use market-based prices, as that term is defined in Section 16-103(c), would preclude the use of the very alternatives suggested by AG and CUB, such as contracts with Ameren's affiliated generating company or others. Under that scenario, utilities without generation would be left with no "legal" means of procuring supply. In the Commission's view, a theory that leads to such a result is not an appropriate interpretation of the statute.

For the reasons set forth, the theory that the proposed auction is prohibited by Section 16-103(c) of the Act should not be adopted.

### 2. Transfer of Generation Plants

In this proceeding, AG and CUB have asserted that Ameren's need to obtain generation is the result of its choice to transfer and sell its generation assets pursuant to Section 16-111(g) of the Act. The implication is that Ameren should have taken additional steps to ensure that it was able to meet its obligations to residential and small commercial customers post-2006 before completing these transactions. These parties appear to be suggesting that Ameren failed to act prudently on behalf of residential ratepayers.

As observed by Ameren, however, this argument is inconsistent with Section 16-111(g). The transfers in question were authorized by the Commission pursuant to Section 16-111(g). It provides, in part, "The Commission shall not in any subsequent proceeding or otherwise, review such a reorganization or other transaction authorized by this Section . . . ." Thus, the Commission declines to find that Ameren failed to act prudently when it transferred its generation plants pursuant to Section 16-111(g).

### 3. Prudency Analysis

As explained above, Ameren, Staff and CCG contend that a review of the prudence of the auction process should take place in this docket, not in a post-auction prudency review proceeding. That is, if the process approved in this proceeding is followed in the auction, and the auction results are certified by the Commission at the conclusion of the three-day review period as addressed in Section V.K of this order, then the acquisitions of supply made pursuant to the auction are deemed prudent and no "after-the-fact" prudency review is either necessary or appropriate.

AG and CUB disagree. Among other things, they argue that under Illinois law, the Commission must assess actual rates, whether they are presented in a rate case under Part 285 and set prospectively, or presented in the context of a retrospective prudency review under Section 9-220 of the PUA and subject to refund. The PUA does not authorize the pre-approval of "blank rates" by the Commission under the guise of approving a process.

The Commission has reviewed the arguments made and authority cited by the parties. In analyzing this issue, the Commission first observes, generally speaking, that retail rates in Illinois are set through either (1) the Part 285 "test year" ratemaking process or (2) a pass-through rider mechanism.

Some pass-through riders are specifically authorized by statute, such as the UFAC and PGA mechanisms in Section 9-220 of the PUA. Others are not specifically identified by statute, but are authorized by Commission order, such as the "coal tar" riders authorized in consolidated Dockets 01-0080 et al. As discussed above, the Commission's order authorizing coal tar riders was upheld by the Illinois Supreme Court in the *Citizens Utility Board* case, 166 Ill.2d 111.

Unlike rates established in a test year ratemaking proceeding, rider mechanisms contain formula rate methodologies designed to pass through costs as they are incurred. Thus, by their very nature, they will not identify specific rates or charges because those charges will not be known until the subject costs are incurred. Therefore, there is no outright prohibition on use of "blank rates" or "formula rates" in pass-through riders. If there were, no such rider could ever be approved. Such a result would be inconsistent with Section 9-220, which specifically authorizes PGA and FAC pass-through riders, and with case law, such as the decisions in *Citizens Utility Board* and *City of Chicago*, 13 Ill. 2d 607, before that.

In the instant case, one of the key issues before the Commission is whether use of the auction process to procure electric supply should be subject to annual reconciliation hearings to consider whether the power acquisition costs being passed through to retail customers were prudently incurred.

Based on the record in this proceeding, the Commission believes that the proposed vertical tranche auction process, as modified herein, is reasonably designed to enable Ameren to procure power supply in a competitive and least-cost manner. In that regard, no alternatives were presented that represent a more viable approach for procuring power supply after January 1, 2007.

As indicated elsewhere in this order, the Ameren utilities have divested themselves of their generating plants pursuant to Section 16-111(g), and must obtain their power supply from others. The provisions of that section do not appear to contemplate any post-transaction second-guessing of the prudency of those transfers.

To the extent some parties are arguing Ameren should obtain power at negotiated below-market rates from its generating affiliate, that option appears to run afoul of the "*Edgar*" standard discussed above.

As noted above, Ameren, Staff and CCG assert that if the auction process is followed, and the auction results are approved by the Commission at the close of the three-day review period, then the acquisitions of supply made pursuant to the auction should be deemed prudent. They claim any further prudence review of the pass-through of those costs to ratepayers, with no markup or profit, would be pointless and legally unnecessary.

Given the record in this proceeding and the findings above, the Commission believes that if the auction results are approved by the Commission at the close of the three-day review period, then Ameren should be entitled to a presumption that the supply obtained pursuant thereto was "prudently purchased."

With respect to any prudence reviews after the Commission certification of the auction results, the Commission acknowledges that the recommendation of Ameren, Staff and others to preclude any post-transaction prudence reviews of auction purchases has practical appeal. Based on the provisions of Section 9-220 of the PUA, however, the Commission believes the better course is to initiate annual reconciliation hearings to review whether the purchased power costs being passed through to ratepayers were "prudent."

The first sentence of Section 9-220(a) provides, "Notwithstanding the provisions of Section 9-201, the Commission may authorize the increase or decrease of rates and charges based upon changes in the cost of fuel used in the generation or production of electric power, <u>changes in the cost of purchased power</u>, or changes in the cost of purchased gas through the application of fuel adjustment clauses or purchased gas adjustment clauses." (emphasis added)

Several sentences later, Section 9-220(a) further provides, in part, "<u>Annually</u>, the Commission shall initiate <u>public hearings</u> to determine whether the clauses reflect actual costs of fuel, gas, power, or coal transportation purchased to <u>determine whether such purchases were prudent</u>, and to reconcile any amounts collected with the actual costs of

fuel, power, gas, or coal transportation prudently purchased. In each such proceeding, the burden of proof shall be upon the utility to establish the prudence of its cost of fuel, power, gas, or coal transportation purchases and costs." (Emphasis added)

Since the instant proceeding was not filed pursuant to Section 9-220 and Ameren presently has no fuel adjustment clause in effect, there may be some question as to whether Section 9-220 is directly applicable to the instant proposal, although AG and CUB assert that is. What is clear is that the section speaks directly to "changes in the cost of purchased power," and where applicable, it requires annual hearings to consider the prudency of power purchases being passed through to ratepayers via FAC riders. In the instant case, it is undisputed that the supply acquisitions in question are in fact "purchased power."

All things considered, the Commission believes that while it is not precluded from authorizing a pass-through of procurement costs without formal reinstatement of a FAC, Section 9-220 does provide appropriate guidance with respect to the procedures that should be followed for reviewing the pass-through of purchased power costs, including purchases made pursuant to the auction. While the instant proceeding and the Commission review during the three-day post-auction window are important tools in terms of prudency, they do not constitute annual public hearings within the meaning of Section 9-220. Furthermore, while the purported lack of "discretionary conduct" by Ameren in making the auction-driven purchases may be relevant in the evaluation of the auction proposal and in the review of auction purchases, there is no language in Section 9-220 exempting "no discretion" purchases from the annual reconciliation process.

Accordingly, the Commission finds that power purchases made pursuant to the auction should be subject to an annual reconciliation proceeding to determine prudency as outlined in Section 9-220. As discussed below, the proceeding will also be used to reconcile amounts collected with actual costs as described in Section 9-220.

As indicated above, if the auction results are approved by the Commission at the close of the three-day review period, then Ameren should be entitled to a presumption that the supply obtained pursuant thereto was "prudently purchased." At the reconciliation proceedings, if Ameren shows that power purchases were made in accordance with the auction process, Ameren will be deemed to have made a prima facie showing of prudency within the meaning of Section 9-220.

Whether the Commission is pre-empted by federal law from conducting a post-transaction review of auction purchases is addressed below.

### 4. State and Federal Authority; Federal Pre-emption

The parties appear to agree that the supply contracts resulting from the auctions will require FERC approval. There is disagreement, however, on whether or to what extent the Commission has authority to conduct a post-transaction review of the prudency of federally-approved wholesale power transactions.

Ameren cites the Supreme Court's *Mississippi Power* decision for the proposition that FERC's exclusive jurisdiction over wholesale rates "binds both state and federal courts . . . ." (47 U.S. 354, 375) "States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates." (Id. at 372)

Ameren also cites *Nantahala Power* where the Supreme Court stated, "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." Rather, a state "must give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." (476 U.S. at 965, 966)

Ameren contends that the type of analysis and review of wholesale transactions urged by AG and CUB is not permitted under federal law.

AG and CUB, on the other hand, cite *Pike County* for the argument that the ICC's authority to review costs incurred by electric utilities, to determine whether they are just, reasonable and prudently incurred, extends to review of the cost of electricity procured under wholesale rates established by FERC. (AG brief at 18) The Court held that "FERC approval of the [generation affiliate's] tariffs means only that, as a matter of law, it is reasonable for [the generation affiliate] to charge such rates; FERC approval does not mean that it is reasonable for Pike to incur such costs." (465 A.2d 735, 739)

According to the Illinois Supreme Court, "States retain the authority to review the prudence of a distributor's actions in incurring FERC-approved supply charges when the distributor had a choice whether to incur the charge." (AG reply brief at 11-12, citing *General Motors Corporation*, 143 Ill 2d 407, 421-22 (1991)) (Emphasis added) AG also cites the *Central Vermont* decision where FERC held that its approval of a rate schedule "does not preclude the Public Utilities Commission…from determining whether [the utility] acted imprudently by not terminating the rate schedule under its terms where lower-priced power was available to the [the utility]." (84 FERC 61,194) (Emphasis added)

In response, Ameren says the Court in *Nantahala* made clear what a state can and cannot do. A state agency cannot undertake "an analysis of [the wholesale seller's] cost of service data, analysis within the exclusive jurisdiction of FERC"; a state agency can undertake an analysis of the utility's "cost of service and comparison with alternative costs of purchased power." The Court explained, "Without deciding this issue, we may assume that a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price." (*Nantahala*, 476 U.S. at 972, citing *Pike County*)

According to Ameren, the AG wants the Commission to do exactly what the Supreme Court in *Nantahala* and the court in *Pike County* said it cannot do: review the

reasonableness of wholesale rates. (Ameren reply brief at 10-11) Ameren complains that the AG's reading of *Pike County* erases any boundary between federal and state jurisdiction and would give the Commission power to determine whether a wholesale rate is reasonable. (Id.)

Having reviewed the arguments and decisions cited, the Commission declines at this time to find that it is pre-empted by federal law from conducting a post-transaction review of the prudence of Ameren's actions in incurring the FERC-approved supply charges in question.

It appears to the Commission that while jurisdiction over wholesale power supply transactions does rest with FERC, as argued by Ameren and others, the case law also indicates that the states are not pre-empted from reviewing a utility's pass-through of such charges to retail customers in some situations, such as where the utility had a choice whether to incur the charge or where lower-priced power was available to it.

Furthermore, from a jurisdictional standpoint, it is Ameren who has brought the instant docket before the Commission and seeks Commission findings relating to the auction procurement process. Whatever the scope of Commission's jurisdiction over these transactions may be, it is difficult to see how the Commission is being asked to assert jurisdiction over these issues in this docket while simultaneously finding that it is somehow pre-empted by federal law from considering the same issues at a later time. Under the circumstances, to make the pre-emption finding at this time would be, at best, premature.

In any event, as noted above, the subject wholesale supply contracts are subject to FERC approval. What specific actions FERC will take, including any determinations relating to whether the utility had a choice in incurring the charge or whether lower-priced power was available to it, are unknown at this time. To the extent Ameren or other parties believe any approvals actually granted by FERC are in fact dispositive of these issues in a manner that supports a pre-emption argument, they are free to make such arguments at the outset of the reconciliation proceedings. In the meantime, the Commission will assume that Illinois law still regards prudency reviews of purchased power transactions as within the Commission's authority to conduct, as contemplated in Section 9-220 of the PUA.

Such reviews will not, however, consider the relationship between the wholesale supplier's underlying cost of service and the charges assessed by it to the utility under FERC-approved wholesale supply contracts. Under applicable case law, that issue is outside the jurisdiction of this Commission.

### 5. Prudency Review of Contingency Purchases

As discussed elsewhere in this order, Ameren may make "contingency" purchases as a result of a supplier's default or other scenarios. Generally speaking,

Ameren and Staff agree that no post-auction prudency review is necessary in situations that Ameren and Staff believe will not involve "discretionary action" by Ameren.

The AG disagrees, arguing, among things, that the situations in question, such as purchases from MISO-administered markets, are not free of judgment and discretion by Ameren. AG also contends that an annual review of contingency purchases is required by Section 9-220 of the Act.

As indicated above, Section 9-220, where applicable, requires annual hearings to consider the prudency of power purchases if those costs are being passed through to ratepayers via FAC riders. In the instant case, it is undisputed that the contingency acquisitions in question are "purchased power." The Commission believes Section 9-220 provides appropriate guidance with respect to the procedures that should be followed for reviewing the pass-through of contingency power purchases. In the Commission's opinion, if Ameren wants authorization in this docket to pass through, to ratepayers, the costs of contingency purchases, such purchases should be subject to annual prudency reviews as part of the annual reconciliation proceeding.

### F. Other Issues

In Section III.D of its brief, Ameren Companies discuss "References to Post-2006 Initiative Report and Results." (Ameren brief at 23-25)

The procurement process incorporated in the Ameren Companies' tariffs and testimony is the result of an unprecedented collaborative effort undertaken in the Post-2006 Initiative. (Ameren brief at 23)

In the spirit of the expressed purpose of the Post-2006 Initiative process, the Ameren Companies have relied upon the results of the workshops in defining and shaping the tariffs proposed in these proceedings. (Nelson Sur., Ex. 17.0 at 6) "In that spirit, and in the spirit of providing necessary context for these proceedings, witnesses for the Ameren Companies have offered specific testimony regarding Post 2006 Initiative workshop results, and the role that such results have played in designing the tariffs at issue." (Ameren brief at 24, citing Baxter Dir., Resp. Ex. 1.0 at 5; Nelson Dir., Resp. Ex. 2.0 at 35-38; Nelson Sur., Resp. Ex. 17.0 at 4-8)

In its reply brief, Section **III.D,** the **AG** takes issue with references by Ameren and other parties to post-2006 Initiative reports and results. (AG reply brief at 14-20) The AG believes such references are inappropriate and should be disregarded.

In Section III.D.1, the AG argues that Initiative participants relied on the Commission's promise that free and open discussion would be fostered by explicitly protecting Post 2006 Initiative discussion materials and reports from use in subsequent litigation. (AG reply brief at 14) In Section III.D.2, the AG asserts that preserving free and open discussion without fear of later misrepresentation is essential to the workshop process as used by the Commission. (Id. at 16)

In Section III.D.3, the AG contends that Ameren's use of the Post-2006 Initiative is repetitive, selective and unnecessary. (AG reply brief at 17) In Section III.D.4, the AG argues that even if properly admitted, testimony referring to the Post-2006 initiative should be given little or no weight because of the nature of the workshop process and assumptions made by participants. (Id. at 18)

Having reviewed the comments of the parties, the Commission observes that objections to certain references to or characterizations of the Post-2006 Initiative and reports were ruled upon during the course of this proceeding and are not before the Commission in this Order.

The Commission believes the Post-2006 Initiative was an innovative and inclusive process that provided a valuable opportunity to a broad range of participants to explore and develop alternatives on the critical issues relating to post-2006 electric supply acquisition.

Parties who disagreed with the thrust of or characterizations in the references to the Post-2006 process or results thereof were given a full opportunity to express their views in this docket, as they were in the Post-2006 Initiative itself, and their comments have been duly considered.

In Section IX of its brief, "Other Issues," CUB comments that Ameren employees own shares of its holding company, and these shares become more valuable as the generating affiliate, AER, becomes more profitable. CUB asserts that these employees therefore have a personal financial interest in the generating affiliates financially benefiting from the auction, even though their corporate responsibilities, solely as Ameren employees, are only owed to customers. Moreover, CUB argues, the Ameren Corporation employees are further biased in favor of the auction, and not customers, because they have a corporate obligation to maximize profits for the benefit of their shareholders. Thus, CUB concludes, 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 brief at 25)

The Ameren Companies object to this characterization. They claim this suggestion of possible bias is unfounded and provides no reason to discount the testimony. The Ameren Companies argue that nothing in this record or in the witnesses' demeanor suggest that their testimony is anything but objective, or should be discounted. Nor has CUB provided any evidence whatsoever that any of these witnesses did, or could have, biased his or her testimony.

The Commission will make not make any formal determinations on this issue, other than to observe that CUB was within its rights to cross-examine the witnesses on the perceived bias, and to comment on the matter in the briefs. As such, CUB's comments constitute appropriate argument and they will not be stricken from its brief.

# IV. SUFFICIENCY OF THE COMPETITIVE MARKET

## A. Introduction; Markets' Relationship to Auction Process

### 1. Ameren's Position

The Ameren Companies assert that the market for wholesale power is the only source of supply that the Ameren Companies have, and that the proposed competitive procurement auction is the best means of obtaining the lowest price at wholesale. (Ameren brief at 28) The markets have sufficient generation to support the auction, and there is more than adequate capacity in the market to make the auction work. The Ameren Companies also assert that the wholesale market is not flawed, as FERC has found, and noted that the Commission does not have jurisdiction to make an alternative finding.

CUB and the AG argue that the wholesale market is flawed, and that, therefore, the Commission should not approve the auction process or rates that reflect the costs incurred in the wholesale market. The Ameren Companies respond that CUB and the AG have not offered meaningful evidence for their position that the wholesale market is flawed, and do not define the scope of the market to which they refer. CUB and the AG acknowledge that the Ameren Companies have no other available source of power to provide the service their customers seek, and they do not argue that the market is too flawed to serve as a source of power for the Ameren Companies. The Ameren Companies believe that CUB and AG want customers to pay lower costs, but do not identify the means by which the Ameren Companies can find an actual source for power at such lower-than-market price.

The Ameren Companies contend that the State cannot compel the Ameren Companies to "buy high and sell low." (Ameren brief at 27) There is nothing in the record to show that the Ameren Companies have any available lower cost source of supply, or that there is any material flaw in the wholesale markets. In particular, the Ameren Companies complain that CUB witness Fagan and AG witness Rose presented virtually no testimony that is relevant to the issues in this proceeding, which involves whether the Ameren Companies' CPA proposal should be used to procure the supplies needed by the Ameren Companies to provide Basic Generation Service (BGS) post-2006.

Rather, the Ameren Companies assert, the testimony of witnesses Fagan and Rose discusses their view of certain competition and market power-related topics that will not be affected by whether or not the Ameren Companies' CPA proposal is implemented. The Ameren Companies believe that these witnesses' testimony is irrelevant, frequently wrong and/or incomplete.

### 2. Staff's Position

Staff takes the position that any deficiencies in the competitiveness of the retail electricity markets add to the urgency and importance of approving viable and appropriate procurement 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. Purported deficiencies in the competitiveness of retail electricity markets say absolutely nothing about which procurement methods are appropriate for electric utilities to implement. (Staff Brief at 17)

Assessing the competitiveness of electricity markets is not directly pertinent to the debate over how electric utilities in Illinois will acquire electric power to sell to their customers starting in 2007. Staff argues that a real need exists to approve a viable and appropriate procurement method for electric utilities to implement. (Staff brief at 18)

### 3. Constellation Energy Commodities Group's Position

CECG states that if the auction process is approved, there will be substantial participation by suppliers of electricity that will lead to a robust competitive process. CECG asserts that potential bidders are interested in the product, know how to price it, and that competition brings suppliers to the process.

CECG further asserts that the auction process will ensure Ameren procures power and energy in the most cost-effective manner. (CECG Brief at 12)

### 4. DES/USESC

DES/USESC argues that, although there has been demonstrable progress in the development of the competitive retail electric market in Illinois, the majority of Ameren's residential service customers do not have a competitive option. However, DES/USESC believes that barriers to a competitive retail market have been and are being removed in Illinois, albeit slowly, and contends that Illinois law requires active exploration for opportunities to advance competition. (DES/USESC brief at 6-7)

### 5. AG's Position

The AG argues that the wholesale electricity market in and around Illinois is not sufficiently developed at this time, to ensure a level of competition among suppliers that yields competitive prices. There are insufficient safeguards in place to prevent the exercise of market power and inadequate market monitoring mechanisms in place to warrant reliance on the wholesale market to determine retail prices. (AG brief at 20)

The AG further notes that Ameren asserts that "the auction is the best means of obtaining the lowest price at wholesale." The AG argues that the auction proposal would unnecessarily raise electric rates to artificially high levels because all winning bidders would be paid the clearing price, regardless of their cost of supplying electricity.

Unlike a truly competitive market, the auction eliminates any and all pressure on low-cost suppliers to reduce their prices and ensures a producer surplus for those suppliers, at the expense of consumers. If the Commission allows this happen, it will be squandering a significant competitive advantage for the Illinois economy, an advantage that ratepayers deserve after years of paying to build and maintain some of the lowest-cost generators in the United States. (AG reply brief at 20)

**6. CUB's Position**

CUB presents arguments intended to address several issues relating to the sufficiency of the competitive market, namely those addressed in brief outline sections IV.A, E, G and J. (CUB brief at 12-16) CUB asserts that the relative immaturity of the MISO spot energy markets and the insufficient scope of capacity and ancillary service structures in MISO result in a high level of uncertainty concerning the competitiveness of the MISO spot energy markets. CUB further asserts that an immature MISO spot market will result in greater unpredictability and volatility of prices relative to the prices expected from a more mature market.

CUB also asserts that the "seam" between MISO and PJM presents a barrier to effective trade between the regions, illustrating that the seam runs directly across Illinois, separating the wholesale electric markets in Northern Illinois from those in Central and Southern Illinois, and thereby denying Central and Southern Illinois residents the benefits of a cohesive, integrated wholesale marketplace for electricity purchase by prospective retail suppliers.

CUB argues that the seam particularly impacts Illinois, as it slices through the state and leaves approximately two-thirds of the consumers on one side (Northern Illinois) and the remaining third on the other side (Central and Southern Illinois). Thus, two-thirds of the customers will be impacted by wholesale market activity in the western portion of PJM, and one-third of the customers will be impacted by wholesale market activities in central MISO.

According to CUB, the main impact is less efficient energy transactions between the two RTO regions, resulting in greater overall production costs for energy than would be required if a single common market was in place, and likely "distorted" LMPs, or deviations from LMPs that would be expected if a common market were functioning and coordination between RTOs was comprehensive. While PJM and MISO will likely eventually resolve the technical issues to ensure such coordination, it may well be 2008 or beyond before such resolution is assured.

The presence of two sets of rules and practices for ancillary services and for installed capacity leads to additional inefficiencies in the wholesale market.

CUB disputes that existing market monitoring and mitigation rules in place in MISO and PJM are sufficient to address the potential exercise of wholesale market

power in the Illinois region and the resulting increase in prices likely to be seen in the proposed competitive procurement auction.

The ability of the MISO market monitor to impose mitigation is even more limited than the authority of the PJM market monitor. In most of the MISO region, there is no mitigation at all unless the offer prices of a generation supplier exceed either 300% of the "reference level" or $100/MWh, whichever is lower. The result is a reduced ability to ensure that market price outcomes are competitive.

### B. Other Jurisdictions' Experiences with Competitive Electricity Procurement

#### 1. Ameren's Position

Ameren asserts that most restructured states use two general procurement models, labeled as the "standard offer approach" and the "portfolio management approach." (Ameren brief at 29-31) Ameren's survey of procurement approaches in restructured states showed that: (1) nine jurisdictions (including the District of Columbia) use variations of the vertical tranche approach for the post-transition procurement of regulated service supplies; (2) six states use variations of the portfolio management approach for such procurement; and (3) six states either cannot easily be categorized into one of the two general approaches or have not yet made a decision on post-transition competitive procurement.

This review also shows that the vertical tranche approach is the predominant procurement methodology for utilities in states facing policy issues similar to those in Illinois, where: (1) generation assets are no longer cost-of-service regulated; (2) retail access has not been limited or suspended; and (3) restructuring has moved beyond the transition period during which retail rates for regulated service generally are frozen.

In contrast, under the portfolio management approach, the utility retains the day-to-day responsibility for directly procuring resources, managing price and volume risks, and providing full requirements, load-following service for its regulated service customers. This generally would be done according to fairly flexible but commission-approved procurement processes. The contracts within the utility's portfolio could be a variety of energy and capacity products (e.g., baseload, peakload, capacity release option, load following, and ancillary service contracts) of various durations and flexible pricing methodologies tailored to meet the expected demand for regulated service at reasonably stable costs.

Ameren used this review of the experience in other restructured states in its contributions to the Commission' s Post 2006 Initiative, and in developing the Post-2006 framework for the Ameren Companies that was presented to and discussed with Commission Staff and other Stakeholders.

### 2. CECG's Position

CECG notes that Ameren's proposal is modeled after the New Jersey auction process. CECG has been providing wholesale full requirements electricity to utilities in Maine, Massachusetts, New Jersey, and Maryland. CECG asserts that the experience in other states should be considered by the Commission. (CECG brief at 14)

### 3. AG's Position

The AG comments that the state of restructuring in the US has taken a dramatic turn since 2000. Only 16 states and the District of Columbia have fully implemented legislation and commission orders that allow full retail access for all customer groups. Two other states allow retail access only for larger customers. Several states have rolled back restructuring and 26 six states are no longer considering restructuring. (AG brief at 24-25)

States that have used bidding or auctions have experienced have experienced price increases. The increases can not be explained simply by increased fuel costs. Other states have had either flat retail prices or nominal increases because of long term coal contracts. (AG brief at 27)

Maine, Maryland, and Massachusetts rely on the wholesale market to provide for retail customers. They have all seen an increase in rates for residential customers. (AG Brief at 26-29)

The AG urges that in light of the risk of anti-competitive behavior, the difficulty of detection and the cost of mistakes, the Commission should do further analysis before approving a radical change in market design to ensure that market participants do not "outwit the designers" at the expense of Ameren's customers. (AG reply brief at 20-21)

## C. Retail Market Conditions

### 1. Ameren's Position

Ameren believes that the status of residential competition is not relevant and that there is no evidence in the record that residential customers would somehow do better under a competitive retail rate than under a competitive wholesale rate. (Ameren brief at 32) Further, Ameren maintains that the complaints of CUB and the AG regarding the state of the retail market amounts to a proposal for the ICC to set rates below the actual cost of procuring power. Ameren cannot sell at a loss and somehow make it up on volume.

### 2. CES' Position

CES states that the competitive conditions in Illinois have yielded something on the order of $4 billion in savings for Illinois residential and non-residential consumers

since passage of the Restructuring Act. (CES brief at 11) The competitive market in northern Illinois for commercial and industrial customers has developed well, as is evidenced by the portion of load that has moved from bundled service to delivery service. CES asserts that the number of business customers that have switched and the size of the load served demonstrate a developed market. (Id. at 15) Customers have saved in the neighborhood of $1 billion for business customers from the commencement of open access in 1999 to 2004.

Dr. O'Connor outlined the four empirical measures suggesting there has been substantial market development in ComEd's service territory. (CES brief at 14-17)

Although Ameren has made some progress recently to address some of these issues, there is a lack of competition in the Ameren service territories, much of which is due to Ameren's policies and practices, as explained by Dr. O'Connor. The Commission should apply the experiences from the ComEd service area while transitioning to a post-2006 procurement process, so that all Illinois consumers -- including those in Ameren's service territories -- can directly receive the benefits of competition. (CES brief at 17-19)

### 3. AG's Position

The AG comments that many retail markets have remained relatively inactive particularly for smaller residential customers. States that have utilized competitive market procurement have seen significantly greater price increases for electric service increase than states that have retained traditional regulatory processes.

The failure of competition to constrain prices and provide efficient and fair prices is shown in those states that have attempted to procure power exclusively from competitive markets. Learning from the experiences of other states can save Illinois consumers up to a billion dollars per year, while insuring safe, adequate and reliable electric service. (AG brief at 33)

The AG's position is simple: the Ameren Companies should recover any and all wholesale power costs that are reasonably and prudently incurred. A utility that procures electricity by shopping among the lowest-cost generators and negotiating the best price possible for consumers is more likely to meet the reasonable and prudent standard than a utility that casts consumers' fate to the wind in an auction process that awards all bidders the auction clearing price set by the highest-cost winning bidder. (AG reply brief at 22)

#### 4. IIEC's Position

IIEC argues that Illinois customers are not currently getting the full benefits of a competitive market and that is illustrated by the wide disparity between the number of RESs serving customers in the Ameren territory and the number of potential wholesale suppliers who might participate in the proposed auctions. Only five or six RESs operated in the Ameren territory while more than 30 wholesale suppliers might participate in the proposed wholesale auctions. (IIEC brief at 10)

In the segment of the retail supply market that many consider to be the one in which retail suppliers are most likely to compete, the level of retail supplier activity has been unimpressive. IIEC believes this is due in part to the Reciprocity Clause which has stymied the development of a fully open competitive retail supply market. (Id. at 12)

### D. Relevant Product Market

Regarding "**required products**," the Ameren Companies' required products are, in the initial auction, one-, two- and three-year requirements contracts for 50 MW tranches, and in subsequent auctions, three-year requirements for 50 MW tranches. According to Ameren, there is no evidence that these products are unavailable or that any seller or group of sellers dominates the market for these contracts.

Regarding Section IV.D.3, **MISO capacity market**, the **Ameren Companies** claim testimony about the absence of MISO-administered installed capacity markets is a red-herring in the context of this proceeding and does not raise any competitive issues. (Ameren brief at 33-34) If the absence of such centralized installed capacity markets presents any real problems, those problems will be just as present under any alternative BGS supply procurement regime as they will be if Ameren's CPA proposal is implemented.

Moreover, testimony on this topic is also incomplete and/or wrong, because the unstated assumption is that if generating resources do not receive capacity payments through MISO-administered capacity markets, they will not receive any capacity payments at all. That is not correct because capacity can be sold in bilateral capacity markets, not only through a MISO-administered market. Even if there were a MISO-administered capacity market, it is reasonable to think that a large quantity of capacity still would trade bilaterally anyway. Even ignoring that there are alternative mechanisms for generators to receive capacity payments today, Ameren believes the concern about higher energy market prices ignores that the very capacity payments required to make the energy market prices lower will impose an additional cost on customers. Ameren asserts that its customers are not interested in just lower energy market prices but lower prices for the package of electricity products they need. (Ameren brief at 33-34)

The **AG** states that capacity markets are relevant to the proposed auction process because potential auction participants that do not have available capacity of

their own will have to procure capacity from firms that do have capacity. Since MISO has not yet developed a capacity market, firms that do not have their own capacity would have limited options for participation in the Ameren auction. This problem, along with the high levels of market concentration in and around the Ameren service territory, would make it difficult for suppliers that do not have their own capacity to participate in Ameren's proposed auction. (AG brief at 32)

### E. Relevant Geographic Market; MISO/PJM Seam & Joint Operating Agreement

Ameren responds that CUB's concerns, whatever their validity, would apply equally if Ameren's proposed CPA is implemented or if any alternative to it is implemented. Accordingly, issues concerning the PJM-MISO "seam" are simply not relevant in trying to decide whether the Ameren Companies' CPA should be used to procure electricity supply for BGS post-2006.

Ameren claims CUB has overstated the significance of the PJM-MISO seam, as there is more than 120,000 MW of generation capacity within MISO that is deliverable to MISO load. Ameren asserts that even if the PJM-MISO seam absolutely precluded generators in PJM from bidding in the Ameren Companies' proposed CPA, the generation located within MISO should be more than sufficient to support CPA bidders' requirements.

To the extent that seams concerns arise because of "pancaking" of transmission charges, that concern already has been eliminated, as the transmission charge for delivery to a MISO sink is the same whether the source is in PJM or MISO. There is a Joint Operating Agreement (JOA) in place between PJM and MISO that provides for certain coordination between the two Regional Transmission Organizations, including, among other things, the exchange of data concerning TTC, ATC and AFC computations, the coordination of outages, and seeking to make LMP computations consistent.

### F. Market Characteristics, Including Supplier Concentration

#### 1. Ameren's Position

The Ameren Companies assert that it is difficult to see how any relative immaturity of the MISO's electricity markets has any relevance to issues concerning how the Ameren Companies will procure electricity to meet their BGS obligations during the post-2006 time period. (Ameren brief at 35-41) They argue that the relative maturity of the MISO's electricity markets is what it is and will be precisely the same whether the Ameren Companies' proposed CPA is used to procure supply to provide BGS during the post-2006 time period or whether some other procurement vehicle is used, such as a Request for Proposal (RFP) process or bilateral contracting.

To the extent that the supposed immaturity of the MISO's markets somehow causes prices to be "too high" in some sense under one procurement regime, it will also cause prices to be "too high" under another procurement regime. The auction proposal neither creates nor exacerbates the supposed problem.

When Ameren Companies go to the market to procure supply, they can expect to pay the market price no matter what procurement system they use. If the market in which they purchase is "less-than-perfect" in all respects, then that is the way it is, but it is that same way for the proposed CPA and any other alternatives. There should be no reasonable expectation that any alternative to the CPA will somehow allow supplies to be purchased at less-than-market prices. If certain intervenors believe that there is some way for the Ameren Companies to purchase at less-than-market prices, they did not outline how this might occur, but any such assumption would not be reasonable.

The MISO is not implementing an untried system. There is substantial experience in PJM, New York and New England with systems similar to what MISO is implementing (e.g., the use of centralized, security constrained economic dispatch, locational marginal prices or LMPs, financial transmission rights or FTRs and independent market monitoring and mitigation), and it is reasonable to think that MISO will learn from the experiences in these other areas. Moreover, even if there are some minor and temporary problems during the initial operation period, the MISO and market participants should have ample time to make whatever adjustments are required in the 21-month period between the beginning of Day 2 markets on April 1, 2005 and the January 1, 2007 date at which supplies procured under the CPA will be used to provide BGS.(Ameren brief at 38)

While it is true that the MISO does not currently operate centralized regulation and operating reserves markets and that, when MISO is able to implement such markets, more efficient commitment and dispatch may ensue, this same situation will exist whether the Ameren Companies' CPA proposal is adopted for procuring post-2006 supplies to provide BGS during the post-2006 time period or whether some other approach is used. The MISO's operation does not have to be perfect in all respects in order for it to provide benefits to auction participants.

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 Moreover, the ownership of generation capacity within the MISO footprint is "unconcentrated" when determined using the Herfindahl-Hirschman Index (HHI). 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.

### 2. AG's Position

The **AG** asserts that the wholesale electricity market in and around Illinois is not sufficiently developed to ensure a level of competition among suppliers that would yield

competitive prices. Further, there are insufficient safeguards in place to prevent the exercise of market power and inadequate market monitoring mechanisms in place to warrant reliance on the wholesale market to determine retail prices. (AG brief at 33-38)

The MISO market is too new and too highly concentrated in the area around Ameren's Illinois service territory to support the proposed auction. Market concentration tests show the Ameren Control Area energy and capacity markets are highly concentrated, and there is an extremely high concentration of generation ownership in the Ameren Control Area. The potential for collusion, strategic-bidding and other types of anti-competitive behavior increases with market concentration. (AG brief at 35-38)

### G. Transmission Constraints

The **Ameren Companies** allege that Central and Southern Illinois area is not encumbered by significant transmission constraints. (Ameren brief at 41-42) MISO's independent market monitor has examined the potential for transmission constraints within the MISO footprint to create market power problems and has determined that the Central and Southern Illinois area should not be classified as a Narrow Constrained Area where more severe market power mitigation measures would be appropriate. To the extent that market power concerns do arise as a result of transmission constraints affecting Central and Southern Illinois, the appropriately less-stringent standards for Broad Constrained Areas in MISO would apply.

The discussion concerning transmission constraints did not discuss any Illinois-specific transmission limits, but rather the results from a study that was nationwide in scope. It is difficult to see how any overall nationwide decline in transmission investment relates either to Illinois or the Ameren Companies' proposed CPA, especially in the face of the above-noted statements from MISO that transmission limits are not a problem in Central and Southern Illinois. According to the Ameren Companies, even if there were concerns about transmission adequacy in Illinois, those concerns would be present under the Ameren Companies' proposed CPA or under any alternative procurement regime.

The **AG** notes that in recent years, the electric transmission system has been required to perform two critical functions. The first is the traditional and important task of maintaining system reliability. To perform this function the system must be able to meet energy and demand requirements at all times and to withstand sudden system disturbances. It appears, at this time, that the Illinois region's ability to meet this reliability requirement is adequate in the near term.

According to the AG, the electrical system is now also being required to provide a second critical function: market support. In a 2003 report, the North American Electric Reliability Council noted that "the transmission system is being subjected to flows in magnitudes and directions that were not contemplated when it was designed or for which there is minimal operating experience."

The AG argues that if this trend of local transmission construction continues as expected, it presents a serious challenge to the development of competitive wholesale markets. While this problem is recognized and is being addressed by both PJM and the Midwest ISO (and other ISOs and RTOs as well), it will, at best, take many years to remove transmission constraints and to reach a point where the transmission system can provide the open access needed to support a more developed competitive wholesale market.

Ameren apparently assumes that because MISO is operating the markets and maintaining system reliability, and because these markets are active and have forward markets present, that this implies the market is competitive. The AG argues that Ameren is confusing market activity with degree of competitiveness and that there is not yet enough information on which to base a conclusion that regional wholesale electricity markets are sufficiently competitive to support an auction. (AG brief at 40-41)

### H. Limitations on Generator Entry

The **Ameren Companies** assert there is no evidence in the record that there are any material limitations on generator entry.

The **AG** asserts that the easier it is for new suppliers to enter a market, the more difficult it is for the existing supplier or suppliers to maintain a price above a competitive level and earn economic rents through the exercise of market power. (AG brief at 41) There are two primary means by which new entrants can enter a market. They can either build new generation capacity within the region or use the transmission system to import electricity from outside the area (either from their own generating facilities or by purchasing power from another source). Building new generation capacity and expanding transmission capacity to increase import capabilities require long lead times to, for example, obtain site permissions, construct facilities, and secure fuel supplies and transmission access. According to the AG, new entrants face significant market risk and uncertainty.

### I. Relationship to Service to Small Commercial and Residential Customers

The AG argues that Ameren's proposed tariff uses an auction to facilitate " . . . market-based pricing for full requirements electric supply . . . [and] determines retail charges for full requirements electric supply based upon the results of the auctions using formulae provided in the Translation to Retail Charges" portion of the tariff. Since wholesale market-based prices are used to determine retail charges, wholesale market conditions directly impact retail rates. If an auction were to be held before wholesale markets are fully functioning and competitive, the auction would likely produce artificially high wholesale prices for electricity which, in turn, would artificially increase retail rates. (AG brief at 41-43)

The AG argues that small commercial and residential customers would be forced to pay these increased rates because Ameren is the only electricity supplier available to these captive customers and because demand for electricity is very inelastic, especially in the short run. The reason for inelasticity in the demand for electricity is that there are few substitutes that customers can switch to quickly.

### J. Market Rules and Monitoring

The **Ameren Companies** believe that market power at the wholesale level is not relevant to whether the Ameren Companies' auction proposal should be approved. **If** market power exists within the MISO footprint, that situation will exist regardless of whether the auction proposal or other mechanism is adopted for procuring post-2006 power**.** The Ameren Companies argue that the auction will neither create nor exacerbate this state of affairs. (Ameren brief at 42-44)

The Ameren Companies take issue with the CUB position that MISO's market mitigation measures are inadequate because they allow mitigated prices to rise too much above marginal cost. The Ameren Companies argue that this extreme position ignores both the generator's need to recover their fixed costs and the general desire to rely on market forces (rather than regulatory processes) to determine the generator's planning and operating decisions.

There are other important features of the MISO's rules that prevent the exercise of market power. According to the Ameren Companies, potential bidders can 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 were able to exercise market power. Also, MISO can, under certain circumstances, order the generating capacity withheld from the market to be operated. Namely, the MISO can require units to be operated in order to provide the needed reactive power. This might defeat the expected price rise from the withholding if the withholding of generation capacity creates reactive power problems.

The **AG** states MISO has an IMM that periodically examines the MISO market conditions. The IMM's analysis is not sufficiently detailed to determine the extent to which relevant wholesale markets are competitive. Conditions are such that is it possible that market power could be or is being exercised. An independent analysis would help shed some light on this important issue.

The AG recommends that the ICC specify wholesale market conditions that must be met before that market is used to procure electricity, "manage" risk, and set rates for Illinois retail customers. Once those criteria are established, the ICC should conduct a comprehensive and rigorous analysis of the Illinois regional wholesale market, to determine the likely outcome of using that market to determine retail prices. The study should assess the potential for strategic bidding, collusion or related anti-competitive activities -- to ensure that market participants cannot outwit the designers in Illinois.

These initial studies could serve as a foundation for on-going analysis of the Illinois regional wholesale market. (AG brief at 43)

### K. Commission Conclusions

Having reviewed the record, the Commission first observes that the parties' analyses on all sides of this complicated issue are informative and useful in gaining an understanding of it.

The Commission next notes, as suggested by Staff and the Ameren Companies, that those utilities must purchase their electric supply from the wholesale markets after the close of the mandatory transition period. That is, regardless of the state of those markets in terms of competitiveness, or issues raised in relation thereto such as "seams" or market power, the Ameren utilities must rely on them for power supply regardless of whether they do through an auction process or some other means.

As explained by Staff, "Thus, even if the AG and CUB witnesses' concerns 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." Staff adds, ". . . Staff does not see how those concerns eliminate the need for utilities to acquire power and energy from those wholesale markets." (Staff brief at 20-21) The Commission believes the Staff perspective is generally correct.

In this proceeding, the Commission certainly does not intend to trivialize the importance of the concerns that were raised regarding alleged competitive deficiencies in the pertinent markets. Whatever those concerns may be, however, the record does not indicate that they would satisfied if an auction process were rejected in favor of some other method of procurement from the wholesale market. Simply rejecting the auction would not make capacity any more readily available within MISO, where the Ameren Companies operate, than it would be in the auction scenario.

In addition, as suggested by some parties, it appears that the competitiveness of the wholesale markets, and many of issues relating thereto, are matters more within the control of FERC and MISO than this Commission. As noted in the record and elsewhere in this order, it appears that the Ameren Companies will be seeking approval of their proposal from FERC, which will presumably review the reasonableness of it in the scope and manner deemed appropriate.

## V. AUCTION DESIGN ISSUES

For the most part, Auction Design" issues were addressed in Section V of the parties' briefs. The parties' arguments on these issues are summarized below. Unless otherwise indicated, assertions contained in these summaries represent the positions of the parties, not findings by the Commission.

## A. General Effectiveness and Suitability

### 1. Comments of Parties

The **Ameren Companies** comments on the general effectiveness and suitability of its proposal are contained on pages 44-47 of its brief. They propose a multiple round descending clock format auction to acquire vertical tranches of power to serve their customers starting in 2007, asserting that the proposed auction process is the best method of procuring supply for the Ameren Companies' customers in the post-2006 period. They claim the proposed auction design is a tried-and-tested, successful process to acquire power and energy, and that this process is in accord with Federal Energy Regulatory Commission ("FERC") guidelines and has been sanctioned by other states' regulatory bodies.

The Ameren Companies do not own any significant amount of generation capacity. Accordingly, each must purchase its supply in order to provide any generation service.

With the proposed vertical tranche auction, the Ameren Companies will obtain reliable supply at a cost that is determined as the result of competition and consistent with market conditions, and the use of the auction to obtain longer-term products (i.e., 1, 2 and 3-year contracts in the first auction) protects small customers from the volatility of short-term market fluctuations and promotes the participation of all market participants on a fair and equal basis. The proposal includes reasonable protections against anti-competitive behavior and provides an objective and clear method for determining winning BGS Suppliers and final auction prices. As proposed by the Ameren Companies, the Commission would be directly involved in and have oversight of the auction process.

An open auction is an effective way of eliciting the best bids when all bidders are evaluating a common market opportunity and to get competitive prices consistent with the market and can be expected to lead to the efficient allocation of the supply responsibility over the different products requested by the Ameren Companies.

The proposal includes several competitive safeguards to protect against potential anti-competitive behaviors. The Associations and Confidential Information ("A&CI") rules will minimize the scope for anti-competitive behavior in each segment of the auction.

The Ameren Companies point out that that Staff recommends approval of the use of a simultaneous descending clock auction with vertical tranches for Ameren Companies' CPA. They further note that other parties, including both potential wholesale suppliers and retail suppliers, support the Ameren Companies' proposed auction, including Dynegy, CCG and the Coalition of Energy Suppliers ("CES").

**Staff** concludes that the basic SDCA auction concept, as proposed by the Ameren Companies and endorsed by Staff, is an appropriate competitive procurement

method for securing power supply commitments for serving Ameren's retail customers. Hence, Staff recommends that the Commission approve the basic SDCA approach. In making this recommendation, Staff is not tacitly endorsing other aspects of the proposed auction process or other aspects of the Ameren Companies' proposal in this case.

The **AG** asserts that the full requirements, vertical tranche, declining clock auction proposed by Ameren is not well suited for supplying electricity to Ameren's customers. (AG brief at 44-47) The auction would result in a uniform price that all suppliers receive, irrespective of their costs or their ability to sell at a lower price.

Electricity is generated by different methods, including the use of nuclear fuel, various types of coal, natural gas, oil and renewable energies such as wind and each of these processes has distinct costs. Under the auction proposed by Ameren, however, low cost producers of electricity who use nuclear energy or coal can obtain prices based on the higher market prices for coal or natural gas.

The immaturity of the MISO RTO is another factor that may unduly raise the prices of electricity obtained through a clearing price auction. MISO began operations barely seven months ago, on April 1, 2005. The risks to consumers are too great to entrust the entire load of central and southern Illinois to a system that is too new to have instilled confidence in its smooth operation.

Because Ameren's proposal would allow MISO and PJM wholesale prices to influence the clearing price, Illinois consumers' rates could increase irrespective of suppliers' actual costs to produce power because MISO's prices would push the auction prices upward.

Additionally, the auction format proposed by Ameren produces undue risks to consumers by holding a single, annual auction for multi-year supply. A single auction for an 8,000 MW obligation is substantial, and obtaining it all at one time puts consumers at risk for all of their supply. Ameren's decision to terminate all of its existing contracts so that all supply would be open at the same time exposes consumers to the risk that the time of the auction might be inauspicious, and drive up prices due to short-term concerns. Securing all supply in a single auction would prevent the company from minimizing the effect of adverse circumstances by spreading its purchases over a greater time frame.

The general structure of Ameren's proposed auction will result in unjust and unnecessary price increases, and rob Illinois consumers of the value of local, low cost generation, which Ameren consumers have paid for over the years through rates that included return on investment and depreciation expense. The annual auction structure, in particular the first auction, will expose consumers to undue risk by exposing all of Ameren load to a single procurement. The Commission should reject Ameren's proposal as ill-suited to Illinois.

DES argues that the Commission should direct the Ameren Companies to make two fundamental changes to its competitive procurement proposal. (DES brief at 12-15) First, the Ameren Companies' proposal improperly relies upon contracts longer than one year, and because of their long terms, such contracts are saddled with an elevated risk premium. Consumers may pay higher default service prices than they would under a model with shorter-term contracts and these long-term contracts also remove the impact of changes in market price driven by supply and demand.

Such price distortions can contribute to a lack of demand-side reductions, and increased environmental harm due to increased energy consumption. The Ameren Companies' proposal segments the availability of auction products to customers by demand level in a way that could hinder the further development of competition. If customers are to fully realize the benefits of a competitive market, multiple products must be offered by multiple suppliers to a full range of customers.

According to CUB, the auction is structured to financially benefit Ameren Corporation and Ameren Energy Resources (the generating companies) to the detriment of the Ameren Companies' customers because Ameren Energy Resources is able to produce power at a very low cost. (CUB brief at 17-18) The auction process also is designed to avoid or overcome FERC scrutiny.

MWGen supports the auction design as currently proposed by the Ameren Companies, as it allows them to take advantage of competition in procuring goods and services in an efficient manner and has been previously used and refined in New Jersey to sell BGS. The auction will be transparent and will encourage BGS Suppliers to participate so long as it is commercially fair and reasonable in its terms. The proposed auction makes available the benefits of market competition while also providing to retail customers reasonably stable rates, and the auction is subject to regulatory review.

### 2. Commission Conclusion

In recognition of the upcoming need for adequate, reliable power and energy supply for Illinois customers after 2006, the Commission initiated the Post-2006 Initiative. That Initiative featured participation from Staff and a wide variety of stakeholders, who identified 18 characteristics of an ideal procurement process to serve as benchmarks for evaluating alternatives. The results of extensive presentations and evaluation by participants suggested that a vertical tranche auction may best meet the goals of providing adequate power supply at the best prices for consumers, as suggested in the Staff Final Report of the Post 2006 Initiative.

In the instant docket, Ameren seeks Commission authorization to use a vertical tranche auction for that purpose. Based on the record presented in the instant docket, the Commission finds that the vertical tranche auction proposed by the Ameren Companies, subject to the modifications and conditions found appropriate herein, best meets the needs of Ameren Companies' customers in providing adequate, reliable, and reasonably priced supply post-2006.

The Commission also observes that there may be some misunderstanding on the part of some parties as to how the auction will actually work. The auction is for tranches or slices of the annual Ameren load. Some arguments by the AG seem to assume a supplier may choose to bid on either peak or baseload demand. That is not the case under the proposed auction.

### B. Full Requirements Product

#### 1. Positions of Parties

The **Ameren Companies** propose to procure power through the auction of individual load shares or "tranches" of fixed-priced, full-requirements wholesale electric power supply that includes both capacity and energy. (Ameren brief at 47-55) The tranches will represent a fixed percentage of BGS load for a particular group of customers. Each tranche of BGS supply would be sized to be approximately 50 MW of peak load for the subject group. BGS suppliers will enter into "load following" full-requirements contracts, and as such the risk of volume fluctuation is on the supplier.

Full-requirements service includes energy, capacity, all losses and congestion costs, as well as any other services as may be required by the Midwest Independent Transmission Service Organization (the "MISO"), but excludes Network Integration Transmission Service ("NITS"). As the Load Serving Entity ("LSE"), the Ameren Companies would provide NITS and acquire the necessary ancillary services. Each BGS Supplier is financially responsible for reimbursing the Ameren Companies for the costs of ancillary services that they will acquire.

The full-requirements product places risk management responsibility in the hands of competitive entities that are best suited to take, manage, and price these risks.

**Staff** informs that "tranche" is a French word meaning "slice" and defining the basic product as a slice of the Company's full requirements essentially shifts the burden of generation portfolio decision-making from the Company (and to some extent, the Commission) to the suppliers.

Alternatives to procuring vertical tranches of the Company's full requirements load would entail procuring an appropriate array of specific types of supply contracts and/or generating assets (e.g., an appropriate assortment of contracts or assets designed to serve base-load, intermediate-load, and peaking-load). Although some intervenors in this docket proposed considering such "active portfolio management" alternatives, Staff opposes them.

Staff agrees that the full-requirements product directly contributes to fulfilling the goal of having competitive entities take, manage and price BGS risks. The full-requirements product places price-risk management responsibility in the hands of competitive entities that are best suited to manage and price these risks. The full-

requirements product contributes to the goal of maximizing participation. It expands the base of potential competitors, including financial players and marketers and traders without an asset base in PJM. Those entities are able to use specialized skills in price-risk management to assemble wholesale portfolios and compete in the auction.

Staff further agrees that a full-requirements product contributes to the goal of minimizing customer confusion and encouraging efficient retail markets.

Thus, Staff recommends that the Commission approve the basic full-requirements product concept in this docket. In making this recommendation, Staff is not endorsing other aspects of the proposed auction process or other aspects of the Company's proposal in this case. (Staff brief at 30-32))

The **AG** states that full-requirements, load following contracts put the risk of volume fluctuation exclusively on the BGS Supplier. Each BGS Supplier will build the risk of this uncertainty, which implicates among other things weather, economic conditions, and customer switching, into their bids by including a risk premium.

The Ameren Companies did not present or conduct any study assessing the size of the risk premium that may be included in the bid price. In the absence of evidence about the magnitude of the risk premium that could be expected in contracts to serve vertical tranche, full-requirements contracts, consumers are left vulnerable to paying excessively high prices to cover risks that could be more economically managed. (AG brief at 47-48)

### 2. Commission Conclusion

Having reviewed the record, the Commission concludes that, on balance, the Ameren Companies' proposal to obtain a "full-requirements" product through the auction process is reasonable. Successfully managing an energy portfolio requires that a sufficient amount of energy is available to serve customers' needs, while safeguarding against paying for energy that is not needed. In terms of adequately meeting energy supply requirements that vary widely by month and by time of day, and in response to particular events, a utility without substantial generation assets would be left vulnerable to certain risks.

The Ameren Companies' proposal for a full-requirements auction product is designed to ensure that customers have adequate energy supply, and pay only for the energy that they use. In shifting the risk from customers to BGS Suppliers, customers are provided an adequate electric supply while at the same time gaining rate stability.

## C. Multiple Round Descending Clock Format

### 1. Load Caps

#### a. Positions of Parties

The **Ameren Companies** explained that load caps limit the number of tranches that a single bidder can bid and win in the auction. (Ameren brief at 58; Resp. Ex. 10.0 at 9) Load caps are one of the auction's competitive safeguards because they (a) limit the influence that a bidder can have on the auction results; (b) act as a complement to the provisions for volume reduction by limiting the extent to which each bidder can inflate its interest in the auction and mislead the Auction Manager; and (c) diversify the exposure to any one particular BGS Supplier's contract and credit risks, by preventing the supply agreements from being concentrated in a few large BGS Suppliers.

The Ameren Companies initially proposed that each potential BGS Supplier's participation in the auction be limited by a 50 % load cap. They said this load cap set a balance between a lower load cap's costs in terms of limiting participation, and potential benefits in terms of limiting overstatement of interest, curbing influence on the auction results, and promoting diversification of the BGS Supplier base. However, in response to Staff's and parties' positions on load caps, the Ameren Companies proposed a revised load cap of 35%.

The Ameren Companies assert that the 100% load cap, suggested by IIEC witness Mr. Collins, does not achieve this balance because a 100% load cap 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 of diversification of the BGS Supplier base.

The position of **Staff** is that the evidence supports the Company's 35% load cap proposal. Staff states that the 35% cap is within the range recommended by Staff and MidWest Gen and is supported by all parties except IIEC. (Staff brief at 32-35)

**MWGen** supports the currently proposed load cap of 35% as appropriate for the procurement auction. (MWGen brief at 6-11) A load cap limits the number of tranches that any single auction participant can obtain and has four related purposes: (1) to increase supplier diversity; (2) to reduce the likelihood that a given share of load will be subject to default; (3) to reduce the impact resulting from any single supplier's default; and (4) to increase the supplies available on the wholesale market underlying the auction by limiting the extent of direct auction participation by owners of physical generation assets, thereby promoting more robust auction bidding by marketer/traders and other participants that do not own significant physical generation assets.

MWGen says IIEC's opposition is based on the belief that a load cap might increase costs to consumers by limiting the amount of load that low cost suppliers could serve. MWGen further argues that although this is a legitimate concern, it is also true

that the objectives of a load cap identified above operate to decrease cost and risk for the utility and its customers. Moreover, no evidence supports the conclusion that eliminating a load cap is likely to result in lower costs.

To the extent that a 35% load cap induces certain generation owners to commit fewer generation resources directly into the auction, more generation resources potentially will be available for sale in the underlying wholesale energy markets that backstop the auction. If, in this fashion, a lower load cap facilitates a more liquid underlying wholesale market (e.g., for various forward and spot purchases), then the lower load cap potentially could encourage more breadth of participation and bidding by pure marketer/traders and other potential auction participants who do not have significant generation resources to cover their own load interest. Thus, according to MWGen, a 35% load cap will result in more auction participants with increased initial interest in tranches, which is pro-competitive and likely to facilitate lower auction prices.

A 35% cap also prevents exaggerated statements by potential suppliers of initial interest which might otherwise result in mis-sizing of the auction. (MWGen brief at 8) MWGen believes that supplier participation in an Ameren auction will be strong enough that a load cap of 35 % will not overly constrain participation. The proposed 35% load cap comports with the New Jersey BGS auction, which limits participants to no more than 33% of available fixed-price tranches in any single auction.

**IIEC** opposes the proposed load cap. (IIEC brief at 12-21) It regards the imposition of the load cap as an “artificial barrier” to open competition and supply at the lowest prices. The cap would prevent any single supplier from winning contracts to supply more than a set percentage of the auctioned load (expressed in number of tranches) -- even if its bid would result in substantially lower prices to Ameren and its retail bundled service customers. Efficient suppliers, 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. A predictable consequence of such limitations would be a higher auction clearing price and thus a higher price to consumers. Even if such suppliers sold their “excess” supplies to other bidders, retail customers would not be supplied at the lower cost otherwise available. IIEC further argues that those efficient, lower priced supplies could only be provided through a winning “middleman-bidder” who would impose its own markup on the low-price supply.

IIEC supports participation by as many suppliers as can reliably and economically provide supply. IIEC disagrees that a load cap is the way to promote robust competition in the auction. The fact that an auction may have more bidders does not mean there will be more low-cost or low price suppliers competing in the auction. Even if a load cap encouraged a larger number of suppliers to participate, elimination of low-price or low-cost bids via the load cap, nonetheless, will reduce the competitiveness of the auction, and in turn increase the auction clearing price.

Marketers and traders with superior risk management capabilities, like generation owners, may elect to skip Illinois' auction if the number of tranches they are permitted to bid on and win is too low to be profitable or efficient. The level of participation by efficient, low-cost or low-price suppliers should not be curtailed for the sake of an appearance of competition. (IIEC brief at 15)

IIEC argues that Ameren, Staff, and MWGen -- the principal advocates for load caps -- have not shown that any load cap is more beneficial than harmful to the results of the auction. A 35% load cap would be more harmful to open competition (and potentially auction clearing prices) than Ameren's original 50% load cap proposal. The Commission should reject the artificial barrier to full competition represented by the proposed load cap.

In its reply brief, page 27, the **AG** joins IIEC in opposing load caps, at any level, in the proposed auction.

#### b. Commission Conclusion

The Commission concludes that the load cap proposed by Ameren, now set at 35% in response to concerns expressed by Staff, is appropriate. Load caps serve as a competitive safeguard, limiting the influence that any one bidder can have on the results of the auction. At the same time, load caps reduce the risk, to the utility and its customers, that is associated with reliance on any one particular supplier.

Staff and the most stakeholders who have weighed in on the issue agree with the 35% load cap. IIEC argues that load caps could adversely impact the competitiveness of the auction in some situations. While that argument warrants consideration, the Commission finds that the benefits provided by a load cap, as cited above, outweigh any potential disadvantages. Looking ahead, the Commission believes load cap issues may well be candidates for reconsideration after the first auction has been completed.

### 2. Starting Prices

#### a. Parties' Positions

The **Ameren Companies** testified that the Auction Manager and the Ameren Companies, in consultation with Staff, would set a minimum and maximum starting price for each segment of the auction. As part of the application process, bidders submit indicative offers at the minimum and at the maximum starting prices.

These indicative offers represent the bidders' maximum interest at each of these prices. The Auction Manager and Ameren Companies, in consultation with Staff, would set round one prices between the minimum and maximum starting prices. (Ameren brief at 60)

**Staff** states that in a descending clock auction, prices start high and tick down over time during the course of the auction. (Staff brief at 36) Staff said that no party offered testimony objecting to the "description," "purpose," and "mechanics" of determining starting prices as explained by Dr. LaCasse. Staff recommends that the Commission approve the Company's proposal with respect to the auction's starting prices.

In its briefs, the **AG** complains that no prediction of starting prices appears in the record and the auction manual and rules fail to provide any information about how the opening prices are set. (AG brief at 48-49; reply brief at 28)

The AG argues that Ameren failed to include an estimate of starting bids or a method for determining the maximum and minimum opening bids, and that the Commission cannot approve such an open-ended process without violating the PUA's requirement that it only allow rates that are just and reasonable. (220 ILCS 5/9-101)

In response to arguments raised in the AG's brief, **Staff** and **Ameren** contend that providing starting prices or a range of prices in this docket, a year before the auction, would not only be premature but also harmful to bidder interest and participation in the auction. (Staff reply brief at 37-39; Ameren reply brief at 21-23)

Ameren further explains that starting prices are set between the minimum and maximum starting prices based on the indicative offers identified by potential bidders in the Part 2 Application, and that the process is explained in detail in the record. Ameren adds that starting prices only determine the price in the first round not the final auction clearing price. Beginning with the first round price, bidders effectively bid prices down from the starting price until the auction achieves a balance of supply and demand. The final price is determined by this perceived value, not the starting price.

#### b. Commission Conclusion

The Commission finds that the Ameren Companies' proposal contains an appropriate methodology for establishing the starting prices, and is described in some detail in the evidentiary record. The Attorney General's position that possible starting bids should be revealed at this juncture is not persuasive, as the determination of starting bids should rely on current market data which can only be assessed near the time of the auction. Also, the Commission Staff's involvement in developing the starting price in conjunction with the Auction Manager and the Ameren Companies will provide safeguards for consumer interests.

The AG's legal objections to the auction process are addressed elsewhere in this order.

### 3. Bid Decrements

The bid decrement is the amount by which the tranche price falls from round to round during the auction. By way of background, Staff explains that the auction proceeds in biddings rounds, in which suppliers bid quantities in response to the prevailing prices announced by the Auction Manager. In the initial round, the price is set relatively high. Between rounds, the price for each product either ticks down or remains the same. The price ticks down when there is excess supply for that product (i.e., when the total number bids for tranches exceeds the target number of tranches sought by the Company for that product). Otherwise (when there is no excess supply for a product), the price remains the same. When there is no longer any excess supply for any of the products, the auction ends. Among the auction rule details is the precise manner in which prices would change between rounds. (Staff brief at 37-39)

The Ameren Companies proposed a simple formula by which the Auction Manager will decrement the tranche prices, taking into account the amount of excess supply for each auction product. Under the Ameren Companies' proposal, all registered bidders would receive a copy of the price decrement formulas.

The Ameren Companies explained that for the auction to work well, there must be some relationship between the excess supply on a product and the tick down on the product.

Staff witness Dr. Salant raised a concern that bidders could use the simple formulas to infer the amount of excess supply and some bidders could achieve an advantage over other bidders. In response, the Ameren Companies proposed a revised bid decrement formula which would not allow bidders to infer the amount of excess supply, even if they know the price decrement formulas. (Ameren brief at 61-62) The Companies state that "the Auction Manager will develop the precise price decrement formulas and parameters in consultation with Staff after approval of the auction." (Id. at 62) They further add that the guidelines should be disclosed to registered bidders. (Id.)

Staff concurs in this recommendation. (Staff reply brief at 39)

Having reviewed the record, the Commission concludes that the proposal ultimately advanced by the Ameren Companies and Staff is appropriate. Price decrement formulas will be provided to bidders in a way that precludes bidders from making inferences about excess supply toward the end of the auction. As such, the proposal represents a reasonable effort to balance two conflicting consequences of providing excess supply feedback. That is, providing too much feedback may empower a bidder to stop the auction prematurely at an elevated price, while providing too little feedback may lead to more timid bidding. The Commission also finds that the Auction Manager should consult with Staff in finalizing these formulas, which would be revealed to bidders prior to the auction in an Auction Manual.

### 4. Auction Volume Reductions

One of the elements of Ameren's proposal is auction volume cutbacks, a process by which the Auction Manager reduces the amount of power acquired in an auction if necessary to ensure a competitive bidding environment. The purpose is to address a situation where auction participation is lower than expected and where auction prices may not reach competitive levels. The Ameren Companies assert that the detailed volume reduction formulae must be kept secret from bidders to prevent unfair manipulation of the auction process. (Ameren brief at 62-63, reply brief at 24-25)

Staff initially recommended that the Auction Manager be permitted to make volume reductions to exert pressure on BGS Suppliers, but Staff ultimately recommended that the Commission accept the Ameren Companies' auction reduction proposal, with the following provisos: (a) Staff and the Auction Manager must still address the competitiveness of the auction in their reports to the Commission; (b) the Commission should have the final word (based on the Auction Manager and Staff reports) on the competitiveness of the auction when it determines whether to approve the auction results or to open an investigation; (c) the detailed volume reduction guidelines should be developed by the Auction Manager and Staff in compliance with the Commission order in this proceeding and that these guidelines should be held in strict confidentiality. (Staff brief at 37-39) Ameren concurs. (Ameren reply brief at 25)

Staff agrees that strict confidentiality should be maintained over the detailed volume reduction guidelines that are yet to be developed. Staff believes that it is important that bidders not be made privy to these detailed guidelines. Staff agrees that the Auction Manager and the Staff (with the assistance of any expert auction advisors that Staff may engage) should work together to develop those detailed guidelines in compliance with whatever order the Commission should hand down in this docket.

Generally speaking, Dynegy also recommends that the Ameren Companies' proposed auction volume reduction guidelines be adopted. (Dynegy brief at 5-6)

Having reviewed the record, the Commission finds that Ameren's volume reduction proposal should be authorized, subject to the conditions recommended by Staff as identified above. As explained above, volumes cutbacks are intended to be a competitive safeguard. They allow the Auction Manager to reduce the amount of power acquired in an auction if necessary to ensure a competitive bidding environment in a situation where auction participation is lower than expected and where auction prices may not otherwise reach competitive levels.

The Commission also finds that detailed volume reduction guidelines should be developed by the Auction Manager and Staff in compliance with the Commission order in this proceeding, and that these guidelines should be held in strict confidentiality.

### 5. Portfolio Rebalancing

Staff witness Dr. Salant proposed an additional use for auction volume reductions, if and when interest in a particular product within the auction is much lower than interest in other products. (Staff brief at 44; Staff Ex. 1.0 at 59-61) Specifically, he recommended, "The Auction Manager can reduce auction volume of under-subscribed products and/or shift tranches from more under-subscribed to over-subscribed tranches." He added, "There are several ways in which volumes of different duration tranches can be adjusted during the auction. I recommend that the rule followed by the Auction Manager attempt to approximately equalize the ratio of supply to demand across tranches of different durations."

The Ameren Companies disagree. They counter that Staff's proposal, which was intended to avoid the situation where one product is very competitive while another is not, does not improve the auction process and likely would be harmful to it. (Ameren brief at 63-64) They contend that the Auction Manager cannot evaluate relative interest among products at an arbitrary moment in time, and that bidder interest evolves as the auction progresses. The proposed auction is designed so that the relative prices for the various substitute products are discovered through the auction, and these relative prices track the realities of the market. The Ameren Companies argue that the judgment of the Auction Manager, even if exercised in accordance with a rule pre-established on the basis of expected bidding patterns, is not a good substitute for this market mechanism.

In its brief, Staff recommends that (1) the Commission authorize the Company's Auction Manager to utilize the portfolio rebalancing option only after consulting with the Staff and there is consensus between the Auction Manager and Staff that such action is appropriate, provided that (2) the Company's Auction Manager, in consultation with the Staff and the Auction Advisor, can devise prior to the auction a protocol deemed appropriate by the Auction Manager for carrying out such portfolio rebalancing. (Staff brief at 46) In Staff's view, the advantages of portfolio rebalancing outweigh the disadvantages. (Staff reply brief at 40)

Dynegy supported the Ameren Companies' position opposing portfolio rebalancing. Dynegy says parties to the auction need to be assured that, absent some pre-defined events occurring, the basic contours of the auction will not vary during the auction itself, and expressed the opinion that the Ameren Companies' proposal best meets that goal. In Dynegy's view, auctions are not intended to become a "game of wits" with constantly changing targets. (Dynegy brief at 7; Dynegy Ex. 1.2 at line 404)

The Commission has reviewed the positions of the parties on the portfolio rebalancing issue. While Staff's proposal offers some potential advantages, the Commission believes they are outweighed by the risks, such as potential adverse effects on the dynamic nature of the auction process in which switching among products is anticipated so that initial interest in particular products does not always reflect the ultimate distribution of bids.

Although it is possible the procedures outlined in Staff's brief would strike an appropriate balance on this issue, the record does not contain sufficient detail to support a finding to that effect at this time. The Commission does believe Staff's recommendation merits further attention in future proceedings examining the auction process.

### 6. Association and Confidential Information Rules

The Ameren Companies state that another of the competitive safeguards in their proposal is the Association and Confidential Information (previously defined as "A&CI") rules. (Ameren brief at 64-67) These rules contain affiliation disclosure requirements applicable to potential bidder. Ameren claims the rules ensure the independence of bidders, prevents collusion among bidders, and prevent any one bidder from gaining advantage in the auction through better information about its competitors. The A&CI rules are managed through the qualification process to ensure that bidders that are registered to participate have every incentive to comply.

Staff initially proposed that the rules be required to disclose full-requirements contracts that are contingent on the auction outcome. However, after reviewing rebuttal testimony, Staff recognized that there are reasonable arguments against requiring disclosure of full-requirements contract information beyond that proposed by Ameren. At this time, Staff does not recommend that the Commission order the Company to modify the association and confidential information rules. (Staff brief at 46-50)

Having reviewed the record, the Commission finds that the A&CI rules proposed by Ameren, which are intended to ensure the independence of bidders, prevent collusion among bidders, and prevent any one bidder from gaining advantage in the auction through better information about its competitors, should be approved.

### 7. Tranche Size

Under the Ameren Companies' auction proposal, they will acquire tranches of power to serve their BGS loads. Each tranche will account for a fixed percentage of a specific load group. (Ameren brief at 67; Resp. Ex. 6.0 at 54)

The Ameren Companies initially proposed a nominal tranche size of 100 MW, but reduced it to 50MW in response to Staff concerns. That is, they propose that the fixed percentage be set to achieve an expected, or nominal, tranche size of 50 MW subject to load growth and customer switching. As each tranche actually represents a fixed percentage of BGS load, the actual MW value of a tranche may vary from 50 MW from hour-to-hour.

Using a 50 MW tranche size would permit auction participation by BGS Suppliers in the 50-100 MW range and would allow larger BGS Suppliers to shape their bids to better match their resources. (Resp. Ex. 11.0 (revised) at 40) The proposed 50 MW

tranche size is consistent with current industry practice in the wholesale markets as they relate to the size of standard, forward-traded products. (Ameren brief at 67)

Staff notes that in the proposed auction, bidders vie to supply one or more "tranches" of one or more of the sought-after products. In its original filing, the Company proposed that each tranche be approximately 100 MW. The Company reduced its proposed tranche size to 50 MW, in response testimony by Staff witness Dr. Salant. He said the tranche size should be significantly smaller than 100 MW at peak, in order to accommodate smaller suppliers or even large suppliers that wish to supply odd lot sizes. Staff recommends that the Commission approve the revised proposal to define tranche size as approximately 50 MW of each customer segment's peak demand. (Staff brief at 50-51)

Having reviewed the record, the Commission finds that the proposed tranche size of approximately 50 MW is appropriate for those reasons provided by Ameren and Staff as are summarized above.

**8. "Price Taker" Proposal**

Staff initially proposed that large bidders be offered the opportunity to acquire tranches beyond the proposed load cap so long as the bidder acts as a "price-taker" for those tranches exceeding the load cap. The tranches above the load cap would be priced at the auction closing price, and the bidder could not withdraw them from the auction regardless of how low prices fell during the auction.

The Ameren Companies argue that large BGS Suppliers likely will not utilize Staff's "price-taker" proposal which would subject the Ameren Companies and the Illinois consumers to increased risk of contract concentration exposure to these large BGS Suppliers. Moreover, the Ameren Companies state that the price-taking option likely will deter auction participation and smaller or newer BGS Suppliers could perceive the price-taking option as a barrier to entry. (Ameren brief at 68)

In Staff's view, the price taker option is unlikely to have much of an effect on the auction, either positive or negative. Furthermore, since suppliers can also sell their power to other bidders or into other markets, the price taker option is not necessary for consumers to gain access to low-cost producers' power.

Thus, at this time, Staff does not recommend that the Commission order the Company to incorporate the price-taker option into the auction. (Staff brief at 55)

Having reviewed the record, the Commission finds that Ameren will not be required to include the "price-taker" feature in the auction at this time.

### D. Clearing Price: Uniform vs. Pay-as-Bid

AG witness Dr. Reny criticized Ameren's Simultaneous Descending Clock Auction proposal. Among other things, he said the "well-established result in auction literature is that a buyer can expect a lower price to result from a procurement auction among suppliers when he sets an appropriate price cap." (AG Ex. 4.0 at 3) However, Dr. Reny's testimony was not intended to propose a specific price cap or reserve price auction, and he did make an auction proposal. (AG reply brief at 29)

To the extent Dr. Reny' was offering a pay-as-bid proposal, Staff takes exception to it. (Staff brief at 56-58)

As noted above, the AG is not offering a specific price cap, reserve price or other auction proposal through Dr. Reny's testimony. Accordingly, no conclusions on any such proposals are necessary.

### E. Auction Management

#### 1. Auction Management and Role of Staff

The **Ameren Companies'** propose to engage an independent **Auction Manager** to actively manage the auction process and be the sole interface between the bidders and the auction, performing a wide variety of functions necessary to successfully complete the procurement process. (Ameren brief at 71) The Ameren Companies and ComEd jointly intend that Dr. Chantale LaCasse be retained for that purpose.

Dr. LaCasse is recognized as an expert on auctions, has extensive experience in this area, and has acted as Auction Manager for each of the New Jersey Basic Generation Service auctions. Although most Auction Manager actions are prescribed by the Auction Rules, some discretionary decisions might have to be made, especially with respect to unforeseen circumstances. This is best accomplished if the process is conducted by an independent Auction Manager with substantial involvement and oversight from Staff, with assistance from their Auction Advisor.

There will be limited communication between the Auction Manager and the Ameren Companies once the auction begins. The Ameren Companies will receive no more information during the auction than the BGS Suppliers bidding in the auction receive. These limited communications will occur only to the extent expressly permitted in the auction rules and other auction documents, and, no representative of the Ameren Companies will be "in the room" while the auction is in process.

Staff and the Auction Manager will each independently submit auction reports to the Commission by the end of the business day following the end of the auction. This process will provide sufficiently independent assessments and permit the Commission to reach a conclusion on the auction within the deadline.

**Staff** has reviewed Dr. LaCasse's qualifications and is satisfied that she is competent to be the Auction Manager for this competitive procurement process.

Staff does have concerns over the independence of whomever ComEd and Ameren hire as the Auction Manager. (Staff brief at 59) This concern arises primarily because both ComEd and Ameren have affiliates who are engaged in the sale of wholesale power and who could be bidders in the proposed auctions, as discussed below.

While the Ameren Companies are proposing an auction procurement plan intended to obtain power on a least-cost basis, they are also proposing a "pass-through" of procurement costs (i.e., a cost-tracking mechanism, whereby the utility experiences neither gains nor losses on retail sales of electricity). Hence, while the Ameren Companies arguably has no disincentive to obtain low prices, by the same argument, they may have little to no incentive to do so, either.

In contrast, the Ameren Companies' wholesale power generating and marketing affiliates (and hence, the Ameren Companies' holding company) cannot be expected to be in favor of or indifferent toward low prices; rather, they can be expected to desire high prices. Herein lies the crux of the problem. The fact that the Ameren Companies are owned by Ameren Corporation, and Ameren Corporation would profit from higher rather than lower auction prices (all else constant), creates a potential conflict of interest for both the Ameren Companies (as electricity purchasing agent for ratepayers) and the "independent" Auction Manager.

The Auction Manager, nominally hired by the Ameren Companies, is effectively working for two bosses with opposing incentives. One, the Ameren Companies, has no particularly strong incentives but at least a duty to get low prices for its retail customers. The other, Ameren Corporation, has an incentive to get high prices for its generation and marketing affiliates participating in the auction.

It is reasonable for the Commission to direct that: (1) the Auction Manager conduct the auction in close consultation with Commission Staff, and decisions made by the exercise of the Auction Manager's professional judgment during the auction will be made in consultation with a Staff lead designated by the Manager of the Energy Division; (2) the Ameren Companies representatives shall not be present "in the room" during the actual conduct of the auction, shall not be permitted to direct or influence the Auction Manager's conduct of the action, and shall not be permitted to communicate with the Auction Manager during the running of the auction; and (3) the Ameren Companies will be entitled to round-by-round data concerning the price and excess aggregate supply for each product and term, provided that this information will only be shared with specific persons at the Ameren Companies who will be identified by name to the Manager of the Energy Division in advance.

Staff observes that the Ameren Companies have agreed to these conditions.

Staff also says the Ameren Companies have committed to continuing to define the auction process so the rules of the auction and the criteria by which bidders' actions are to be reviewed are known well before the auction begins.

In particular, the Auction Manager, and the ICC Staff with the assistance of the Advisor who will all monitor the bids during the Auction and administer the bidding process, will have no contact with the Ameren Companies during the auction.

On the other hand, one cannot deny that the Ameren Companies, as public utilities, are the purchasing agents for their retail customers. The Ameren Companies have the resources and the responsibility to obtain power at least-cost and provide service at just and reasonable rates. It is not the Commission's role to take over or to micro-manage public utility functions.

Thus, for all the reasons discussed above, including the fact that Staff will be able to monitor and provide input on the various Auction Manager functions, Staff recommends that the Commission approve the Company's proposal to hire an independent Auction Manager. (Staff brief at 64)

With the above conditions, and other measures to limit the discretion of the Ameren Companies-employed Auction Manager and reinforce the independence of the Auction Manager, the role of the Ameren Companies in the auction have been satisfactorily narrowed to minimize undue influence over the auction, notwithstanding the conflict of interest problem. Furthermore, the Commission has relatively wide latitude to prescribe the form of the auction and any safeguards deemed warranted, provided such dictates are consistent with the record evidence and governing laws. (Staff brief at 65-66)

With further regard to the **role of Staff**, the Auction Manager will coordinate with Staff, before the auction, the finalizing of auction documents and methodologies. Representatives of Staff will be present with the Auction Manager during the actual auction and will directly observe the Auction Manager's implementation of the auction process.

The Auction Manager should conduct the auction in close consultation with Commission Staff, and decisions made by the exercise of the Auction Manager's professional judgment during the auction will be made in consultation with a Staff lead designated by the Manager of the Energy Division. (Staff brief at 66; Resp. Ex. 10.0-Corrected at 4) In addition, "the Ameren Companies now propose that the monitoring, reporting and other activities previously proposed for the Auction Advisor be performed by the ICC Staff in consultation with the Auction Advisor and/or any other expert(s) the ICC Staff believes would be appropriate." (Resp. Ex. 11.0-Revised at 53)

Based on its own observations and their Auction Advisor's observations, the Staff will issue a report to the Commission within one business day. The report would address, among other things, four general areas: (a) pre-auction activities; (b) the

conduct of the auction; (c) external events that may have affected the auction results; and (d) any issues, concerns or recommendations identified by the Staff. (Staff brief at 67)

Having reviewed the record, the **Commission** finds that using an independent, third-party Auction Manager to conduct the auction would be advantageous in numerous respects. In addition, the evidence supports a finding that Dr. LaCasse is qualified to hold such a position, particularly given her experience in the New Jersey auctions. Accordingly, the plan of ComEd and the Ameren Companies to jointly retain Dr. LaCasse as Auction Manager, as clarified in response to Staff suggestions, is reasonable.

It is important that in conducting the auction, the Auction Manager must function in an independent manner so as to maintain the fairness of the auction and to keep it free of any bias. As noted above, the Ameren Companies have agreed to certain measures, including restrictions on their own involvement, to help promote that independence. The Commission agrees that these limitations are necessary and appropriate, and shall be observed.

Regarding Staff's role, the record shows that Staff will be actively involved in all phases of the auction process, which will help ensure the protection of consumers. The record also shows that Staffs post-auction reports will be useful for independently assessing the auction process and results in terms of competitiveness and other appropriate respects. Accordingly, the Commission approves the full extent of involvement by Staff as proposed by Staff and Ameren, including its issuance of a post-auction report in the form of the revised outline, and the modification proposed by Staff as set forth in Staff Exhibit 11.0, Appendix 1.

### 2. Consumer Observer

**CUB** witness Steinhurst testified that if the Commission approves the auction despite CUB's objections, then it should provide for a consumer observer. (CUB Ex. 2.0 at 20) Such an observer should have the same access to information and processes as the Staff Advisor, but would be charged with monitoring the process and outcome from a consumer perspective and presenting that perspective to the Commission when the Commission is deciding whether to accept or reject the results of the auction. CUB also suggests that the observer play an active role in other reviews.

In its reply brief, the **AG** concurs in the CUB witness' recommendation. (AG reply brief at 32)

The **Ameren** Companies believe such a consumer observer is neither necessary nor desirable and should be rejected. The additional oversight is not warranted given that the auction process designed by the Ameren Companies provides transparency for every market constituent. Moreover, the confidentiality of certain bidder information and bid data is critical to attracting bidders to the auction. Bidders could be subject to

competitive harm if confidential information were released, even if unintentional, either at all or before the proper time. Increasing the number of people with access to the confidential information will increase the likelihood of a leak. (Ameren brief at 77)

**Staff** is willing to accept the responsibility for observing and assessing the auction as a neutral party, which Staff believes is in the best interest of consumers. Staff takes no position with respect to the CUB proposal for an additional "Consumer Observer."

Having reviewed the comments of the parties, the Commission observes that Staff, with the assistance of an Auction Advisor, is charged with the responsibility of observing and assessing the auction as a neutral party. As such, the Staff, with its impartiality and expertise, will have a key role in protecting the interests of customers. If Staff believes that the assistance of a separate consumer observer will be beneficial to Staff in its fulfillment of those responsibilities to consumers, Staff is not prohibited from enlisting and utilizing such a resource.

### F. Date of Initial Auction

#### 1. Positions of Parties

The **Ameren Companies** state that their objective is to hold the auction at a time that will attract the maximum number of potential bidders and, therefore, the lowest price for their customers. They currently propose that the first joint auction with ComEd be held sometime within the first 10 calendar days of September 2006. (Ameren brief at 79) They claim the benefit of holding a single statewide auction on the same date outweighs the benefits of either a May, July or September auction date, and note that several potential BGS Suppliers have supported a September auction date.

These suppliers wanted a September, versus May, auction because a September auction would be closer to the delivery date. Thus, holding an auction in September will reduce the time premium that the BGS Suppliers would have to account for in their auction prices.

**Staff** supports a September 2006 date for the initial auctions. Staff notes that Ameren and ComEd are now in agreement on using the first 10 days of September 2006 as the timeframe for the initial auction. (Staff brief at 69-72)

Staff believes this date should address any concern that the Auction Manager will not have a sufficient amount of time following the Commission's order in this proceeding to complete the tasks that must be completed prior to the auction, such as the testing of and practice with software and supplier training. Staff opines that it would be preferable to spend more time ironing out any problems upfront rather than, as CES suggests, scheduling the auctions at an early date and leaving September 2006 as a fallback date.

While Staff recommends the September 2006 timeframe for the initial auction, Staff recognizes that September 2006 would leave relatively little time prior to January 2007 should the Commission reject the auction results. Therefore, Staff recommends that the Ameren Companies be required to have a contingency plan ready to present to Staff and the Commission in the event the auction results are rejected.

**IIEC** states that if an auction is approved, the initial auction should be held in September 2006, as proposed by the Ameren Companies. The single dissenter from that date is CES, which argues for a May 2006 auction.

In IIEC's view, the September 2006 date is a more advantageous date because an auction closer to the time of physical delivery would produce a more accurate price. IIEC argues that reducing the time gap between the auction and actual physical delivery of power reduces bidders' uncertainty in their market pricing forecasts and any associated risk premium. This reduction of forecast uncertainty allows bidders to offer bids that better reflect market conditions at the time of physical power delivery.

IIEC argues that its member companies and other consumers would have to absorb any price premium attributable to the risks of changes in future market prices. Any such premium can be reduced by an auction date closer to the time when supplies must be provided.

**CCG** asserts that a May auction would be better because it would provide sufficient time, subsequent to the initial auction, for the utilities, winning suppliers and the Midwest ISO and PJM to ensure that all of the operational details associated with providing service are in place. Notwithstanding its preference, CCG does not object to a simultaneous September auction, but prefers May. CCG also does not object to a July auction, as its third preference.

**CES** believes that conducting the auction prior to September would increase flexibility and options for the Commission, for regulators and policymakers and, most importantly, for customers. Accordingly, CES advocates an initial auction date in May 2006 or July 2006. (CES brief at 19-24) Either of these earlier dates would provide additional time for customers -- particularly those below 1 MW of demand -- to assess their options prior to the end of the mandatory transition period on January 1, 2007.

CES argues that the experience in other states demonstrates that it is unnecessary to hold the initial auction in September to provide sufficient time for the Auction Manager to set up the process, advertise to potential suppliers, or provide training to suppliers. According to CES, scheduling the initial auction for May or July 2006 would afford the Auction Manager sufficient preparation time to set up the process. CES argues that a total of eight months of preparation time is not necessary.

CES further states that its comparison of historic wholesale electricity prices shows the assumption a September auction would be more "accurate" than an earlier auction is not always correct. CES argues that its comparison revealed market prices in

May were as accurate as the market prices in September for the upcoming calendar year.

CES believes that it is critical that the initial auction be a success and that the market be launched with the least amount of uncertainty. Unknown risks and issues resulting from inexperience could impact the success of the initial auction; therefore, allowing for additional time could help to minimize those potential risks.

Holding the initial auction prior to September 2006 would provide auction participants, the Commission, and the Auction Manager the benefit of additional time to make corrections or adjustments in the event of problems that impact either or both the ComEd and the Ameren auctions.

#### 2. Commission Conclusions

On this issue, the Commission concludes that the first ten days of September 2006 should be approved as the period for commencing the initial ComEd and Ameren auctions.

The Commission first observes that conducting the ComEd and Ameren auctions simultaneously offers potential benefits not available if the auctions are held at separate times, and does not appear to be a matter of dispute. Where the disagreement lies is with regard to the month to be used for the auction.

Although CES' argument are not without merit, the Commission believes that, on balance, the evidence favors September 2006 over the earlier dates under consideration. The September date would permit more time to complete various pre-auction tasks and resolve any "first auction" problems.

Also, compared to the earlier months, the September date would reduce the time between the auction date and delivery date, which several parties believe will reduce uncertainties in forecasting prices, thereby avoiding any incremental risk premium attributable to a longer gap between the auctions the January 2007 start date.

### G. Common vs. Parallel Auctions

#### 1. Switching Between ComEd and Ameren Products

##### a. Positions of Parties

Based in part on the recommendations of Staff witnesses Dr. Salant and Ogur, the **Ameren Companies** and ComEd agreed on rebuttal to an auction process that permits switching between the fixed-price products of ComEd and the fixed-price products of the Ameren Companies, and also permits switching between the hourly-price products of ComEd and the hourly-price products of the Ameren Companies. That is, ComEd and Ameren agreed to hold two common auctions: (1) for all of their fixed-

price products and (2) for both of their hourly products. The Ameren Companies believe that switching makes sense because these products are good economic substitutes for one another in the bidders' business plans.

However, Ameren's proposal does not permit switching between fixed-price products and hourly-price products. (Ameren brief at 79-81) Ameren believes the BGS-FP and BGS-LFP products are not good substitutes for the BGS-LRTP product because the products would not hold the same place in the bidder's business plan. The bidder's success with fixed-price products critically depends on its ability to predict future energy prices and the hourly load obligations. With the BGS-LRTP product, on the other hand, a bidder's success does not depend as much on future energy prices or the ability to forecast.

BGS-FP and BGS-LFP Suppliers take radically different risks from BGS-LRTP Suppliers and the characteristics of the revenue streams for the BGS-FP and BGS-LFP products are different from those of the BGS-LRTP product. Therefore, switching between the fundamentally different fixed-price and hourly-price products, whether between such products in the Ameren Companies auction or between the ComEd and Ameren Companies auctions is both unwise and risky, at least until further experience is gained with auction processes in Illinois.

**Staff** agrees with approach of combining products within a single common auction. Staff notes the general efficiency gains and consumer benefits to the common auction approach (allowing switching or "arbitrage" between products) as opposed to the separate but parallel auction approach. As proposed by Ameren on rebuttal, Staff "recommends that the Commission approve the combining all of the Ameren and ComEd 'fixed price' products in one common auction and all of the Ameren and ComEd hourly products in one common auction." (Staff brief at 76)

Dr. Salant also discussed the potential benefits of switching between fixed-price products and hourly-price products. The Commission observes that Ameren opposes this type of switching in the first auction as noted above, and Staff's current position on it is somewhat unclear.

**IIEC** does not object to the notion of a common auction, should an auction process be approved, although IIEC suggests market bifurcation and other factors will render switching between load zones unlikely. (IIEC brief at 25-29)

**CES** does not object to the proposition, but cautions that the desire for congruence should not come at the expense of interfering with the market's role in allocating migration risk premium. (CES brief at 25-27)

#### b. Commission Conclusion

The Commission finds that a common Ameren-ComEd auction for fixed-price products and a common Ameren-ComEd auction for hourly products, as urged by Staff

and in turn proposed by Ameren on rebuttal, will provide efficiencies and consumer benefits as compared with the parallel auction approach. Accordingly, the Ameren Companies' proposal to do so is approved.

To the extent a suggestion to allow bidders to switch between fixed price and hourly products in an auction setting is before the Commission at this time, it will not be adopted for those reasons advanced by Ameren as are noted above.

In summary, switching is permitted between fixed-price products and is also permitted between hourly-price products, but is not allowed between fixed-price and hourly products.

### 2. Common Deliverability Test

#### a. IIEC's Position

MISO and PJM each perform a test to determine whether capacity resources are deliverable to aggregate load in their respective footprints. If customers are to receive the full benefit of having ComEd (and the Ameren Companies) conduct a single auction and to facilitate the ability of bidders to switch between ComEd and Ameren fixed price products, ComEd (and the Ameren Companies) should be directed to work with one another, as well as with MISO and PJM, to develop a single common deliverability test for resources in the combined PJM-MISO footprint to load within the ComEd and Ameren service areas within the State of Illinois. (IIEC brief at 29; reply brief at 19-20)

There is a disparate treatment of capacity resources in the MISO versus those in PJM for service to ComEd load in PJM and in treatment of capacity resources in PJM versus those in MISO for service to Ameren load in MISO. Specifically, MISO and PJM separately perform a test for capacity resources to determine whether those resources are deliverable to aggregate load in their respective footprints. The tests are not the same. In addition, for a capacity resource in one RTO to be deemed deliverable to load in the other RTO, firm point-to-point transmission service must be requested from the capacity resource to the boundary with the other RTO.

In addition, case-by-case transmission studies that can be lengthy (at least 60 days) and costly (on the order of tens of thousands of dollars) may be required both within the RTO in which the capacity resource is located and in the RTO where the load is located. Furthermore, even if these studies show that the resource is deliverable for one auction, the inter-RTO deliverability finding would not apply in the other auction. New studies would be needed for future auctions.

These hurdles make it cumbersome and expensive for bidders to rely on capacity resources in the MISO for the ComEd auctions and on capacity resources in PJM for the Ameren auction. Thus, bidders will be inclined to rely on resources inside PJM for the ComEd auction and on resources inside MISO for the Ameren auction. It is unlikely, in the auctions as proposed, that there will be much switching by bidders between the

ComEd and Ameren auctions due to the aforementioned lack of interchangeability of capacity resources between the ComEd and Ameren load zones.

IIEC requests that as a condition of approval of its Illinois Auction Proposal, Ameren should be required to work with ComEd, PJM and the MISO to remove, as soon as practicable, those impediments that preclude a single common market starting with the implementation as soon as practical of a single common deliverability test for the delivery of resources in the combined PJM and MISO 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.

**b. Ameren's Position**

The Ameren Companies are not opposed to cooperating with ComEd, MISO, and PJM in a joint effort to implement a "common deliverability test." (Ameren brief at 81-82, reply brief at 36-37) However, the Ameren Companies and ComEd control neither the existence nor results of such joint effort. Whether MISO and PJM ultimately develop a common deliverability test will depend upon the participation of many other market participants -- most of whom are not subject to the Commissions jurisdiction -- and the willingness of FERC to adopt the approach, if any, adopted by MISO and PJM.

The Ameren Companies emphasize that the existence of a "common deliverability test" should not delay approval or implementation of the auction. The Ameren Companies' proposed auction process is properly designed for the wholesale markets as they exist. Any future improvements to the wholesale markets (through a common deliverability test or otherwise) can only improve the effectiveness of the proposed auction process.

**c. Staff's Position**

Staff expresses no position on the IIEC's apparent recommendation that the Commission "require the Ameren Companies to work with ComEd, PJM and MISO to establish a common deliverability test for capacity resources within the combined MISO and PJM footprint to the combined ComEd and Ameren load zones in Illinois." Approval of the Ameren Companies' proposed auctions should not be withheld until such a common deliverability test is established. Numerous witnesses indicated that there are benefits to a common auction, even if the seams between MISO and ComEd are not completely eliminated. (Staff brief at 78-80)

To the extent IIEC is seeking conditional approval of the auction process, its recommendation should be denied. (Staff reply brief at 50)

#### d. Commission Conclusion

As noted above, the Ameren Companies are not opposed to cooperating with ComEd, MISO, and PJM in a joint effort to implement a common deliverability test. As Ameren Companies observe, however, they control neither the existence nor results of such joint effort.

The Commission finds that cooperation by Ameren in such an effort has potential benefits and Ameren should do so to the extent such efforts are within its control.

The Commission also finds, however, that approval of the Ameren Companies' proposed auctions, or implementation of them, will not be conditioned on the establishment of a common deliverability test or on any joint effort relating thereto.

### H. Blended, Fixed-Price Auction Products

#### 1. Proposals for Residential and Small Commercial Customer Supply

#### a. Ameren Proposal

The **Ameren Companies** propose that Residential and Small Business ("R&SB") customers with demands under 1 MW will receive a fixed-price service. Ameren Companies initially will seek to procure supply for its R&SB customers in a mix of one-year, two-year, and three-year supply periods so as to step into a three-year rolling procurement structure. (Ameren brief at 82, reply brief at 38)

In the first auction only, the Ameren Companies propose to procure supply for 17, 29, and 41-month terms beginning January 1, 2007, for this category of customers. This is intended to allow for the alignment of future auctions with the MISO planning schedule. As much as practicable, an equal number of tranches will be procured for each supply period.

Tranches representing about one-third of the BGS-FP load will expire each year. The expiring contracts will be replaced with three-year (or 36-month) contracts through the annual auction process. Hence, each year, the Ameren Companies will procure contracts covering about one-third of their BGS-FP load for a three-year supply period. Procuring overlapping three-year contracts in which one-third of the R&SB load is procured every year provides market-based yet reasonably stable pricing for this group of small customers.

**Staff** supports adoption of the Ameren Companies' proposal for an annually-revised portfolio of three-year supply contracts for serving the residential and small commercial customer included in the so-called BGS-FP segment. (Staff brief at 80-84) In Staff's view, at this time there is no evidence of a better way of obtaining "market-based yet reasonably stable pricing," as stated by the Ameren Companies. Staff would

be particularly concerned with proposals to use contracts of less than one year, considering such alternatives inconsistent with obtaining price stability. Staff would also be opposed to making significantly greater use of long-term contracts, such as five-year or longer.

Staff recommends approval of the Ameren Companies' proposal for an annually-revised portfolio of three-year supply contracts for serving the residential and small commercial customer included in the so-called BGS-FP segment, along with the transitional use of other contract durations during the initial auction in order to arrive at this eventual steady state.

**b. DES Proposal for Monthly and Quarterly Auctions**

**Direct Energy ("DES") and USESC** are opposed to Ameren's use of overlapping, multi-year, full requirements wholesale supply contracts, specifically any wholesale supply contract over one year in duration as defined by FERC.

Instead, DES and USESC propose that residential and small commercial customer supply (customers with annual usage less than 15,000 kWh) would be procured using four quarterly auctions. Supply for larger commercial customers (with demands less than 1 MW) would be procured in monthly auctions. (DES/USESC brief at 15-21)

DES and USESC argue that the Ameren Companies' proposal improperly relies upon contracts longer than one year and because of their long terms, such contracts are saddled with an elevated risk premium. DES and USESC assert that these long-term contracts also remove the impact of changes in market price driven by supply and demand.

They claim the Ameren Companies' proposal segments the availability of auction products to customers by demand level in a way that could hinder the further development of competition. If customers are to fully realize the benefits of a competitive market, multiple products must be offered by multiple suppliers to a full range of customers.

**Ameren** opposes the DES/USESC proposal. (Ameren brief at 87-88) When developing its product design and deciding on the terms of the various products, the Ameren Companies considered, among other things, the consensus opinions of the Commission's Post-2006 Initiative Procurement Working Group ("PWG"), the positions of specific stakeholders that participated in the PWG, the current development of the retail markets in the Ameren Companies' service territories and the Ameren Companies' expectations of how competition might develop in the future.

The DES-USESC proposed product design is not consistent with these concepts and cannot be procured efficiently using auctions. Under that proposal, the Ameren Companies would be required to run an auction each month in order to procure fixed-

price service for its R&SB customers with annual usage greater than 15,000 kWh. The Ameren Companies would also be required to hold auctions on a quarterly basis for their R&SB customers with annual usage less that 15,000 kWh.

Holding monthly auctions would be expensive, inefficient, and impractical. In contrast to the Ameren Companies' proposal, the expenses of setting up, running, and participating in a monthly auction would be spread over the small amount of energy procured by a monthly auction. It is possible BGS Suppliers will not be willing to make such an investment if winning earns them only a one-month contract.

**Staff** disagrees with the DES/USESC proposal of using only contracts of one month duration for customers above 15,000 kWh and three months duration for all customers with annual usage below 15,000 kWh. (Staff brief at 88-92) Ameren will attract more bidders, and more offers per tranche, with one large auction than it would with a sequence of smaller auctions, because a larger auction is likely to attract more bidder interest. Increased bidder participation should result in a more competitive auction.

Staff argues that DES' proposal would try to give alternative suppliers an artificial advantage over Ameren's BGS-FP service, simply by degrading the BGS-FP service to a form that is less desirable to customers.

#### c. Commission Conclusions

The Commission finds that the record supports adoption of the Ameren Companies' proposal for an annually-revised portfolio of three-year supply contracts for serving the residential and small commercial customer included in the BGS-FP segment. Use of the overlapping contracts in the three-year rolling procurement structure will help protect against price unpredictability and instability for the smaller customers.

The Commission believes the Ameren approach better balances the objectives of price stability, efficiency, practicality and bidder participation than does the DES/USESC proposal for monthly and quarterly products.

### 2. Proposed One-Year Fixed Price Product for 400kW-1MW Customers

#### a. Ameren's Position

When developing their product design, the Ameren Companies considered the tradeoffs between, on the one hand, creating a large number of customer groups (and auction products) based on differing load characteristics and switching risks and, on the other, having fewer customer groups and relying on the rate translation prism to handle differences, such as differences in load characteristics. In designing its auction products, the factors considered by the Ameren Companies were: (a) switching risk; (b)

customer metering; (c) that additional products are already included in the first auction to step into the three-year ladder for the R&SB customers; (d) the fact that the auction products can be adjusted in later auctions; and (e) lessons learned from past auctions in New Jersey. (Ameren brief at 84)

For customers between 400 kW and 1 MW, the Ameren Companies propose to group these customers with the smaller BGS-FP customers and acquire fixed-price power for them as part of the rolling three-year term contract cycles.

CES, on the other hand, would group customers with loads between 400 kW and 1 MW customers with the larger BGS-LFP customers and acquire power for them through a series of one-year fixed-price contracts. This would become the default option for these customers.

The Ameren Companies oppose CES' proposal. (Ameren brief at 84-88) Ameren Companies do not intend or expect to replicate their current rate books through the auction or split the customers into small groups based on customer characteristics. Instead, their product design focuses on providing consumers with a simple, viable default service option at the lowest cost. The simple default service option permits the retail marketplace to develop the products demanded by consumers without the influence of arbitrary, artificial product designs. ARES are in a better position to determine and respond to consumers' changing needs and desires with respect to specific products and services than the Ameren Companies can be under the default service obligation.

The Ameren Companies also complain that CES' proposal raises practical concerns. Hourly historical load profiles are important to bidders so they can understand the auction products. The level of detail in the historical load data for the 400 kW to 1 MW customers may not be sufficient for potential BGS Suppliers to fully understand and quantify the risks associated with some of the products for the smaller group. As a result, bifurcating the R&SB group as CES suggests might unduly affect the price that comes out of the auction.

In addition, the Ameren Companies claim they do not have load profile metering in place for over 90% of these customers. If CES' proposal is adopted, many new metering installations will be required and new costs will be placed on these customers.

The Ameren Companies allege that including these customers in the BGS-LFP product, as proposed by CES, may result in higher prices for these customers for other reasons. Bidders on the BGS-LFP product likely will include a risk premium to account for the open enrollment period. If the rate prism is unable to specifically identify and specifically allocate this risk premium to BGS-LFP, the customers in the 400 kW to 1 MW group could end up with higher prices as a result of moving this customer load into the BGS-LFP product.

**b. CES' Position**

CES argues that the Ameren Companies' proposed customer grouping for its blended, fixed price auction product is unreasonable and anti-competitive. CES proposes to include the 400 kW to 1 MW customers in the annual product auction with the larger customers. (CES brief at 29-37)

ComEd and Ameren originally proposed virtually identical customer groupings and retail rules. Throughout its procurement proceeding, ComEd repeatedly revised its proposal to establish a more workable structure, which the Coalition now generally supports. Consistent with its history of anti-competitive practices, the Ameren Companies manufactured excuses and failed to consider the same revisions ComEd made to its proposal. To promote the development of the retail electric market throughout Illinois and to further the goal of statewide uniformity, the Commission should order the Ameren Companies to revise their customer groupings and related retail rules to bring them more in line with those presently being advocated by ComEd in its procurement proceeding.

Specifically, CES proposes to include the 400 kW to 1 MW customer group with those customers over 1 MW in the BGS-LFP annual product auction, and establish an enrollment window that is at least 50 days long. In short, CES requests that the Commission direct the Ameren Companies to revise its customer groupings and enrollment window to be similar to those which ComEd presently is advocating.

Regarding Ameren's lack of load profile metering, CES suggests, through Dr. O'Connor, that Ameren could develop the requisite load data based on sampling or alternatively, relying on ComEd data. (CES brief at 34; CES Ex. 4.0 at lines 335-342)

**c. Staff's Position**

Staff recommends that CES' proposal be placed in abeyance pending review of at least one round of auction results and subsequent switching activity by customers within the BGS-FP segment. (Staff brief at 85-88)

Staff also notes that Ameren witness Cooper raised a practical concern, claiming that 90% of the customers in the 400 kW to 1 MW size range do not have the interval meters that would be necessary for them to be carved out of the BGS-FP segment. (Resp. Ex. 15.0 at 18-21)

In Staff's view, given the relatively low cost of installing the interval meters that would be necessary for the 400 kW to 1 MW customers to be carved out of the BGS-FP segment, the Commission should direct the Ameren Companies to begin the process of ensuring that all such customers will have such meters installed within approximately two years. (Staff brief at 88) The proposal should be revisited after Ameren has developed the requisite metering capability.

#### d. Other Parties

IIEC did not address the issue in its initial brief. In its reply brief, IIEC disagrees with the CES proposal to include the load of customers with demand of 400 kW together with those customers over 1 MW in the BGS-LFP annual product auction. (IIEC Reply at 21-22)

#### e. Commission Conclusion

Among other things, CES proposes to include the 400 kW to 1 MW customer group with those customers over 1 MW in the BGS-LFP annual product auction. While CES has made some strong arguments in favor of its proposal that deserve close consideration, it appears that Ameren's lack of load profile metering makes CES' proposal problematic from a practical standpoint at this time.

The Commission agrees with Staff that given the relatively low cost of installing the necessary metering, the Ameren Companies should be required to begin the process of installing such meters, and to complete that process within two years.

In conclusion, based on the record in this docket, the CES proposal will not be adopted with respect to the initial auction. The proposal may appropriately be revisited in subsequent auctions when the necessary data is available by virtue of metering or other means.

### I. Fixed Price Auction Product and Tariffed Services for Larger Customers

#### 1. Nature of Auction Product and Tariffed Services for 1 MW and Over Customers

The **Ameren Companies** propose that larger customers (those with loads exceeding 1 MW) be served through BGS-LFP tranches and BGS-LRTP tranches. BGS-LFP tranches represent fixed-price full-requirements service. BGS-LRTP tranches represent full-requirements service with a real-time (hourly) priced full-requirements service. In the first auction, these tranches would be from January 1, 2007 to May 31, 2008. Once the auction terms are harmonized with the MISO planning year, the BGS-LFP and for BGS-LRTP supply period for subsequent auctions would be 12 months, from June 1 to May 31. (Ameren brief at 88)

The Ameren Companies do not believe that customers with peak demands at or above 1 MW should be placed on an hourly rate without a fixed price option. Providing a one-year fixed price option to these customers ensures they will have an opportunity to receive stable rates. (Ameren reply brief at 43-44)

**DES-USESC** propose that for customers with demands equal to or over 1 MW that have not been declared competitive, the bundled product should be an hourly energy product. (DES/USESC brief at 22)

According to **IIEC**, the Ameren Companies and IIEC agree that a fixed-price product is needed for customers 1 MW and over because, given the current state of the retail market, customers require this product. (IIEC brief at 29-31) IIEC does not believe that having only an hourly energy price option will be a sufficient utility default option for any customer group. IIEC claims that a single, price-volatile option does not allow customers to enjoy the full benefits of the available competitive markets. Given the importance of a fixed price service to customers in the 1 MW and above group, IIEC recommended that the Ameren Companies' proposal to offer 1 MW and over customers a one-year fixed price product be approved.

Based on a review of the evidence, the **Commission concludes** that the proposal to provide a fixed-price product to customers of 1 MW and above is reasonable and should be approved. As indicated in the record, the fixed-price service will provide a desired, and reasonable, level of price stability to customers within that group.

### 2. Pre-Qualification of BGS-LFP Load

IIEC proposes that the largest consumers, i.e., 3 MW or larger, be required to pre-qualify their loads prior to the auction in order to be eligible to elect BGS-LFP service. IIEC states that this proposal would prevent customers who are precluded from electing the fixed price service, or are otherwise not interested in the auction, from exacerbating the load risk to the detriment of other customers in the class, and thus would “mitigate load risk” and provide greater load certainty to BGS Suppliers.

Under IIEC’s proposal, if a consumer wanted its load put into the auction, it must notify the Ameren Companies in advance of the auction date. IIEC notes that this prequalification is not a commitment to take the ultimate fixed-price offer, only an “affirmative indication of eligibility.” (IIEC brief at 31-33)

The **Ameren Companies** oppose IIEC’s proposal, arguing that a customer's ability to choose between alternatives should not be limited by administrative hurdles and burdens. Any prequalification process necessarily implies deadlines and obligations. Failure to meet them will result in lost opportunities. In this case, under IIEC’s prequalification proposal, if a customer fails to register its load with the Ameren Companies, that customer will lose the opportunity to compare the final BGS auction prices against other supply sources. (Ameren brief at 88-89)

**Staff** had no opposition to this proposal, as it might reduce any risk premium that wholesale BGS Suppliers might consider adding to their bids. Therefore Staff recommended that the IIEC’s prequalification proposal be adopted by the Commission. (Staff brief at 92-93)

Having reviewed the record, the **Commission finds** that if 3 MW and above customers want to be eligible to take BGS-LFP firm service, they should be willing to inform the Ameren Companies of their non-binding desire to be eligible for this product, and provide non-binding estimates of their eligible load to the Ameren Companies. The Ameren Companies should contact these customers for that purpose. The Commission emphasizes that such an estimate is not a commitment to take the ultimate fixed-price offer, only an indication of eligible load. The Commission believes the potential benefits of such a procedure, in the form of reductions in risk premiums due to uncertainties over the volume of load, outweigh the arguments made by Ameren.

### 3. Demand Charge Component for Large Customers

The Ameren Companies and IIEC have agreed, as in described the Ameren Companies/IIEC Stipulation, to propose implementation of a cost-based demand charge in the fixed-price rate design for whatever rate or tariff applies to 3+ MW customers by the third auction, i.e., by the auction contemplated to be held in February 2009, or by the first auction subsequent to the time a capacity market is implemented in the MISO, whichever is sooner in time. (Ameren brief at 89) Accordingly, IIEC agreed that the Commission need not adopt its recommendation for immediate implementation of a capacity charge in this case.

The Ameren Companies recommended that the Commission endorse the Stipulation and Agreement in full as discussed in Section VII.10 “Alternative proposals re interruptible service.”

Having reviewed the record, the Commission finds that the terms of the Stipulation relating to the proposal to implement a cost-based demand charge in the fixed-price rate design for 3+ MW customers, as described above, are reasonable and should be approved.

### 4. Other

**IIEC** also recommended a separate auction or auction segment for customers with demands of 3 MW or greater. (IIEC brief at 35-36)

Among other things, IIEC claims a separate auction or auction segment would recognize the fact that the load characteristics of the customers in the 3 MW and larger range may be significantly different from the customers in the 1-3 MW range. (IIEC Ex. 1 at 11-12) IIEC argues that the Ameren Companies have not shown how IIEC’s proposal would increase costs or otherwise harm the Ameren Companies, the auction process, or other customers. Accordingly, IIEC recommended the Commission approve a separate solicitation for the 3 MW and larger customers as recommended by IIEC

According to **Ameren**, the IIEC proposal should be rejected. (Ameren reply brief at 46) Splitting the customers into many small groups based on special customer

characteristics and administering a separate procurement process for these customers would be neither practical nor wise. Instead the Ameren Companies' product design focuses on providing consumers with a simple, viable default service option at the lowest cost.

The simple default service option permits the retail marketplace to develop the products demanded by consumers without the influence of arbitrary, artificial product designs. IIEC has not shown the creation of another auction segment or administering a completely separate solicitation to be required.

Having reviewed the record, the Commission observes that the issue at hand is a close one. The **Commission concludes** that Ameren's position, which involves fewer separate auctions, provides a practical and reasonable starting point for purposes of the initial auction. Further, the Commission notes that although these large 3+ MW customers are not being given the separate auction they prefer, they do have the benefit of being provided access to fixed-price products through the auction. In any event, the "separate auction" issue is a candidate for further attention with respect to future auctions.

### J. Contingency Purchase Plans

#### 1. Ameren

Ameren addresses "contingency" acquisitions of supply in Section V.J of its briefs. Contingency plans define the process that the Ameren Companies will use to procure replacement supply in the "unlikely event" additional supply sources are required beyond what is procured in the Ameren Companies' BGS auctions. (Ameren brief at 90-92; Resp. Ex. 3.0 at 18-21) Contingency plans for three scenarios have been developed.

The first is "volume reduction." In the event the auction volume fails to procure 100% of a BGS auction product, the Ameren Companies will purchase the necessary services for the unfilled BGS tranches through the MISO-administered spot markets until the next scheduled BGS auction. The remaining term of the unfilled tranches of BGS supply would be included in the next scheduled BGS auction. To the extent that the MISO has not yet implemented a market for capacity, the Ameren Companies will procure the required capacity through the bilateral capacity markets.

This contingency plan does not permit the Ameren Companies to purchase the necessary services from the bilateral wholesale market. This arrangement is intended to alert bidders that in order to secure BGS supply prices from the Ameren Companies, it will be necessary to actively participate in the auction. Bidders would have less incentive to participate in the auction and present their best offers if the contingency plan relied upon a secondary market in which the Ameren Companies would seek to acquire fixed-priced supplies.

Under the second scenario, "Supplier Default," the Company would do the following:

- Immediately upon SFC termination, the Ameren Companies will temporarily replace the supply through purchases from the MISO-administered spot markets. To the extent that the MISO has not yet implemented a market for capacity, the Ameren Companies will procure the required capacity through the bilateral capacity markets.

- If the default occurs less than 90 days before the end of the SFC's last delivery day, the Ameren Companies will continue purchases from MISO-administered spot market for the remaining contract term.

- If the default occurs 90 or more days before the end of the SFC's last delivery day, the Ameren Companies will issue a RFP to replace the BGS tranches through a power purchase agreement ("PPA") with deliveries scheduled to begin 20 days after termination of the defaulted-on contract. Other than term and price, all other contract terms will remain the same.

- Any incremental costs or savings associated with prudently-procured replacement power purchases would be collected from the defaulted BGS Supplier. To the extent that some portion of the incremental cost in unable to be collected from the defaulted BGS Supplier, this cost would be trued up through a market value adjustment factor.

Under the third scenario, "ICC Rejection," the Ameren Companies have proposed a contingency plan that would apply if the Commission rejects the auction results. Under this plan, the Ameren Companies will meet with the Staff, the Auction Manager, and Auction Advisor within five days and review the reasons why the Commission rejected the results. If the auction results were rejected for reasons that could easily be corrected then the appropriate corrections would be made and the Auction Manager would re-run the auction.

If the auction results were rejected for reasons that are not easily corrected, the Ameren Companies would work with the Staff to develop an alternative procurement plan to be used to procure the required BGS supply until the next scheduled BGS auction. The Ameren Companies would file the plan with the Commission for approval. The unfilled tranches of BGS supply would be included in the next scheduled BGS auction.

This is an appropriate contingency plan in the case where the Commission rejects the BGS auction results because it allows the Ameren Companies and the Staff the appropriate level of flexibility to evaluate the reason for the Commission rejection and take the appropriate action. (Ameren brief at 91)

### 2. Staff

In Section V.J of its brief, Staff agrees with Ameren's contingency plans, with one clarification noted below. (Staff brief at 93-98) Staff finds the Companies' proposed reliance on the MISO spot market as their primary supply source under certain contingency scenarios to be appropriate. (Staff brief at 94)

Regarding the first scenario, "volume reductions," Staff does not object to the contingency plan provided that in the event that the Commission rejects the results of an auction, all of the tranches originally to be procured through the rejected auction – including any tranches not auctioned due to volume reductions – are to be subject to the "rejection" contingency provisions. (Staff brief at 96)

In its reply brief, Ameren agreed to this clarification. (Ameren reply brief at 47)

### 3. AG

In its reply brief, the AG argues that if Ameren were to limit its purchases of replacement electricity to MISO spot market purchases, it would deny consumers the potential benefit of other options available to purchasers in the MISO markets. The Commission should recognize that MISO-administered markets include more than a spot market, and that Ameren should be required to use reasonable and prudent judgment to obtain the best price it can for replacement power. (AG reply brief at 33-34)

### 4. Commission Conclusion

Based on a review of the record, the contingency plans that were actually offered into evidence are the ones proposed by Ameren, as clarified by Staff. These proposals appear to be reasonable methods for acquiring supply under the three contingency scenarios described.

Parties' positions on the disputed issue of post-transaction prudency reviews of contingency purchases are addressed elsewhere in this order.

## K. Regulatory Oversight and Review

### 1. Introduction

In Section V.K of their briefs, Regulatory Oversight and Review, the parties addressed a number of issues. These issues include the three-day review of the auction results, post-transaction prudency reviews of supply purchases, and a review of the auction process. The prudency issue is addressed in Section III.D above. The other two issues are discussed immediately below.

### 2. Three-day Post-Auction Commission Review of Results

#### a. Ameren

In Section V.K.2 of its brief, Ameren addresses “post-auction Commission review of results.” (Ameren brief at 95-96, citing Resp. Ex. 2.0 at 25)

The proposed Rider MV provides for prompt post-auction consideration of the auction results by the Commission. If the Commission concludes that grounds exist to initiate an investigation or complaint concerning the auction outcome, it would notify the Ameren Companies, triggering the pre-specified contingency provisions.

In deciding whether to issue a notice of investigation or complaint, the Commission, in consultation with its Staff and the Auction Advisor, would consider if the competitive procurement has been conducted in accordance with the approved procurement process and whether there was unambiguous evidence that the auction outcome has been manipulated. (Ameren brief at 95)

If no such action is taken by the Commission within three days following notice of the end of the auction from the Auction Manager, the auction-determined procurement costs should be deemed prudent for the purpose of full cost recovery in retail rates. At that point, the Ameren Companies would proceed with the acquisition of supply from the pre-qualified successful bidders. (*Id*.)

Bidders will not accept an open-ended auction review process. If bidders know that the auction is subject to a lengthy post-auction review, they would either be less likely to bid, or would increase their asking price if they did bid, to reflect the greater risk to them.

In its reply brief, Ameren responds to MSCG, CCG and CUB. (Ameren reply brief at 51-53)

MSCG recommends that the Rider MV be modified such that the Commission's ability to initiate an investigation of the auction would be expressly limited to those situations where "the conduct or competitiveness of the Auction or outside events are believed to have compromised the Auction process." (MSCG brief at 3) CCG recommends that the Commission adopt a New Jersey Board of Public Utilities style post-auction review process. This process focused on the mechanical aspects of the auction and whether there was evidence of collusion, gaming or market anomalies that called the auction competitiveness into question. (CCG brief at 14, 17)

In response, Ameren states that while the Commission can reject the auction for any reason that it believes justified, the Commission should rely heavily on the reports provided to the Commission by Staff and the Auction Manager. Although the Ameren Companies agree that the Commission should limit its review to the conduct or competitiveness of the Auction or outside events are believed to have compromised the

auction process, the Ameren Companies do not desire to expressly limit the Commission's authority on this matter. (Ameren reply brief at 52)

CUB objects to the three-business day Commission turnaround, in part because the Ameren Companies did not quantify their claims that auction prices might be driven up if the review is delayed. CUB suggests that the price risk to leaving the auction open is a product of the Ameren Companies' conjecture. In response, Ameren says bidders will not accept an open-ended process. (Resp. Ex. 2.0 at 26) The lack of a quantitative analysis does not eliminate the substantial risks that these parties have identified. (Ameren reply brief at 52)

CUB also objects to the Auction Manager having "only one business day" to file its report on the auction. While true, the obligation to file the report within one business day should not be read to suggest that the Auction Manager has only one day to review the auction (and activities leading up to the auction), prepare the report, and file the report with the Commission. Such activities likely could not be completed in just one business day. Instead, the Auction Manager will continuously prepare the auction reports throughout the pre-auction and auction processes. Also, the Auction Manager has committed to provide a copy of a draft report on the pre-auction process to the Staff before the auction itself even begins. (Resp. Ex. 11.0 at 57-58)

CUB also objects to the Commission's three-business day window for reviewing the auction results and the assumed inability of the Commission to review the final prices (rather than whether the auction rules were followed). CUB cites testimony that the Commission only can reject the auction if "unambiguous evidence that the auction process was not followed." CUB suggests the Commission is being asked to accept on blind faith that the prices are fair because the auction rules were followed (and that an after-the-fact prudence review is not required to determine the justness and reasonableness of the resulting rates) because the Ameren Companies proposal does not expressly permit the Commission to review the auction results relative to the market price.

In response, the Ameren Companies suggest such claims are unfounded. First, the proposal does not limit the Commission's ability to reject the auction in certain circumstances. Although the Ameren Companies expect the Commission's review to be based on the Auction Manager's report and the Staff report, the Commission can decide to accept or reject the auction for any reason. (Ameren reply brief at 53)

**b. Staff**

In Section V.K.2 of its reply brief, Post-auction Commission review of results, Staff responds to arguments in the AG, CCG and MSCG briefs. (Staff reply brief at 53-55)

The AG asserts that the three-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 brief at 53) The AG's comments 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. (Staff Ex. 11.0 at 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 proposal is subject to review and approval. The AG's position should be rejected.

CCG suggests that the Commission should define the scope of the post-auction review to focus 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 brief at 17) CCG argues that by defining the scope, 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.

Similarly, MSCG argues that the following language should be adopted, "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 brief at 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 on to 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. at. 9)

The Commission should reject CCG's and MSCG's arguments. (Staff reply brief at 65-66) 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 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. (Staff Ex. 11.0 Corrected at 78)

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 as they propose. While 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" (Staff

Ex. 11.0, Corrected at 77-78), he also said he did not believe "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 Ex. 11.0, Corrected at 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. (Staff reply brief at 53-55)

**c. AG**

In Section V.L.2 of its brief, Post-Auction Review of Results, the AG claims that the proposed post-auction review is too rushed and limited to provide customers with sufficient protection against unfair, unjust or unreasonable rates. (AG brief at 53)

Under Ameren's proposal, three business days after the close of the auction, the Commission must decide whether to initiate a formal investigation or other proceeding. (Resp. Ex. 10.0 at 23-24, 26) The three-day period would enable the Commission to read the reports of the Auction Monitor and the Auction Manager, which are to be prepared by the end of the business day immediately following the end of the auction. This gives the Commission two business days to meet and decide whether to reject the entire auction, to identify the problems that led it to reject the auction, and to initiate whatever action it believes is appropriate. This is an extraordinarily short time to make such major decisions.

Ameren suggests that the Commission can only reject the auction results if it has "unambiguous evidence that the auction has been manipulated." (Ameren Ex. 10.0 at 25) This is an impossible standard to meet in three-days time, and further demonstrates that the review contemplated in this filing can only be cursory.

The three-day review period is made more burdensome and restrictive given the magnitude of the procurement in the first auction and the lack of alternatives being offered by Ameren. The failure to provide a more comprehensive and diversified procurement method leaves consumers exposed to unknown risks and uncertainties should the auction results be rejected. (AG Ex. 2.0 at 8; AG brief at 53)

In Section V.L.2 of its reply brief, the AG responds to arguments in the Ameren and Morgan Stanley Capital Group Inc. ("MSCG") briefs.

Ameren argues that the auction results could only be rejected if the process was not followed or there was "unambiguous evidence that the auction outcome has been manipulated." (Ameren at 95) Given the fact that the review window is so small, the Commission could not do much other than identify the grossest errors or issues. However, the Commission should not limit the scope of its review or restrict its ability to respond to unforeseen or anomalous circumstances. (AG reply brief at 39)

MSCG argues that the post-auction review should be severely limited to process issues to provide bidders with more certainty. Otherwise, MSCG opines, bidders will increase risk premiums and be less willing to participate in the auction. (MSCG brief at 7-8)

According to the AG, the Commission should reject MSCG's attempt to obtain absolute certainty, at the expense of ratepayers. Despite the fact that the review contained in Ameren's proposal is insufficient to allow a thorough review of either the process or the result, the slight delay in certifying the results of the auction should not be seen as a major obstacle to bidder participation. If it were, the market would not support a competitive auction taking place several months before the delivery of power, and including contracts covering periods from one year to three years. The volatility MSCG's position implies, where a several-day review period would discourage a bidder from participating, would if true, render the proposed auction an unacceptable process. (AG reply brief at 39)

**d. CUB**

CUB's discussion of the three-business day post-auction review of the auction is contained in Section V.L of its brief, "Regulatory oversight and review." (CUB brief at 20-23; CUB reply brief at 15-16)

After the auction closes, the auction manager, an Ameren hired agent, has only one business day to file a report concerning the auction. This report merely provides a factual summary of the activities and events that occurred during the course of the auction, the resulting prices and the manager's affirmation that the auction rules apparently were followed. Notably absent from the report or from any other source is an after-the-fact analysis whether the prices resulting from the auction are fair, reasonable or were prudently incurred by Ameren. (CUB brief at 19, citing Tr. 428-430 (Baxter))

Then the ICC, with no analysis of whether the resulting rates are in fact reasonable, has only three business days from the close of the auction to accept the results. It can reject the results only if there is unambiguous evidence that the auction process was not followed. (CUB brief at 19; Tr. 104-106)

Parties are to accept on blind faith that the prices are fair simply because the auction rules have been followed.

Ameren's testimony, alone, raises serious doubts about such an assumption. James Blessing, Managing Supervisor, Power Supply Acquisition in the Strategic Initiatives Department was asked, "And in terms of the clearing price that's determined for the auction, are you expecting anyone from your company to do an independent analysis of those clearing prices to determine whether they seem to be fair competitive prices to pass on to the consumer?" He answered, "I'm not sure how that would be accomplished." (Tr. 518)

When asked how she was going to know whether auction results are competitive market prices, Dr. LaCasse, stated, "Well, as I said, it's the confluence of these factors in the sense [that] if the bidding in the auction has been competitive, if the bidding patterns are what we would expect from a competitive auction, if there were no difficulties with the bidding procedure, if there is no external events that we believe has impacted the bidding and would have been transitory, given all these factors, if all these factors are in the affirmative, then I would believe that the resulting prices are competitive market prices." (Tr. 847-848)

There is a reason why no one can say whether the actual clearing prices are reflective of any market prices. Ameren has created an auction product that is not traded or has comparably priced equivalents. The absence of comparably priced products in the market leaves it virtually impossible to determine in real time or immediately thereafter whether the ending auction prices are in fact reasonable or competitive. (CUB brief at 20)

Ameren claims that any delay in approving the auction prices might drive prices up, but has not offered any quantitative analysis to support this supposition. Likewise, it did not elicit any similar quantitative testimony from a possible bidder. Mere conjecture should not cause the ICC to eliminate the only true protection consumers have to avoid paying unjust or unreasonable rates. (CUB brief at 21)

In CUB's view, the proposed process does not satisfy the requirement for an after-the-fact prudency review, as discussed elsewhere in this order.

**e. CCG**

In Section V.K of its brief, CCG addresses regulatory oversight and review. (CCG brief at 15-17) In Section V.K.1, CCG comments on the nature of the Commission review before, during and after the auction. (CCG brief at 15-16)

During the auction, Ameren's proposal calls for Commission monitoring of the auction through Staff and an Auction Advisor. Each would submit independent reports to the Commission by the "end of the business day following the Auction Completion Date." (Ameren Ex. 11.0 Revised at lines 1207-1212) Ameren's proposal further calls for a prompt Commission review of the auction results and to either confirm or initiate an investigation or complaint concerning the auction results. (Ameren Ex. 2.0 at lines 458-463, 548-552)

Regarding the post-auction Commission review of results, Section V.K.2, CCG suggests that the Commission consider adopting a post-auction review that is similar to the one adopted by the New Jersey BPU. By defining the scope of the post-auction review so that it focuses on ensuring that 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," the potential bidders would have confidence that the auction will result in executed SFCs. (CCG Ex. 1.0 at lines 145-149)

This type of certainty would encourage suppliers to participate in the bidding process resulting in benefits to consumers. Therefore, CCG continues to urge the Commission to adopt a scope for its post-auction review that is similar to that adopted by the New Jersey BPU. (CCG brief at 17)

In its reply brief, CCG further addresses the post-auction review of results. (CCG reply brief at 5-9)

Under the Ameren Auction Proposal, the Staff and the Auction Manager will submit independent auction reports to the Commission by the end of the business day following the end of the auction. Ameren suggests that "[t]he Staff report will assess whether or not the Ameren Companies' auctions were conducted fairly and appropriately and all necessary actions to ensure the competitiveness and integrity of the auctions were followed." (Ameren brief at 76) The Commission Staff also suggests that the Confidential Staff Report that would be provided to the Commission after the completion of the auction would address questions, such as:

- Is there any evidence of collusion or improper coordination among bidders?
- Is there any evidence of a breakdown in competition in the auction?
- Were bidding patterns observed during the auction consistent with competitive bidding and the efficient allocation of load among bidders?

(Staff brief at 43)

According to CCG, the language in Original Sheet No. 27.028 is devoid of any definition describing the scope of the Commission's review of the auction results. That language, in part, states:

> If the ICC, during the period that ends on the third business day following the Auction Completion Date, acts through the filing of a formal complaint, the initiation of a formal investigation, or the undertaking of any other similar formal action regarding the CPA, then the Company shall not execute the SFCs resulting from the CPA.

Nothing in that provision sets forth the scope of the Commission review or a standard which the Commission would utilize in taking any action. CCG has suggested that the Commission state that the post-auction review will be focused 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 bids received. In its recent order approving auction results, the New Jersey Board of Public Utilities indicated that its review of the auction results focused on the mechanical elements of

the auction and on whether there was evidence of collusion, gaming or market anomalies. (CCG reply brief at 6, citing New Jersey BPU Docket No. EO04040288, 2/16/05 at 3-4)

By defining the scope of the Commission's post-auction review, potential suppliers would have confidence that the auction results would result in executed Supplier Forward Contracts ("SFC") if the auction process is followed and no anomalies in the bidding process are found. This type of certainty would maximize supplier participation in the auction process and bring about greater competitiveness. (CCG reply brief at 6-7)

In order to eliminate the possibility of ambiguity and to bring about certainty with regard to the scope of the Commission's review at the conclusion of the auction, CCG urges the Commission to define the scope of its post-auction review as outlined above in its Order and to direct Ameren to modify Original Sheet No. 27.028 accordingly. (CCG reply brief at 8-9)

**f. MSCG**

In Section III of its brief, "Issues V.K.1 and V.K.2," MSGC argues that the Commission should affirm that it will institute an investigation or otherwise reject and re-run the auction results only if the competitiveness of the auction is believed to have been compromised. (MSCG brief at 3-13)

More specifically, MSCG recommends that Ameren 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 brief at 3)

In Section III.A of its brief, MSCG discusses "Ameren's proposal for the review of Auction Results." (MSCG brief at 5-7)

Under Ameren's proposal, by the end of the business day following the Auction Completion Date, the Auction Manager submits a report to the Commission providing a factual summary of the activities that occurred during the ComEd and Ameren Auctions and an assessment of whether such auctions were conducted fairly and appropriately in accordance with the CPP rules and procedures. The Auction Advisor also submits a report providing an independent assessment as to the fairness, appropriateness, competitiveness and integrity of the auctions, and any concerns or recommendations identified. (MSCG brief at 5)

By the third business day following the Auction Completion Date, the Staff will submit its Confidential Staff Report containing four general sections: (1) a review of the summary of the Auction Manager with respect to pre-auction activities; (2) an evaluation

of the conduct of the auction; (3) a review of external events; and (4) a summary of any concerns identified by the Staff and its recommendations. Ameren witness Dr. LaCasse introduced, in surrebuttal testimony, revised rider language, explaining that the Staff's recommendations for further action will be based upon its answers to the above questions and "if all questions are answered as to indicate a valid result it is expected that Staff will recommend no further investigation of [the Auction]." (Id. at 5-6)

If, during the period that ends at the end of the third business day following the Auction Completion Date, according to Ameren's proposal, the Commission initiates a formal investigation or other formal proceeding regarding the CPP auction, then Ameren will not execute the Supplier Forward Contracts ("SFCs") resulting from such auction(s) until there is a Declaration of Successful Auction. If the Commission takes no formal action, then the Auction Manager will issue a Declaration of a Successful Auction at the end of the third business day following the Auction Completion Date. (Id.)

Ameren envisions that the Commission will base its decision of whether to initiate a formal proceeding on the Auction Manager and Confidential Staff Reports (collectively, the "Post-Auction Reports"). If the Commission decides to initiate a formal proceeding, Ameren proposes that the descending-clock auction phase will be repeated in a timely fashion if Ameren and the Auction Manager determine that the descending-clock auction phase of the auction at issue can be conducted again in a manner that timely addresses the concern(s) that led to the Commission's formal action. Upon completion of such a repeated auction and no rejection of its results by the Commission, the Auction Manager will issue a Declaration of a Successful Auction. (Id. at 6-7)

In Section III.B of its brief, MSCG argues that an open-ended Auction Review Process introduces risk to bidders that may be reflected in higher offer prices. (MSCG brief at 7-11)

Without inclusion of MSCG's proposed clarifying language set forth above, the Commission's review could be interpreted incorrectly as open-ended and undefined, thereby introducing prohibitively expensive and unnecessary risk and uncertainty to the pre-bid and bidding processes, to the detriment of Illinois' consumers. If the Commission reserves a very broad post-auction flexibility for rejecting an auction's results, bidders and winning suppliers will face uncertainty regarding the auction results. Proposed Original Sheet No. 27.028 does not yet indicate explicitly that the Post-Auction Reports and the Commission's analysis of whether to investigate the auction results will focus only on whether the competitiveness of the auction has been compromised. (MSCG brief at 7)

If the Commission's review criteria is not clarified in this manner, bidders face an unsettling risk that an auction run competitively and fairly and resulting in an auction clearing price closing below the auction starting price, may nevertheless be subject to a formal investigation because the resulting price might be deemed "too high" in hindsight based on an internal price benchmark (or formula or index), or other price or non-price related criteria that were not revealed to bidders prior to the auction.

Failure to inform bidders prior to the auction regarding how the auction results will be evaluated – and whether some other benchmark might be applied to judge the price results even if a successfully cleared auction is deemed competitive – would create an untenable lack of transparency in the process. Bidders must have all relevant information set in the auction rules prior to the auction, especially with respect to how the auction results will be judged, so that bidders may rely on that information in their calculations and provide the lowest possible economic bid. (MSCG brief at 8)

If an investigation is conducted by the Commission even when the auction is deemed competitive and clears under the auction starting price, suppliers also will not have the security of signed SFCs. When formulating bids, suppliers will face not only the risk that the acceptance of bids may be delayed even if the auction was competitive but also an extended risk until the Commission makes its decision regarding the bids that were received and cleared below the auction starting price. (MSCG brief at 8)

ComEd witness LaCasse agreed, stating, "It is important to bidders that the Commission review criteria be well specified . . . . [A]n open invitation to add any question [in the post-auction review period] . . . would create substantial uncertainty for bidders . . . ." (Ameren Ex. 19.0 at lines 1313-1318)

Ameren agrees that the Commission's review of the auction does create some uncertainty for bidders. Several other parties agree that the Commission's option to review an auction's results, without further direction included in the rider prior to the auction, creates significant uncertainty and risk for potential winning suppliers. (MSCG brief at 9)

In Section III.B.2, MSCG claims bidders may include a risk premium to account for the risk present in an open-ended review process, which may result in higher offer prices. (MSCG brief at 9-10)

A potential supplier will incur price risk on its hedge position if there is uncertainty regarding whether or not it will need the hedge position because the Commission investigates and reruns the results of a competitive and successfully-cleared auction. Bidders likely will add a risk premium to the bids to account for the risk of being left with supply and hedging arrangements that are unneeded or held open beyond the proposed three-day review period pending the Commission's investigation.

As Ameren points out, "bidders [could] factor this uncertainty into their bids as a risk premium." CCG witness Smith points to a New Jersey Board of Public Utilities' decision stating that, "[i]f bidders perceive that there may be a delay in certifying the results, the additional risk to bidders will show itself through higher prices." (MSCG brief at 10-11, citing CCG Ex. 1.0 at lines 182-184, State of New Jersey Order 1100655-57, CCG Ex. 1.2)

In Section III.B.3, MSCG argues, "Facing the significant risk presented by an open-ended review process, bidders may decide not to participate in the auction." (MSCG brief at 10-11) Commission Staff witness Salant notes that "bidders would be more reluctant to participate and bid in the auction, due to the added risk that their supply commitment would be rejected." (MSCG brief at 10, citing Staff Ex. 11.0 at lines 1909-1911)

In Section III.C, MSCG argues that the Commission "should require more specific language in the rider and auction rules limiting the acceptable reasons for rejecting auction results only to instances when the competitiveness of the auction is believed to be compromised – for example, through bidder wrongdoing or material auction implementation flaws." (MSCG brief at 11-14)

Adopting more specific language would represent more clearly Ameren's intentions with respect to defining upfront the Commission's post-auction review. Commission Staff witness Salant stated, "During the post-auction review period (within three days of auction close), the Commission should focus on whether the approved auction process was followed and whether there were any anomalies in the bids or process that would call into question the competitiveness of the auction. Barring any such anomalies, the Commission should be able to directly observe the competitive prices in the auction, as well as the competition in the auction." (MSCG brief at 12, citing Staff Ex. 11.0 at lines 1887-1893)

Clarifying the rider language to focus the Commission's ability to institute an investigation of the auction results also addresses another significant risk. (MSCG brief at 13-14) Bidders face risk if they do not have all necessary information to formulate bids, including any price benchmark or formula the Commission might apply internally to judge a competitive, successfully cleared auction.

The primary purpose of the Commission's review is not to compare the auction clearing prices to some arbitrary "benchmark' value" but instead to review the various reports to assure that all criteria for a competitive result were met. (MSCG cross Ex. 2.0 at 2.08) Thus, the level of the auction clearing price alone, without a reasonable belief that the competitiveness of the auction has been compromised, cannot be grounds to reject the auction results. (MSCG brief at 13-14)

**g. Dynegy**

Dynegy did not comment on regulatory oversight and review in its initial brief. In its reply brief, in Section K.L.2, "Regulatory oversight & review," Dynegy addresses "Post auction Commission review of results" in Subsection 2. (Dynegy reply brief at 5)

Dynegy agrees with the many parties who have argued for a relatively short, post-auction review period by the Commission -- one that is limited in scope as well as duration. (See CCG brief at 15-17; Ameren brief at 93-96; MSCG brief at 3-13; but see AG brief at 53) As a prospective bidder in the auction, Dynegy wishes to emphasize

that the post-auction review process "should not be an after-the-fact referendum on whether other parties like the price that resulted from the auction." (Ameren brief at 95)

The reason is simple enough. Any delay or uncertainty in the post-action review process will lead to higher auction-clearing prices because Suppliers will include a risk premium to cover the risk inherent in delay and uncertainty. Particularly harmful would be a full-blown review of the prices obtained from the auction, in the guise of a "prudence" review or otherwise. In such a case, the Commission could well be creating a "vicious feedback loop" that will only drive prices up. On the other hand, by focusing on whether the rules for the auction process were followed and whether any anomalies arose, the Commission will send the proper signal and help ensure that prices that result from the auction do not include unnecessary risk premiums. (Dynegy reply brief at 5)

**h. Conclusion**

As explained above, Constellation Energy Commodities Group urges the Commission to clarify the scope of the post-auction review so that it focuses on ensuring that 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." That way, CCG reasons, the potential bidders would have confidence that the auction will result in executed SFCs.

Similarly, Morgan Stanley Capital Group believes the tariffs should provide, "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." Without this clarification, MSCG contends, bidders face risk that may be reflected in higher offer prices.

Ameren, Staff and the AG disagree with those recommendations. According to Staff, while 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, Staff does not believe 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.

Having reviewed the positions of the parties, the Commission concludes that the language proposed by CCG and MSCG should not be adopted. While the review should focus on the information and issues cited by those parties, and by Ameren and Staff, the Commission agrees with Staff that the restrictiveness of the proposed language would deprive the Commission of needed flexibility. Furthermore, the brevity of the Commission's review period, consisting of three working days, should help alleviate the alleged risks, and MSCG offered no testimony to the contrary.

### 3. Process Review

#### a. Ameren

In Section V.K.3 of its briefs, Ameren comments on the **Post-Auction Workshop Process.** The Ameren Companies are committed to a continuous improvement process. To this end, their proposal includes a post-auction review process structured to provide an open forum for the continued improvement of the competitive procurement rules and methods. As part of this process, the Auction Manager will deliver to Ameren a factual report on the auction that will be made public and serve to improve future auction processes and review the experience in the auction with stakeholders and suggest improvements for future auctions. (Ameren brief at 96, citing Resp. Ex. 6.0 at 66 and 12.0 at 8)

In Section V.K.4, Ameren addresses "**Formal Proceedings to Consider Process**." (Ameren brief at 96, 135-136, reply brief at 54) The Ameren Companies have reached a stipulation with IIEC regarding formal review of the auction process. (Ameren/IIEC Joint Exhibit 1) As part of that stipulation, the Ameren Companies and IIEC agreed to formal reviews after each of the first two auctions with biennial formal reviews thereafter.

As detailed in the stipulation, the formal review process would include the opportunity for participants to file comments or testimony, submit responses, participate in hearings and file briefs. IIEC and the Ameren Companies recommend that the Commission accept the terms of the stipulation.

In Section V.K. of its briefs, Ameren addresses "**Other Processes and Proceedings**." (Ameren brief at 96, reply brief at 54-55)

According to Ameren, DES/USESC seek to hijack this proceeding and turn it into an opportunity to create a customer choice initiative, requesting that the Commission direct the Staff to open a process in which the Staff will identify and eliminate barriers to a competitive retail electricity marketplace. (Ameren reply brief at 54, citing DES/USESC brief at 23-24) DES/USESC also seeks to use this proceeding to launch a Commission investigation into advanced metering technologies.

While the Ameren Companies share DES/USESC's interest in a vibrant retail electricity market in its service territories, one party's individual interests and endgames should not bog down this proceeding. This proceeding is focused on the Ameren Companies proposal for acquiring power for the post-2006 era and the tariff revisions necessary to ensure cost recovery. DES/USESC's efforts to launch Customer Choice and advanced metering initiatives simply do not belong in this proceeding. If DES and USESC feel strongly about these efforts, they can directly petition the Commission for their implementation. (Ameren reply brief at 54)

**b. Staff**

In Section V.K.3 of its initial brief, Staff discusses the "Post-auction workshop process." (Staff brief at 104-105) In Section V.K.4 of its reply brief, Staff addresses "Formal proceeding(s) to consider process." (Staff reply brief at 55-56)

The Ameren Companies initially proposed that the Commission convene workshops after each auction to evaluate the auction process and suggest improvements for the next auctions. (Resp. Ex. 4.0 at 13-14)

IIEC witness Collins recommended that, instead of informal workshops, the Commission should hold formal proceedings to consider improvements to the auction process that should occur prior to the next auction, rather than afterwards as proposed by the Companies. (IIEC Exhibit 3.0 at 16)

The Ameren Companies and IIEC reached an agreement with respect to the formal review of the Ameren auction process. (IIEC brief at 38; Ameren brief at 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 the February 2008 auction. After the first two annual reviews the reviews would be biennial. The first biennial review would take place after February 2010.

Staff recommends that the Commission reject the agreement reached between IIEC and the Ameren Companies. (Staff reply brief at 56) 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.

**c. AG**

In Section **V.L.3** of its reply brief, the AG addresses the **post-auction workshop process**. (AG reply brief at 40)

The AG agrees with IIEC that "the novelty of the proposed auction process and the determinative ratemaking effect of the auction results (under the Ameren proposal) require a formal review." (IIEC brief at 37)

Ameren and IIEC submitted a stipulation and agreement that the Commission formally review the auction process annually for the first two auction years. (Ameren brief at 96; IIEC brief at 38) While supporting this stipulation and agreement, the AG

maintains that the Commission should reserve the right to a regular and a rigorous review of Ameren's procurement process and not consider this docket an irrevocable commitment to an unproven procurement strategy.

In this docket, Ameren and other parties have used the Post-2006 Initiative workshop process to marginalize and discredit parties who oppose the companies' proposal. The AG is wary of another workshop process where the parties attempt to resolve issues without the structure of a docketed case or a rulemaking and where the proponents of a process or method take the lead in setting the agenda and determining the outcome. The informality of a workshop does not lend itself to the examination of something as crucial to the State as a 7500 megawatt purchase of electric supply. (AG reply brief at 40)

**d. IIEC**

In Section V.K of its brief, the IIEC addresses "**Regulatory Oversight and Review**." In V.K.1, IIEC comments on the "Nature of Commission Review Before, During, and After Auction." (IIEC brief at 36-37) In IIEC's view, the Commission should not commit itself and consumers irrevocably to a "barely tested" procurement process and there should be a formal process to review the successes and failures of that process and its various components. (IIEC brief at 36)

In Section V.K.4 of its brief, IIEC discusses "**Formal Proceeding(s) to Consider Process**." As part of its procurement auction proposal, Ameren originally proposed that Commission oversight of any approved process take the form of annual informal workshops of stakeholders.

It is IIEC's position that the novelty of the proposed auction process and the determinative ratemaking effect of the auction results (under the Ameren proposal) require a formal, docketed review process each year. (IIEC brief at 37)

Ameren and IIEC reached an agreement with respect to the formal review of the Ameren auction process. (See Ameren/IIEC Jt. Ex. 1 Sec. 2) Under the Ameren/IIEC approach, the Commission would conduct a formal review after the **first and second** auctions, and every two years thereafter.

Section 2 ( Auction Review Proceedings-Second Stipulation) provides:

> The Ameren Companies, assuming the Commission approves a declining clock vertical tranche auction, agree to (i) an annual formal review of the auction process through a docketed proceeding after the first and second auctions and (ii) thereafter, biennial formal reviews. The auction review process should provide the opportunity for participants to file comments/testimony, response to any comments/testimony, discovery, hearing(s) on the comments/testimony filed, and briefs, and is to be completed in time such that any material changes ordered as a result of

> the Commission's formal review of the auction process can be implemented in a timely manner prior to the next auction.
>
> For the sake of clarity and for illustrative purposes, the Ameren Companies have proposed that the first auction be held in September 2006 and, therefore, the first formal annual review would take place after September 2006; the Ameren Companies anticipate that the second auction will take place no later than February 2008 and, therefore, the second formal annual review would take place after February 2008; the Ameren Companies anticipate that all subsequent auctions will occur no later than February and, therefore, the first formal biennial review of the auction process would take place after February 2010.

IIEC recommends that the Commission accept the terms of the Stipulation for periodic formal reviews of the auction process. It does not prejudice the interests of any other party to this proceeding and represents a prudent compromise between the positions of the utility and its large customers. If, however, the Commission does not accept the Stipulation between Ameren and IIEC with respect to the formal review of the auction process, then IIEC recommends the Commission accept the recommendation for an annual formal review as set out in the testimony of IIEC witness Mr. Collins. (IIEC brief at 38-39, citing Collins Dir., IIEC Ex. 3 at 15-17; Collins Reb., IIEC Ex. 6 at 11-15)

In its **reply brief**, IIEC responds to the Commission Staff. Staff did not specifically discuss the Ameren/IIEC approach. Staff states it does not object to Ameren's original suggestion for an informal workshop each year. (IIEC reply brief at 27-28, citing Staff brief at 104-105)

There appears to be a fundamental difference between the Ameren/IIEC stipulated approach and the Staff approach. There would be no formal review of any kind mandated under the Staff approach.

The proposal for informal workshops appears to be inconsistent with the New Jersey approach. New Jersey is the state with the greatest auction experience and the state that should have the greatest comfort in the auction process. (Salant, Jt. Tr. 1060) New Jersey still conducts a formal review of the auction process each year, in which New Jersey regulators consider annually whether the auction process should be changed or discontinued. (Collins Reb. IIEC Ex. 6 at 12, 15) It is difficult to understand why Illinois should forego such a review, since this state has no auction experience. Illinois customers should be entitled to safeguards of regulatory review that are at least equal to the protections available to their New Jersey counterparts. They should be assured of and entitled to participate in an annual formal review process. (IIEC reply brief at 27-28)

A workshop and a formal review process are not the same. There are significant differences in the tools available to participants in a workshop and a formal proceeding, including access to discovery. (Collins Reb., IIEC Ex. 6 at 13, 15) The Ameren/IIEC

Stipulation approach would give all participants the right to conduct discovery and to present testimony or comments. (Ameren/IIEC Jt. Ex. 1 Sec. 2; Ameren brief at 135) Also, a formal process assures consumers that the Commission actually will timely assess all relevant developments, in a way that informal workshops do not guarantee. However, there is nothing to prevent the Commission from incorporating a workshop into the formal review process if it wishes to do so.

The workshop approach also does not appear to contemplate a comprehensive scope for Commission review -- in particular, consideration of the desirability of continuing the auction. (Staff brief at 105) In the formal review process under the Ameren/IIEC Stipulation, the Commission would determine whether the auction process continues to be appropriate for the acquisition of power supply on a going-forward basis. The Commission should adopt the Ameren/IIEC Stipulation on this point. (IIEC reply brief at 28)

Staff argues that parties could initiate formal proceedings by filing a complaint or petition with the Commission, but does not explain how parties would gain access to the information they would need to ascertain the necessity for or to support such a complaint or petition in the first instance. Without access to such information, parties who would bear the burden of proof (see 220 ILCS 5/16-107 and 10-110) would have a difficult time persuading the Commission to initiate proceedings, and meeting their burden of proof. Moreover, a petition or a complaint to open an auction investigation is not a realistic or fair remedy for customers required to automatically pay power supply costs incurred by Ameren.

To recap, New Jersey, the state with the most auction experience, continues to believe annual formal reviews are necessary elements of the auction process, based on its experience with the auction to date. Illinois, a state with no auction experience whatsoever, should do no less. (IIEC reply brief at 29)

**e. CES**

In Section V.K of its initial brief, "**Regulatory oversight and review**," CES comments on the post-auction workshop process in Subsection V.K.3. (CES brief at 37-38)

The issue of what products should be offered to which customers should be a topic for thoughtful consideration by the Commission in the annual post-auction collaborative effort, along with other issues. (CES Ex. 1.0 at lines 488-490) The Commission has been well served by its ability to respond to various market developments, and it should continue to evaluate the products, customer class demarcations, and other important tariff terms and conditions to look for further opportunities to promote the development of the competitive retail electric market in Illinois. (CES brief at 38)

**f. DES/USESC**

In Section V.K of its brief, "Regulatory Processes and Proceedings," DES/USESC addresses "other processes and proceedings" in Subsection V.L.5. (DES/USESC brief at 22-24)

The Commission should articulate its vision for the achievement in Illinois of a robust and fully competitive retail electric marketplace and should actively seek out opportunities to promote fair and open competition in the provision of electric power and energy.

The Commission must keep in mind that the end of this initial transition period is only the beginning step in establishing a competitive retail electricity market. (DES/USESC Ex. 1.0 at lines 707-711) The Commission needs to be mindful that nothing it implements in this proceeding unnecessarily delays the day when all consumers will benefit from a competitive retail electricity market.

Another opportunity the Commission could take in this proceeding to advance retail electric competition would be to launch a "Customer Choice" initiative in the form of ongoing collaboratives that the Commission could use to identify and eliminate barriers to the implementation of a competitive retail electricity market for all customers. At the Commission's direction, Staff would work with all interested parties to further develop the next steps necessary to advance competition in the electric industry in Illinois. (DES/USESC Ex. 1.0 at lines 694-696) The Commission should direct Staff to report back specific recommendations by December 31, 2006, with additional collaboratives resulting in specific recommendations every 24 months. (DES/USESC brief at 23)

The Commission should also immediately initiate an investigation to determine how advanced metering technology could be deployed more widely so that all customers in Illinois can readily obtain the benefits of real-time pricing and demand response programs. (DES/USESC Ex. 1.0 at lines 700-703) Such an investigation would allow the Commission to collect additional data to develop and implement retail rates that better reflect the true cost of producing electricity. The Commission should find ways to apply the Center for Neighborhood Technology's real world experience in this area. As Mr. Steffes explained, as the Commission begins to chart the course for the Illinois retail electric industry of the 21st century, there is no reason why lack of technology should preclude the competitive market from developing. (DES/USESC brief at 24)

**g. CCG**

After the auction, Ameren's proposal calls for informal workshops that would provide parties with an opportunity to discuss changes to the "auction process or rate related issues." (Ameren Ex. 4.0 at lines 277-281) There is nothing is Ameren's auction proposal that would diminish the Commission's authority under the PUA to examine the

auction process by initiating a proceeding or by other mechanisms permitted by law for the purpose of improving the auction process for future auctions. (CCG brief at 16)

**h. Dynegy**

In subsections V.L.3-4 of its reply brief, Dynegy comments on "Post-auction workshop process & Formal proceeding(s) to consider process." (Dynegy reply brief at 5-6)

Many different proposals have been advanced in terms of the process the Commission should use for determining whether improvements can be made to subsequent procurements by Ameren. (Ameren brief at 96; IIEC brief at 37-39; Staff brief at 104-105) Dynegy believes that annual workshops punctuated by formal triennial proceedings (with no party forestalled from filing a formal proceeding more frequently if it believes such is warranted) best balances (a) the need for some stability between auctions and the need to determine if patterns have arisen over the course of several auctions with (b) the need to ensure formal consideration (with the attendant rules for discovery and evidence) occurs periodically. (Dynegy Ex. 1.2 at lines 530-541)

In the two prior MVI cases, the Commission required formal reviews that allowed for several years between the date of the Order at hand and the next one. (ICC Docket 02-0656 (cons.), Order at 101 (March 28, 2003) (providing a sunset date for the approved tariffs of December 31, 2007 and requiring new tariffs to be filed on or before June 30, 2006); ICC Docket No. 00-0259 (cons.), Order at 153 (April 11, 2001) (providing a sunset date for the approved tariffs of the conclusion of the May 2004 billing cycle and requiring new tariffs to be filed on or before October 1, 2002)) In any event, Dynegy will fully support any process adopted by the Commission that "allows all parties an opportunity to propose and discuss possible improvements." (Dynegy reply brief at 6)

**i. Conclusion**

Having reviewed the recommendations of the parties, the Commission agrees with IIEC that a docketed review of the auction process should be conducted on a periodic basis. Given the obvious significance of the auction and the fact that it is untried in Illinois, a formal review of it should be included in the process, particularly in the early years. Further, as IIEC points out, New Jersey, the state with several years of auction experience whose auction served in many respects as the model for the one proposed by Ameren and ComEd, conducts an annual review to evaluate the process.

As noted above, Ameren and IIEC reached an agreement with respect to the formal review of the Ameren auction process. The Commission finds that the review schedule contemplated therein should be adopted, whereby a formal review will be conducted after the first two auctions, and every other year after that.

On a different issue, DES/USESC recommend that the Commission launch a "Customer Choice" initiative to identify and eliminate barriers to the implementation of a competitive retail electricity market for all customers. Additionally, DES/USESC wants the Commission to initiate an investigation to determine how advanced metering technology could be deployed more widely so that all customers in Illinois can readily obtain the benefits of real-time pricing and demand response programs. Ameren objects to these proposals arguing, among other things, that the instant docket is not the appropriate forum to consider them.

The Commission observes that a large number of very complex issues must be decided in the instant proceeding. While the Commission appreciates the concerns of DES/USESC and its efforts to improve the competitive electric markets in Illinois, the Commission declines to take any formal action at this time with regard to the recommendations in question.

## L. Supplier Forward Contracts

### 1. Uniformity

#### a. Ameren's Position

The Ameren Companies stated that, where appropriate, the Ameren Companies and ComEd SFCs should be nearly identical. Therefore, throughout the regulatory process, they have incorporated a number of modifications to the SFCs to more closely align them with the ComEd SFCs. As a result of these efforts, the Ameren Companies have adopted several organizational and substantive modifications. (Ameren brief at 98)

However, the Ameren Companies noted there are differences in the operations of the Ameren Companies relative to ComEd, including differences in the operations and regulations of the RTOs in which they operate (i.e., the MISO instead of the PJM interconnection). These differences necessitate slightly different SFCs between the companies. (Ameren brief at 99)

The Ameren Companies proposed a process to review and finalize the SFCs. This process includes a compliance filing and a collaborative effort to ensure the SFCs are as clear as possible while conforming to the Commission's final order. (Ameren brief at 97)

The Ameren-proposed auction timeline includes a detailed process in which the Staff determines compliance as an initial matter, the SFCs then are published for comments, and, finally, the comments are reviewed/incorporated by a committee consisting of the Auction Manager, Staff, the Ameren Companies, and ComEd. The SFCs would not be modified unless the parties agreed that the suggestions improve or clarify the document without jeopardizing compliance with the Commission's order. (Ameren reply brief at 56)

Ameren asserts that Dynegy seeks an opportunity to negotiate substantive modifications to the SFCs after the Commission issues its final order. Ameren, however, believes additional workshops and negotiation sessions are not required. The Ameren Companies say they cannot make any SFC changes that would cause the SFC to be in noncompliance with the Commission's order. Ameren asserts that any process that would lead to such changes would be an inefficient waste of time. The Ameren Companies, therefore, oppose Dynegy's proposal that potential suppliers be permitted to craft substantive provisions in the SFCs after the order. (Ameren reply brief at 56)

Ameren states that Staff takes issue with the SFC compliance/improvement process recommended by the Ameren Companies, suggesting that the process could be interpreted to mean that the Ameren Companies, ComEd, Staff, or the Auction Manager could make changes that were not consistent with the Commission's order. Ameren says it is not the intent of the Ameren Companies to permit non-compliant substantive changes – regardless of who recommended the changes. (Ameren reply brief at 56)

Although the Ameren Companies are not opposed to the compliance filing and review process, they do not support the Staff's proposed process. Ameren complains that other than specifying a 60-day compliance filing, Staff leaves it to the Commission to fill in the details. Ameren asserts that the record does not show what details must be included. Ameren therefore recommends that the Commission adopt the compliance review/filing process proposed by the Ameren Companies. (Ameren reply brief at 57)

**b. Staff's Position**

Staff continues to recommend a 60-day compliance filing for finalizing the SFCs. A 60-day compliance filing would allow bidders time to provide comments regarding finalizing the SFCs and would also allow the Ameren Companies, ComEd, Staff and the Auction Manager time to consider, respond to and, if necessary, incorporate such comments into the final SFCs. (Staff brief at 108)

Staff recommended that the compliance filing due date be within 60 days of the posting of the draft contract on the auction web site, which should occur within seven days of the entry of the final order in this proceeding. Staff further recommends that the Commission's order set forth additional details regarding the process for the compliance filing, and direct 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 the docket. (Staff brief at 106-108)

**c. Dynegy's Position**

Dynegy notes that because the auctions will be conducted at the same time with switching permitted between like products offered by ComEd and Ameren, uniformity between the contracts is all the more important. Dynegy asserts that removing sources

of possible difference between the two utilities' offerings will aid potential Suppliers by simplifying the information they must learn and then use to develop their bidding strategies and will aid the Commission in its review process of the auction results. (Dynegy brief at 10) It is Dynegy's position, however, that to the extent, substantive provisions may further change as a part of that process, Dynegy and others should be permitted an opportunity to be heard prior to the finalization of the SFCs. (Dynegy brief at 11)

#### d. Commission Conclusion

The Ameren Companies have proposed to utilize uniform supply contracts based on those used in the New Jersey auction. The Ameren Companies have also worked with ComEd to achieve as much uniformity as possible between the ComEd and the Ameren Companies' SFCs. The Ameren Companies have adopted various changes to the supply contracts based on various comments of parties in this proceeding as well as based on public meetings with potential BGS Suppliers who would be subject to the contracts. A number of other SFC-related issues were the subject of recommendations by the parties and findings by the Commission.

As noted above, some parties also addressed SFC-related "compliance filings" in this section of their briefs. The Commission observes that over the course of this proceeding, the parties have had a full opportunity in their testimony and briefs to make whatever recommendations they deem appropriate with respect to the terms and conditions of the SFCs. Where parties have raised issues, the Commission has attempted to make determinations on them.

At this point, it is somewhat unclear what "unresolved" SFC-related issues the parties believe need further post-order attention that would require a compliance process as atypical as those suggested. In any event, the Commission finds that after entry of this order, Ameren shall make a compliance filing within 60 days including SFC forms reflecting all findings and determinations made in this order on those issues. To the extent this compliance question needs further attention, the Commission notes that any arguments made and clarifications provided in the briefs and reply briefs on exception on the issue will be duly considered.

### 2. Credit Requirements

#### a. Ameren's Position

The Ameren Companies state that they expect to provide reliable power supplies at reasonable rates tied to market levels and these goals will be jeopardized if any entity is unable to meet its obligations. The Ameren Companies state that the best way to avoid this turmoil and uncertainty is to: (a) have appropriate BGS Suppliers pre-qualification standards; and (b) holding the Ameren Companies to financial quality requirements. The Ameren Companies explain requirements in detail in their brief. The Ameren Companies also describe a number of steps they have taken to secure credit

protections in the event a BGS Supplier fails to perform according to its obligations under the auction rules or under the Ameren Companies' agreements. (Ameren brief at 99)

The Ameren Companies state that the credit protections put in place by the Ameren Companies cannot provide 100% coverage for any and all possible credit-related risks. However, the credit provisions are intended to strike a reasonable balance between providing adequate protection against default risk and adversely affecting participation by qualified bidders. (Ameren brief at 99-100)

The Ameren Companies intend to apply the same credit provisions to all BGS Suppliers throughout the SFC terms. If, however, unforeseen circumstances warrant the establishment of less restrictive creditworthiness standards, the Ameren Companies will seek review of any proposed changes to the creditworthiness standards by the Staff and/or the Commission in advance of implementing changes. (Ameren brief at 100)

Ameren states that before the auction all BGS Suppliers must submit a pre-auction letter of credit as part of the application process. Depending on their creditworthiness, under Ameren's proposal, BGS Suppliers also may be required to demonstrate an ability to provide a specified level of collateral in proportion to their indicative offers (e.g., a letter of reference from a bank that would be willing to provide a letter of credit for up to a specified amount). (Ameren brief at 100)

According to Ameren, BGS Suppliers must cover their mark-to-market credit exposure to the Ameren Companies (i.e., the difference between its obligations under its supply contract and forward market conditions) through either an unsecured line of credit, a guarantee, or with a cash deposit or letter of credit. Ameren asserts that a BGS Supplier can receive an unsecured line of credit from the Ameren Companies if it maintains a certain credit rating from the major credit rating agencies. The amount of unsecured credit available to the BGS Supplier is based on the suppliers' credit rating. Ameren states that if a BGS Supplier's credit exposure to the Ameren Companies exceeds that BGS Supplier's credit limit and posted security, the Ameren Companies may make a "margin call" under which the BGS Supplier will be required to provide additional margin in the form of cash or letter of credit. (Ameren brief at 100-101)

Under Ameren's proposal, BGS Suppliers are required to notify the Ameren Companies if there is a change in their financial condition -- credit rating changes, or credit watches with negative implications and any materially adverse change in the guarantors' financial condition. Ameren says requiring direct, prompt notification is necessary to ensure that the Ameren Companies are informed of the situation as soon as possible. Ameren asserts that even if this information may be publicly available, changes in financial condition may not become immediately known without such a disclosure. Once the Ameren Companies become aware of such an adverse change, the BGS Supplier may be required to provide additional security if its credit rating is downgraded. (Ameren brief at 101)

The Ameren Companies also are required to provide prompt notification to the BGS Suppliers in the event that any Ameren Company rating should fall below investment grade. If the Ameren Companies' credit rating is downgraded below investment-grade level, BGS Suppliers may seek the return of cash held as security and require accelerated payments under the applicable contracts. (Ameren brief at 101)

Ameren claims its proposed SFC's also provide for credit protections for the BGS Suppliers. If the credit rating of one of the Ameren Companies falls below investment grade, the amount of cash collateral held relative to the level of exposure that such downgraded Ameren Company has to a BGS Supplier will be transferred to a qualified institution upon receipt of written request from the BGS Supplier. Ameren says the collateral held by Ameren Companies that carry investment grade ratings may continue to be held by them at their discretion. Ameren says that additionally, the payments due from such downgraded Ameren Company would automatically be accelerated to twice per month. Payments due from the Ameren Companies that carry investment grade ratings will continue to be made on a monthly basis. Ameren believes these credit protections provide the credit assurances needed by BGS Suppliers. (Ameren brief at 102-103, reply brief at 59)

Ameren asserts that the SFCs differ from the typical power sale agreements between unregulated parties. Ameren says the SFCs are for the sale of power to serve regulated public utilities' retail load and are not unregulated contracts between unregulated parties for the sale of wholesale power. According to Ameren, unlike the BGS Suppliers, the Ameren Companies, as regulated public utilities, are subject to the continuing regulatory scrutiny of the Commission. Ameren says that while Commission oversight cannot eliminate the existence of credit exposure for the BGS Suppliers, such oversight serves to reduce the probability that the Ameren Companies would default on payments under the SFCs. (Ameren brief at 103-104, reply brief at 59)

Ameren states that after entering into an SFC, BGS Suppliers may have a measurable credit exposure. However, in Ameren's view, the risk that the BGS Suppliers could actually realize credit losses is low. Ameren argues that premiums, if any, that a BGS Supplier may embed in its offer should be small. Ameren claims there is no evidence showing that premiums would exceed the Ameren Companies' cost of meeting collateral posting requirements. Ameren says auctions in other states without bilateral credit requirements have proven to be successful. (Ameren brief at 104)

The Ameren Companies claim to have taken a number of steps to ensure a proper, secure credit relationship exists between the BGS Suppliers and the Ameren Companies. Ameren asserts that the SFC credit provisions provide protections against credit risks of both parties. Ameren argues that the credit risks are not mutual. In Ameren's view, the credit provisions, should, therefore, not be mutual. Ameren says they are designed to appropriately account for the risks experienced by both parties. (Ameren reply brief at 59)

The Ameren Companies state that no potential BGS Suppliers, other than Dynegy, objected to the credit terms proposed by the Ameren Companies. Ameren also states that Dynegy does not object to the identical credit provisions in the ComEd proceeding. Ameren claims the ComEd and the Ameren Companies' SFCs are as uniform as practicable, including virtually identical credit terms. Ameren argues that Dynegy should not object so strongly in this case while accepting the identical terms in the ComEd case. (Ameren reply brief at 59-60)

Ameren claims these same credit provisions have been used in other states facing the same questions now before the Commission. Ameren asserts that the states of New Jersey and Maryland do not require bilateral credit terms between parties to their default supply agreements. Ameren says auctions in other states without bilateral credit requirements have proven to be successful. The Ameren Companies believe their proposed SFCs strike a reasonable balance of interests between protecting the utilities and ratepayers from default risk and adversely affecting participation by qualified bidders. (Ameren reply brief at 60)

Under Ameren's proposal, the BGS Supplier's total mark-to-market exposure to the Ameren Companies will be increased by 10% to account for exposure associated with energy supply and with additional products required under the contract. According to Ameren, Dynegy claims that BGS Suppliers should be required to provide only 100% of the mark-to-market amount. Ameren states that the base mark-to-market amount includes only a comparison of energy prices. Ameren asserts that the auction products, however, are full-requirements products including transmission, ancillary services, and capacity among other items. If the Ameren Companies covered only their exposure to the energy component of the full-requirements product, Ameren claims they would be exposed with respect to the other components of the full-requirements product. (Ameren brief at 101, reply brief at 60-61)

According to Ameren, if a BGS Supplier defaults and the Ameren Companies do not have access to the 10% multiplier the utilities, and thus the ratepayers, could fully realize any and all credit exposure associated with capacity, capacity reserves, load shape, basis, odd lot, and illiquidity premium. Ameren recommends that the Commission approve the 1.1 multiplier to the Ameren Companies' mark-to-market calculation. (Ameren reply brief at 61)

**b. Dynegy's Position**

Dynegy states that while it does not object to properly crafted credit provisions, it does object to the credit provisions in the draft Ameren SFCs. First and foremost, Dynegy objects to the credit provisions because they are not mutual or bilateral, i.e., they are imposed on Suppliers but not on the Ameren Utilities. If the Commission decides that the overall credit provisions should not be mutual, then Dynegy proposes a number of other changes to the credit provisions. (Dynegy brief at 11)

Dynegy says the proposed Ameren SFCs impose collateral requirements on suppliers in situations where the market price for power and energy varies from the contract price. Dynegy adds that Ameren's proposed SFCs do not impose on the Ameren Utilities a similar obligation to deliver collateral when the current market price has fallen vis-à-vis the contract price (i.e., the supplier is no longer able to obtain a price in the market as high as it could under the contract price). According to Dynegy, although the inclusion of credit requirements pegged to market movements during the life of the contract is very common, it is very uncommon that such provisions only apply to suppliers and not the buyer. (Dynegy brief at 11-12)

Dynegy proposes that the credit provisions be modified so that they apply to both parties to the contract (suppliers and the Ameren Utilities). Dynegy argues that once the auctions have been conducted and the contracts have been executed, market prices may go in either direction. Dynegy accepts that, if market prices rise and a Supplier defaults, the Ameren Utilities could be forced to procure replacement supply at prices higher than the contract price. Dynegy says Ameren does not seem to want to accept the consequences of an opposite market movement. Nonetheless, in Dynegy's view, the problem can be just as great from a Supplier's standpoint as it is from that of the Ameren Utilities. Dynegy states that should prices fall instead of rise and the Ameren Utilities were to default, then the Supplier would be forced to sell its supply that had been committed to the SFC into a market where the price is now below the contract price. Dynegy argues that at a minimum, bilateral credit provisions mirror the fact that markets move in both directions, and thus, Suppliers need protection too. (Dynegy brief at 12)

Dynegy contends that Suppliers are actually at greater risk than Ameren if they have inadequate credit provisions. It is the Ameren Utilities that in general have the obligation to pay for supply under the SFCs, not Suppliers. Dynegy asserts that this accounts receivable risk is independent of whether market prices move up or down and represents a second type of risk, one borne predominately by Suppliers. Dynegy says it is willing to accept only an MtM credit provision and not argue for further protection, even though additional protection is warranted. (Dynegy brief at 12-13)

Dynegy also argues that crafting mutual provisions will act as a natural restraint on overreaching in terms of substance. In Dynegy's view, a more balanced set of provisions will likely result if the Ameren Utilities too must comply with them. (Dynegy brief at 13)

According to Dynegy, the added risk that Suppliers face may well have adverse impacts on the auctions and the auction-clearing prices. Mutual provisions will not, Dynegy asserts, necessarily lead to higher costs for the Ameren Utilities if their credit ratings remain strong because of the way the Credit Limit Cap ("Cap") works under the SFCs. Dynegy states that under the Ameren proposal, consumers pay for the credit premiums embedded in the auction-clearing price, with those premiums calculated such that they have no Cap to mitigate their cost. In contrast, under Dynegy's proposal, consumers will only have to pay the amounts above the Cap that Ameren pays to

secure the credit needed under the contract. Dynegy asserts that absent the Ameren Utilities' credit falling such that they have no Cap, which Dynegy claims underscores Suppliers' need for credit assurances, or market prices plummeting after the auction, Dynegy's proposal is the lower cost one. (Dynegy brief at 13)

Dynegy says it did not seek similar provisions in the ComEd SFCs because the Ameren Utilities do not stand in the same position as ComEd. Dynegy says it was able to reach an accommodation with ComEd on several aspects of the case, which led to Dynegy's decision to not raise credit-related issues in ComEd's case. Dynegy also asserts that the Ameren SFCs have at least one provision, relating to joint and several liability, that has important credit implications but that is irrelevant in the ComEd context. (Dynegy brief at 15)

According to Dynegy, the Ameren Utilities have proposed a deal in which they are treated as one in some respects when it suits them yet are treated as separate entities when that suits them. Dynegy claims this difference sets the Ameren Utilities' SFCs apart from the ComEd SFCs and calls for different treatment if the Ameren Utilities insist on continuing with this approach. (Dynegy brief at 15)

Dynegy states that Ameren raises the issue of various credit-related provisions being the same as in the ComEd SFCs and concludes that because Dynegy was willing to accept those provisions in the ComEd case, it should be willing to do the same in the Ameren case. Dynegy complains, however, that Ameren fails to address either of Dynegy's reasons the two contracts should differ: (1) based on the totality of the SFCs proposed by ComEd, Dynegy decided not to object to the ComEd credit provisions; and (2) the inappropriate exclusion of joint and several liability among the Ameren Utilities. Dynegy maintains that it is not willing to accept Ameren's lack of mutuality with respect to the credit provisions. (Dynegy brief at 15-16)

Dynegy claims Ameren does not deny or even attempt to refute the logic behind Dynegy's reasoning that under Ameren's proposal a Supplier premium will be higher than the credit Ameren may have to post should its credit obligations exceed the Cap. Dynegy also asserts that Ameren did not provide any data in support of its position, even though it bears the burden in this case under Section 9-201(c) of the Act. (Dynegy brief at 16)

It is Dynegy's position that if the Commission rejects Dynegy's call for bilateral credit provisions, then, at a minimum, it should modify several of the credit-related provisions in the SFCs that have not been justified by Ameren and will likely raise the final auction-clearing price. (Dynegy brief at 17)

Ameren has proposed to increase the MtM amount Suppliers need to post by 10%. Dynegy states that although this has ostensibly been included because FRS includes more than just energy, Ameren has been unable to provide any cost support or justification for its adder. According to Dynegy, in surrebuttal, Ameren relies on the fact that the ComEd SFCs use the same multiplier and the SFCs in other states do the

same. Dynegy argues that these refrains are invalid and do not offer any substantive rebuttal to the basic point that retail customers should not have to pay for more credit protection than Ameren has been able to justify. Dynegy maintains that it is Ameren's burden to support the costs it seeks to impose on retail ratepayers. Dynegy asserts that despite having opportunities to do so in rebuttal and surrebuttal testimony, Ameren has been unable to provide any support that its 10% adder bears any resemblance to reality. (Dynegy brief at 17)

Dynegy states that the Ameren SFCs include a provision that negates any joint and several liability among the various Ameren Utilities. Dynegy argues that in doing so, the Ameren Utilities essentially wish to be treated as "one" when that suits them and as "three" when that suits them. Dynegy says Ameren attempted to explain the need for the disputed clause because the purpose of the auction is for each of the Ameren Companies to acquire generation supply for the post-2006 period; each of the Ameren Companies has its own unique load and its own unique generation needs; the BGS Suppliers will be supplying each of the three Ameren Companies separately; and the SFCs are between the three Ameren Companies, on the one hand, and the BGS Supplier, on the other, simply for ease of administration. (Dynegy brief at 17)

Dynegy claims there is virtually nothing separate about Ameren's proposed SFCs. Dynegy states that for each given auction, for example, a Supplier cannot decide (due to credit or any other concerns) to bid solely on supplying AmerenCIPS or, alternatively, to refuse to bid with respect to AmerenCIPS but bid on the other two utilities. Nor can a Supplier during the auction set a different number of tranches for each Ameren Utility. Nor can the auctions end at different prices for each Utility. Instead, Suppliers must supply a pro rata share to each Ameren Utility at the auction-closing price. Dynegy asserts that if Ameren would like each of its Utilities to be treated separately, this could be achieved by having separate auctions for each, with Suppliers being fully able to decide which auctions to compete in and with auction-clearing prices being potentially different for each Utility. (Dynegy brief at 18)

In Dynegy's view, Ameren's claim of ease of administration is little more than a non-substantive shield attempting to mask the problems at the expense of Suppliers and retail customers. According to Dynegy, Ameren says the Ameren Utilities are not authorized by the Commission to pay or guarantee the debts of each other. Dynegy claims that the law does not bar such authorizations in all cases Ameren could have sought such authorization as a part of this very case. Dynegy suggests that the Ameren Utilities should, under the circumstances, split the auctions and contracts to avoid the problems created by their disclaimer of joint and several liability. (Dynegy brief at 18-19)

It is Dynegy's position that there is no reason whatsoever not to split the contracts and auctions if Ameren insists that it will not (or cannot, due to its own inactions with regard to its filing) remove the limitation on joint and several liability. (Dynegy brief at 18)

**c. Staff's Position**

Staff notes that Article 6 of Ameren's proposed SFCs describes the credit requirements. Staff makes three recommendations regarding the Ameren Companies' proposed credit requirements: (1) the level of the Ameren Companies' proposed credit requirements should be approved; (2) the provision to "notch" down issuer credit ratings by Moody's Investors Service should be eliminated; and (3) a reporting requirement for the Ameren Companies in connection with the credit provision that allows the Companies to unilaterally reduce their credit requirements should be established. (ICC Staff Exhibit 15.0, p. 2, lines 21 38) The only remaining contested issue relates to the credit provision that allows the Ameren Companies to unilaterally reduce their credit requirements. (Staff brief at 108-109)

Given the similarity between the Ameren Companies' and ComEd's proposed credit requirements and the fact that the optimal level of credit requirements is unknown at this point in time, Staff does not object to the Ameren Companies' proposed credit requirements differing from those proposed in the ComEd proceeding. (Staff brief at 109)

Staff recommends eliminating the credit provision in the Ameren Companies' proposed SFCs that requires "notching down" the corporate issuer credit rating from Moody's Investors Service ("Moody's") because Moody's issuer ratings are already equivalent to unsecured credit ratings. The Ameren Companies agreed to modify their SFCs to eliminate notching Moody's issuer credit ratings in Sections 6.4 and 6.8a of their proposed SFCs. (Staff brief at 109-110)

Staff notes that Section 6.1 of the Ameren Companies' proposed SFCs initially allowed the Companies to unilaterally reduce the credit requirements, which provided them the flexibility to respond to "significant, unforeseen circumstances . . . [in order] to accomplish objectives such as ensuring reliability, dampening price volatility and maintaining market stability." Staff recommends that should the Ameren Companies change the SFC credit requirements, within 15 days of the changes in credit requirements, they file a report with the Manager of the Commission's Finance Department and Chief Clerk that identifies the effective date, explains the reason for the change and summarizes any facts and analyses on which the decision to change the credit requirements was based. Staff also recommends the Ameren Companies clarify whether the SFCs permit Ameren to restore the credit requirements to their initial level as circumstances permit. (Staff brief at 110)

In response to Staff's proposed reporting requirement, the Ameren Companies propose eliminating the credit provision from Section 6.1 of the SFCs that allows the Company to unilaterally reduce its credit requirements. Staff objects to the proposal to eliminate this credit provision. Staff found the Ameren Companies' argument for including this credit provision convincing and believes that the flexibility provided by this credit provision could potentially benefit both customers and suppliers. Moreover, Staff argues that the Companies have not provided any details regarding its proposal to

confer with the Commission or Staff before reducing the credit requirements. Specifically, the Ameren Companies have not specified (1) the proposed procedure for discussing with the Commission or Commission Staff any proposal to reduce the SFC credit requirements; (2) the information the Ameren Companies would provide the Commission or Staff should they seek to establish less restrictive credit requirements; (3) the amount of time the Commission or Commission Staff would have to review any proposed reduction in credit requirements; and (4) any input the Ameren Companies would seek from the Commission or Staff during the time allotted for review of any proposed reduction in credit requirements. Staff believes it would be unwise to rely on a process with so many unknown variables. Thus, the Ameren Companies' proposal to eliminate the credit provision allowing them to unilaterally reduce their credit requirements should be rejected and 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 Companies may restore the credit requirements to their initial level as circumstances permit. (Staff brief at 110-111)

Staff states that 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. (Staff reply brief at 60)

In Staff's view, the Ameren Companies' proposed credit requirements and those proposed by ComEd in Docket No. 05-0159 are more alike than different, with the difference being in the amount of the dollar caps. Except for the Ameren Companies' proposal to eliminate the provision in Section 6.1 of the Ameren Companies' proposed supplier contracts, Staff does not object to the credit requirements proposed by the Ameren Companies. (Staff reply brief at 60)

Additionally, Staff agrees with the Ameren Companies' rationale for not including bilateral credit requirements. 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. (Staff reply brief at 60)

According to Staff, 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. 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. It is Staff's position that 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, according to Staff, 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. Staff asserts that 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. (Staff reply brief at 61)

In response to MWGen, Staff states that 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. Staff says, 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. Staff claims that 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. (Staff reply brief at 64)

According to Staff, 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. Staff adds that 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 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, in Staff's view, 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. Staff recommends approval of the language put forth in Dr. Schlaf's 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. (Staff reply brief at 64-65)

#### d. Morgan Stanley's Position

Morgan Stanley points out that, under the SFCs, bidders must meet certain credit requirements established in order to protect the Ameren Companies and its customers against the risks of default by BGS Suppliers. The Ameren Companies allows any

bidder to submit an alternate form of guaranty rather than the form of guaranty included with the Ameren Companies' filing. (Morgan Stanley brief at 13)

Morgan Stanley states that the Commission should confirm that New York law may be designated in the alternate guaranty as the choice of law that governs the interpretation of that alternate guaranty approved as described in the Part I Application Form, Appendix C. Morgan Stanley explains that treasury departments of guarantors likely will submit as alternate guaranties their own, strongly preferred standard guaranties. These guarantors' standard forms of guaranty include all of their preferred terms, often including New York governing law, a provision critical to many guarantors. Because virtually every issue regarding the law of guaranties has been handled in New York, most guaranties in any context are governed by New York law.

Morgan Stanley asserted that to encourage wider participation in the auction, bidders should be allowed to submit alternative forms of guaranty governed by New York law. Morgan Stanley pointed out that, with respect to their standard offer procurements similar to that proposed by the Ameren Companies, Maryland has required and New Jersey has allowed New York law to govern interpretation of their guaranties and/or alternate guaranties. (Morgan Stanley brief at 13-14)

**e. MWGen's Position**

MWGen supports the Ameren Companies' proposal not to include an independent credit requirement ("ICR") in its proposed BGS SFCs. Midwest Generation wishes to inform the Commission that this is an important issue for suppliers such as MWGen, and MWGen agrees with the Ameren Companies that the absence of an ICR is consistent with standard electric industry practice. Moreover, MWGen's position is that an ICR would be too onerous for suppliers and could diminish auction participation without providing added consumer protection. Midwest Generation notes that the consumer protections that Ameren has incorporated into the SFCs, as well as the MISO credit requirement, are sufficient to ensure credit protection for this initial auction, and will provide effective consumer protection without the need for an independent base credit requirement that would impose an unwarranted burden on BGS Suppliers. (MWGen brief at 11)

**f. Commission's Analysis and Conclusions**

Morgan Stanley asks the Commission to confirm that New York law may be designated in the alternate guaranty as the choice of law that governs the interpretation of that alternate guaranty is granted. No party objected to this request. The Commission believes it is reasonable and it is hereby approved to the extent the Commission has authority to do so.

Staff recommends that the Commission reject the Ameren Companies' proposal to eliminate the credit provision allowing them to unilaterally reduce their credit requirements. Staff further recommends that the Ameren Companies 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 Companies may restore the credit requirements to their initial level as circumstances permit. Ameren maintains that the disputed language in Section 6.1 should be eliminated.

Staff suggests that retaining the disputed language will ensure reliability, dampen price volatility and maintain market stability. Ameren does not really refute these assertions. As a result, the Commission adopts Staff's recommendation that the disputed language in Section 6.1 be retained. Additionally, within 15 days after making any such changes in SFC credit requirements as are authorized herein, the Ameren Companies shall file a report with the Chief Clerk that identifies the effective date, explains the reason for the change and summarizes any facts and analyses on which the decision to change the credit requirements was based. A copy thereof shall be provided to the Manager of the Commission's Finance Department.

The Ameren Companies are also hereby authorized to restore the credit requirements to the initial level as circumstances permit, with the understanding that such an action will also trigger the reporting requirement implemented immediately above. The Ameren Companies are not authorized to increase the credit requirements above the initial level authorized in this Order without prior Commission approval.

Dynegy proposes bilateral credit provisions for Suppliers and the Ameren Companies. In support of its proposal, Dynegy argues that Suppliers face the possibility of economic losses because there is a possibility that an Ameren Company could default on a payment or that the market price of power and energy could drop after the auction. The Ameren Companies oppose Dynegy's proposal, arguing it is unnecessary.

Because the contracts at issue are not the result of arms length negotiations, the Commission does not believe it is appropriate to compare the provisions of such contracts to competitive contracts. Additionally, under the contracts, Suppliers' bids can be increased to include their perceived risk premium for the factor Dynegy alleges exists. Thus, contrary to Dynegy's suggestion, there is no true adverse economic impact on suppliers. The Commission has reviewed the parties' arguments and while it does not accept all of the Ameren Companies' arguments, the Commission rejects Dynegy's proposal for bilateral credit provisions at this time.

Dynegy requests alternative relief in the event its proposal for bilateral credit provisions for Suppliers and the Ameren Companies is rejected. Specifically, due to its concerns about joint and several liability among the various Ameren utilities, Dynegy proposes that the Ameren utilities split the auctions and contracts to avoid the problems it perceives with joint and several liability. Additionally, Dynegy recommends that the 10% increase in the MtM amount Suppliers need to post be removed.

Joint and several liability is addressed in the subsequent section of this Order. As for the second portion of Dynegy's alternative request, both Ameren and Staff oppose this proposal. Both argue that the 10% adder is intended to compensate

Ameren for costs associated with capacity, capacity reserves, load shape, basis, odd lot and liquidity premiums. They also argue that such an adder is used by other utilities including ComEd.

The Commission understands that the 10% adder may cause suppliers including Dynegy to incur additional costs and the Commission does not wish to impose unnecessary costs on bidders. However, the Commission believes the costs imposed here have the potential to benefit ratepayers. If a Supplier defaults and Ameren is required to incur any of the types of costs the MtM adder is intended to cover, Ameren's proposal will improve the likelihood it will recover the costs from the defaulting supplier rather than passing such costs on to ratepayers.

Additionally, there is nothing to prevent suppliers from including a premium in their bids to reflect the cost associated with the proposed MtM adder. The Commission notes that Dynegy did not assert that this 10% adder would put it or any group of suppliers at a disadvantage relative to other suppliers, so the Commission need not address the relevance of such a concern.

Finally, while the record is somewhat lacking in specific data about the cost of capacity, capacity reserves, load shape, basis, odd lot and liquidity premiums, Dynegy did not dispute the fact that the categories of cost identified actually exist. To the extent Ameren does not actually incur such costs, neither suppliers nor retail customers will ultimately bear such costs. All things considered, the Commission finds that rejecting Dynegy's proposal is in the public interest.

### 3. Joint and Several Liability

#### a. Staff's Position

Staff states that under the SFCs proposed by the Ameren Companies, each contract will contain multiple purchasers (i.e., AmerenCIPS, AmerenCILCO and AmerenIP) and a single seller (i.e., a successful bidder for one or more tranches). This multi-party purchaser structure necessarily raises the issue of whether each of the Ameren Companies will have "joint and several" contractual obligations or only "several" obligations. According to Staff, in *Brokerage Resources, Inc. v. Jordan*, 80 Ill.App.3d 605, 608-609 (1st Dist. 1980), the Court described the general framework under Illinois law for determining whether a contract results in joint and several obligations, and explained the general effect of having joint and several obligations or covenants.

Staff asserts that the multi-party purchaser provision of the SFCs gives rise to several concerns with respect to the Ameren Companies' auction proposal. While the Ameren Companies contend the obligations of each are separate and distinct under the SFCs, they also appear to acknowledge that the wording of their proposed SFCs would allow a default by one of the Ameren Companies to result in a termination of the SFC for the other two non-defaulting Ameren Companies. (Staff brief at 119)

In Staff's rebuttal testimony, Staff described inconsistencies between (i) Mr. Blessing's assertion that the SFCs set forth individual obligations for each of the Ameren Companies and (ii) specific language in the SFCs setting forth rights and obligations of the Ameren Companies on a collective basis. Staff continues to recommend that the various provisions contained within the SFCs be re-drafted to make clear whether the contract is referring to the Companies collectively or whether each Company has a separate obligation. Staff's alternative recommendation is for the SFCs to be re-drafted to provide separate contracts or sub-agreements that (i) include separate payment provisions for each utility, (ii) separate the other obligations of the utilities, and (iii) completely describe the termination and default provisions if only one or two of the three Ameren Companies default or terminate the contract. (Staff brief at 119)

Ameren submitted a revised form of SFC through the surrebuttal testimony of Ameren witness Blessing. Staff says the revised form SFC contained various organizational and substantive modifications, including revisions to make the Ameren Companies' proposed SFCs more closely conform to the comparable ComEd contracts. (Staff brief at 120)

Staff notes that Section 7-102(A)(f) of the PUA provides that "[n]o public utility may in any manner, directly or indirectly, guarantee the performance of any contract or other obligation of any other person, firm or corporation whatsoever" without first obtaining the consent and approval of the Commission. (220 ILCS 5/7-102(A)(f)) No such approval has been sought or obtained in the instant case. As a result, 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 brief at 120)

Staff states that Ameren did not directly address Staff's alternative recommendation, but did provide a clean (Resp. Ex. 18.1) and redlined (Resp. Ex. 18.2) versions of the revised form SFC. The revisions disclosed therein reveal that the Ameren Companies did revise the form SFC to more clearly delineate the separate and independent obligations of the Ameren Companies (i.e., not joint and several) under the SFCs. (Staff brief at 121)

Staff recommends that the Commission direct the Ameren Companies to further revise the form SFCs to: (1) change remaining references to "the Companies" to "each of the Companies" to reflect the independent nature of the referenced rights or obligations; (2) add a sentence to paragraph (ii) of "Section 5.2 Rights Upon Default" providing that the rights and obligations of Non-Defaulting Parties survive an Early Termination applicable to one Defaulting Party in the event of a default by less than all of the Ameren Companies; and (3) clarify the language of Section 5.4.e to express that an "automatic termination" shall only apply with respect to the obligations of the Defaulting Party in the event that such termination involves a default by fewer than all of the Ameren Companies. (Staff brief at 123)

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. 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 problem of inconsistencies between (1) the position that there should be no joint and several liability and (2) the specific language contained in the SFCs setting forth the right and obligations of the Ameren Companies on a collective basis. Staff believes that Ameren needs to redraft its SFCs as provided in Staff's Initial Brief, which set forth the relevant changes being advanced. (Staff reply brief at 65-66)

**b. Ameren's Position**

In their reply brief, the Ameren Companies maintain they cannot undertake to commit themselves to assuming joint and several liability to the BGS Suppliers. They are not authorized by the Commission to pay or guarantee each others' debt or obligations, and have not sought such authorization from the Commission. According to the Ameren Companies, joint and several liability simply does not make sense in this situation. For instance, the BGS auctions permit each of the Ameren Companies to acquire generation supply for the post-2006 period. Each of the Ameren Companies has its own unique load and its own unique generation needs. The BGS Suppliers will be separately supplying each of the three Ameren Companies. Further, SFC Section 15.13(ii) unambiguously states that the Ameren Companies are not jointly and severally liable. (Ameren reply brief at 62)

The Ameren Companies argue that Staff's Initial Brief incorrectly interpreted the revised SFC to permit termination of specific SFC obligations rather than the termination of the whole agreement. Staff also misinterprets the Early Termination clause to permit termination of the SFC with respect to the obligations one of the Ameren Companies (but not all of the Ameren Companies) upon the default of less that all of the Ameren Companies. This is not the intent of the Ameren Companies. (Ameren reply brief at 62-63)

Ameren says the Early Termination of the SFC refers to the termination of the entire agreement - not to the termination with respect to just one of the Ameren Companies. This is clearly stated in section 4.1.b of the form SFCs "Termination of Right to Supply BGS-FP." According to Ameren, this intent also is embedded in SFC § 5.4.b "Net Out of Settlement Amount." (Ameren reply brief at 63-64)

The Ameren Companies say their approach to the Post-2006 procurement process is to acquire power to meet the needs of the combined footprint of the Ameren Companies as a single block of Energy and Capacity and governing that transaction with a single SFC that does not allow for termination in part for non-performance by one or two of the Ameren Companies. They claim this approach allows customers to benefit from the efficiency of procuring the loads of the three Ameren Companies as one block of load. It also recognizes the importance, from a planning and pricing perspective, of

treating the BGS supply obligation to each of the three Ameren Companies as a commitment with respect to a single block of Energy and Capacity.

Under this approach, each of the three Ameren Companies will bear the risk that nonperformance by another can ultimately result in the termination of the SFC. Therefore, while the Ameren Companies are not jointly and severally liable, each of the Ameren Companies bears the risk that the entire contract (and the supply which flows from it) can be terminated as the result of nonperformance by even one of the Ameren Companies. The Ameren Companies believe maintaining this concept best accommodates the needs of both the Ameren Companies and the BGS Suppliers. (Ameren reply brief at 64-65)

**c. Commission's Analysis and Conclusions**

The parties' position on this difficult issue are set forth above. Both Staff and Dynegy express concerns regarding the joint and several liability implications of Ameren's proposed SFCs.

Staff recommends that the Commission direct the Ameren Companies to further revise the form SFCs to: (1) change remaining references to "the Companies" to "each of the Companies" to reflect the independent nature of the referenced rights or obligations; (2) add a sentence to paragraph (ii) of "Section 5.2 Rights Upon Default" providing that the rights and obligations of Non-Defaulting Parties survive an Early Termination applicable to one Defaulting Party in the event of a default by less than all of the Ameren Companies; and (3) clarify the language of Section 5.4.e to express that an "automatic termination" shall only apply with respect to the obligations of the Defaulting Party in the event that such termination involves a default by fewer than all of the Ameren Companies.

As alternative relief under the previous section of this order, Dynegy requested that the three Ameren utilities be required to conduct separate auctions to address its concerns in this area. For its part, Ameren claims it has made modifications in the proposed SFCs and there is no need for further modifications or for separate auctions.

Dynegy says that, as drafted, the SFCs treat the three Ameren utilities as one when acquiring supply but, with respect to responsibility for obligations for the supply the three Ameren utilities are treated separately. Dynegy suggests that while this arrangement may be good for Ameren, it is bad for suppliers and retail customers.

As the Commission understands it, because Ameren has not requested or received such Commission authorization, if any one of the three Ameren utilities defaults on an SFC, the other two Ameren utilities have no responsibility for the obligation. In that event, under Ameren's proposal, the entire SFC would be terminated. Dynegy seems to assert that this provision is advantages to the Ameren utilities and disadvantageous to suppliers and customers.

As the Commission understands Staff's proposal, in the event of default by one Ameren utility, only a portion of the SFC would be terminated. Ameren opposes this proposal and suggests that a total termination of the SFC in the event of default by one Ameren utility is a beneficial aspect of the SFCs. Ameren argues that each of the three Ameren utilities bears the risk of losing the supply associated with an SFC if only one Ameren utility defaults on an SFC.

On this point, while the record is not completely clear, it appears to the Commission that if market prices exceeded the SFC prices, it would be customers not the Ameren utilities who likely would bear the price risk associated with a terminated SFC. Alternatively, the Commission expects that if SFC prices exceed market prices, it would likely be suppliers not Ameren that would bear the price risk associated with a terminated SFC.

The Commission also believes that there are real and significant benefits for ratepayers from conducting joint rather than separate auctions. These benefits led to changes in the Illinois auctions whereby the ComEd and Ameren auctions are being held simultaneously and bidders will be allowed, to some extent, to switch between the ComEd and Ameren auctions. Thus, the Commission is reluctant to accept Dynegy's proposal to split the Ameren auction into three pieces.

Ameren states that the "BGS Suppliers will be separately supplying each of the three Ameren Companies." (Ameren reply brief at 62) Thus, the Commission adopts Staff's recommendation and directs Ameren to modify the SFCs to allow for termination of supply obligations of the defaulting Ameren utility only rather than complete termination of the SFC. The language contained in Staff's brief at page 123 is hereby adopted. Finally, the Commission believes that this is a complex issue and one that may warrant reconsideration when the auction design is revisited.

#### 4. Force Majeure

According to Staff, Section 2.1.b.(v) of the Ameren Companies SFC refers to circumstances beyond a supplier's control that may make it impossible for the supplier to deliver the contracted supply, otherwise known as "Force Majeure." Staff says that unlike the provision proposed by ComEd in its SFCs filed as part of its procurement proceeding (Docket No. 05-0159), the Ameren Companies' provision -- while providing the supplier with the option of arranging alternative delivery -- appeared to invalidate the application of a defense of Force Majeure. It appeared to Staff that Ameren wanted a "supplier to retain responsibility for meeting the load requirements except when energy cannot be delivered." Thus, Staff recommended that the Ameren Companies adopt the ComEd Force Majeure provision as it more clearly captured this intent.

On rebuttal, the Ameren Companies amended their proposal. The now proposed to use the Force Majeure language in the ComEd docket with clarifying language that excludes the unavailability of Energy in the Locational Marginal Price ("LMP") markets from the definition of Force Majeure.

While Staff believes adoption of the Force Majeure language utilized by ComEd would provide additional clarity, Staff does not believe that the Ameren Companies' amendment to that language detracts from that clarity to any significant extent. Therefore, Staff does not object to the amended Force Majeure provision as reflected in Ameren's Exhibit 18.1.

It appears that there is no longer a contested issue and the Force Majeure provision as reflected in Respondent's Exhibit 18.1 is hereby adopted.

### 5. Procurement of Ancillary Services

#### a. Staff's Position

Staff recommends that the pro-forma contracts be modified to give the suppliers the additional option of self-supplying or self-procuring their shares of ancillary services. (Staff brief at 124) Staff claims there are no costs associated with this additional option, and that offering such option for procurement of ancillary services may result in two benefits: (1) an increase in auction participation or (2) lower price bids by bidders due to lower expected ancillary services procurement costs or higher certainty about such costs.

Accordingly, Staff believes offering such an option may potentially lower auction prices and thus lower rates for end use customers. Finally, Staff contends that the MISO Tariff has explicit provisions that would allow the Ameren Companies to give suppliers the option of self-procuring ancillary services. (Staff brief at 124; reply brief at 66-67)

According to Staff, whether the self-supply of ancillary services is quite complex and costly is simply not relevant. What Staff believes is relevant is whether it is feasible for suppliers to self-supply ancillary services. (Staff brief at 127)

Given the fact that providing this option to the suppliers costs nothing to the Ameren Companies or their ratepayers, from a policy making perspective, Staff claims it would be unwise to exclude such an option, regardless of how the size of its benefits are qualified. Further, Staff argues that if the potential benefits indeed are not large enough to justify allowing this option to the suppliers and no supplier will be interested in using this option, then no harm results in offering this option since it is unlikely a supplier would utilize it.

Also, Staff says Ameren's claim about the insignificance of the potential benefits is contradictory to its statement that a supplier can gain an unwarranted competitive advantage in the process of self-supplying ancillary services. If such benefits are so insignificant, Staff claims those benefits should not be a significant source of unwarranted competitive advantage to a supplier. (Staff brief at 128)

According to Staff, the Companies never responded to Staff's claim that the record was devoid of evidence suggesting that there is any difficulty or impossibility associated with giving the suppliers the option of self-supplying two of the ancillary services, spinning reserve (Schedule 5) and supplemental reserve (Schedule 6). (Staff brief at 131)

Staff maintains that there is no requirement for real-time metering to support self-supply of regulation service. Additionally, Staff argues that the Companies never satisfactorily responded to the assertions that (i) Ameren's argument that "certain costs which are not easily identifiable or assignable" associated with self-supply of ancillary services is vague, (ii) potential unwarranted competitive advantage or cost discrepancies associated with self-supply of ancillary services are not unique to this procurement case and these options are available to all market participants in MISO, and (iii) FERC already found these provisions just and reasonable and approved them since they have been included in the MISO Tariff. (Staff brief at 131-132)

Staff recommends that the Commission order the Companies to modify the SFC language to include a provision to give the suppliers the option of self-supplying MISO Schedule 3 (regulation service), Schedule 5 (spinning reserve) and Schedule 6 (supplemental reserve) ancillary services. (Staff brief at 132)

**b. Ameren's Position**

According to Ameren, significant technical issues exist, most importantly the requirement that real-time metering must be in place to self-supply. Ameren maintains that the necessary metering is not in place and cannot be installed in sufficient time to be in place prior to the start of delivery. Ameren asserts that Section 5.4 of the Coordinated Reliability, Dispatch, & Control Business Practices Manual of MISO clearly and explicitly states that hourly schedules, load forecasts as well as after-the-fact metering may be utilized – but only in the context of the balancing authority being the one providing the ancillary services. (Ameren reply brief at 65-66)

Ameren also argues that neither the MISO nor the applicable balancing authority is obligated to change their FERC regulated tariffs or business practices to accommodate such a recommendation, if approved by the Commission. Ameren further contends that it would be improper to include provisions in the SFC which conflict with such tariffs and business practices. (Ameren reply brief at 66)

If the Commission requires the Ameren Companies to give the BGS Suppliers the option to self-supply ancillary services, Ameren claims the SFCs should be revised to clearly indicate that the provision of such resources must comply with all applicable Transmission Service Provider tariff requirements and the requirements of the applicable Balancing Authority, and that such a contract provision does not infer or otherwise suggest that the BGS Supplier's proposed arrangements will be acceptable to Transmission Service Provider or the Balancing Authority.

Also, Ameren asserts that the self-supply arrangements would need to be in place prior to the earlier of commencement of service or such time that the Ameren Companies as the Transmission Service Customer would be required to make an election of the method of procuring ancillary services to MISO. Finally, Ameren says provisions related to the recovery of MISO charges and other incremental costs incurred by the Ameren Companies to accommodate such an option would need to be included in the SFC, to ensure that the BGS Supplier incurs to the greatest extent possible the full and complete cost of electing such an option. (Ameren reply brief at 66)

**c. Commission's Analysis and Conclusions**

Staff recommends that the Commission order the Companies to modify the SFC language to include a provision to give the suppliers the option of self-supplying MISO Schedule 3 (regulation service), Schedule 5 (spinning reserve) and Schedule 6 (supplemental reserve) ancillary services.

Ameren claims there are technical barriers, such as metering issues, to Staff's recommendation. Staff claims there are no technical barriers, including metering problems, and even if there are, Ameren should be required to overcome these barriers. Ameren also argues that there are administrative barriers to implementing Staff's recommendation. Staff disagrees and says even if there were, Ameren should be required to surmount the barriers to implement its recommendation. Additionally, Ameren states in its reply brief that if the Commission requires allowing suppliers the option to self-supply ancillary services, certain changes to the SFCs are appropriate.

The Commission wishes to adopt a procurement process that is fair to suppliers, customers and Ameren. It appears, however, that in this instance Ameren has raised arguments that are self-serving. Also, Ameren attempts to extend what are arguably legitimate concerns about offering one ancillary service to all three. Perhaps in anticipation of Staff prevailing on this issue, Ameren appears to retreat to some degree in its reply brief.

The Commission directs Ameren to revise the SFC to allow self-supply of regulation service, spinning reserve and supplemental reserve. Additionally, Ameren is authorized to modify the SFC to require that the provision of such resources must comply with all applicable Transmission Service Provider tariff requirements and the requirements of the appropriate balancing authority.

As for Ameren's suggestion that provisions need to be added to provide for the recovery of MISO charges and other incremental costs incurred by the Ameren Companies to accommodate such an option, the Commission is willing to consider any evidence regarding such provisions in an appropriate forum.

### 6. Identification of Resources

#### a. Staff's Position

Staff recommends that the Commission order the Ameren Companies to remove the references in the SFCs to the Companies' resource adequacy obligations to MISO in connection to acquiring capacity resource information from the suppliers; remove from the SFCs the "December 1" date by which the Companies are obligating the suppliers to submit capacity resource information to Ameren; and "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." (Staff brief at 142; reply brief at 67)

According to Staff, some suppliers may consider such data as commercially sensitive, and thus may be hesitant to reveal the information to the Companies -- especially since the Companies' generation and marketing affiliates are competitors of the suppliers in the procurements auctions, bilateral energy and capacity markets, centralized day-ahead and real time RTO LMP markets and possibly many others. (Staff brief at 133)

Staff also argues that for the Ameren Companies to procure Network Integration Transmission Service ("NITS"), suppliers do not have to identify to them any resources because the pro-forma contracts will suffice for the Companies to procure NITS. Staff also contends that since resource adequacy obligations for the Companies' loads to the MISO will be met by the suppliers and these transactions take place via the Commercial Model, the suppliers do not have to reveal any information, which may be potentially commercially sensitive, to the Companies. Staff suggests the Companies may be able to meet their MAIN requirements without obtaining capacity resource information from the suppliers provided both MAIN and the Ameren Companies agree to such provisions. (Staff brief at 133-134)

Staff claims the Ameren Companies' position that its proposal is consistent with industry practice is invalid because these negotiations are conducted between private corporations in a manner that is not open to the public; thus, no public record exists. Further, Staff contends that industry practice is not determined by a few purchased power contracts or requests for power. (Staff brief at 136)

Staff notes that ComEd, in its procurement auction proceeding (Docket No. 05-0159), does not require the suppliers to identify capacity resources to the buyer. Staff argues that the suppliers do not need to submit capacity resource information to Ameren in order to be eligible to nominate FTRs. Staff says they can submit this information directly to MISO under Module E as market participants and this is sufficient to make them eligible to nominate and receive FTRs during the MISO FTR allocation period. (Staff brief at 137-138)

According to Staff, turning the obligation over to the suppliers does not imply irresponsibility. Currently, Staff says the Companies meet their MAIN requirements by receiving the capacity resource information from the suppliers and then submitting that information to MAIN during MAIN's summer audit. Thus, Staff suggests that instead of this two-step process, the Companies can simply allow the suppliers to submit required information directly and confidentially to MAIN on behalf of Ameren. Staff also argues that ComEd is under exactly the same resource adequacy obligations to MAIN and yet is not requiring its suppliers to submit any capacity resource information to ComEd. (Staff brief at 138)

It is Staff's position that even if the requirement on the suppliers to submit capacity resource information to Ameren is retained, the SFC "December 1" deadline to submit such information should be changed. Staff argues that since MAIN's annual audit is performed in the summer, there is no reason for the suppliers to identify capacity resources to the Companies as early as December 1 of each year. (Staff brief at 139)

Staff agrees that the MISO Generator Deliverability Test Results are publicly available, but claims those test results do not make available the entities that designated the network resources. In addition, Staff says the results of FTR allocations do not necessarily identify all of the DNRs of specific market participants. Even if the FTR allocation results allowed one to identify all of the DNRs of specific market participants, Staff believes this is still not a sufficient reason to require the suppliers to submit capacity resource information to the Ameren Companies. (Staff brief at 140)

**b. Ameren's Position**

The Ameren Companies say they take their obligation to provide reliable service to their native network customers as paramount. In their view, any proposal that jeopardizes their ability to do so is unacceptable and all other arguments are secondary. (Ameren reply brief at 67)

According to Ameren the claim that supplier's may find such data to be commercially sensitive is without foundation because no supplier has objected to these provisions. Ameren adds that none of AmerenIP's current suppliers who have a similar requirement objected to such provisions. (Ameren reply brief at 67)

The Ameren Companies argue that they, and not the BGS supplier, are the transmission service customers, thus, access to the data already exist. Ameren adds that the provisions within the SFC cannot compel MISO, MAIN, or any other regional reliability organization ("RRO") to modify their tariffs, business practices, operating guides of procedures. (Ameren reply brief at 67-68)

Ameren argues that Staff's recommendation likely would conflict with the applicable rules and standards of MAIN and MISO. If the Commission requires the Ameren Companies to adopt this recommendation, it should condition such an

obligation on the Ameren Companies' ability to comply without violating standards of or obligations to MISO, MAIN, or any other RRO and without violating any applicable law or regulation. (Ameren reply brief at 68)

#### c. Commission Analysis and Conclusions

Staff wants Ameren to be required to modify the SFCs so that certain information need not be provided by suppliers to the Ameren Companies due to a concern over the commercial sensitivity of the data. Initially, Ameren insisted reliability would be at risk if it did not have access to the data in question. In its reply brief, Ameren suggests some unspecified state or federal law or regulation may require Ameren to have access to the information.

Staff has explained why the suppliers might be reluctant to provide the information in question to the Ameren utilities. Ameren's concerns about reliability notwithstanding, the Commission believes Staff has demonstrated that Ameren will be able to provide reliable service even in the absence of the disputed data. Thus, a supplier shall not be required to provide the data if it certifies to Ameren that doing so will involve the release of commercially sensitive information. In the event a supplier so certifies, but Ameren nevertheless believes state of federal law or regulation dictate that Ameren must obtain such information, then Ameren may file a petition with the Commission seeking appropriate relief. Ameren is directed to modify the SFCs to make them consistent with these findings.

### 7. New Taxes

CCG proposed language intended to provide a mechanism for the Commission to review any new tax that could be imposed on a supplier and determine whether that tax should be passed on to customers. CCG claims it is a matter of risk allocation for suppliers. Adding this language to the SFC will provide suppliers with a measure of comfort that they may not bear unknown tax liabilities. CCG asserts the imposition of such a tax on suppliers is a real possibility. To the degree that a new tax could potentially be imposed on wholesale suppliers, CCG believes there should be a mechanism to address that issue and it urges the Commission to adopt the one it proposes. (CCG brief at 18-19)

In its reply brief, CCG says it has no disagreement with Ameren as to the line of demarcation and responsibility for new taxes. CCG argues that the point is that the SFC has no mechanism that would allow the Commission to determine whether new taxes that may be imposed on suppliers should be passed on to end users. CCG claims that if a new tax were imposed on Ameren as the load serving entity, it would pass the tax on to end users if it were entitled to do so; BGS Suppliers should have the same right. (CCG reply brief at 9)

According to Ameren, the issue is whether it is appropriate for these tax consequences to be shifted to retail consumers. Ameren states that the SFCs create a

clear line of demarcation between the BGS Supplier's responsibilities and the Ameren Companies responsibilities. Ameren argues that CCG seeks to shift these costs across that line. These tax obligations would be shifted from the BGS Supplier through the Ameren Companies to the retail consumers. In Ameren's view, such a shifting is counter to the fundamental nature of the SFCs. By agreeing to the SFCs, Ameren argues that the BGS Suppliers should accept the responsibilities growing from their side of the demarcation line. (Ameren reply brief at 68)

Having reviewed the record, the Commission does not adopt CCG's proposal. While the Commission appreciates CCG's concern about possible new taxes, it seems that such an argument could be extended to countless other types of costs. To the extent CCG or any supplier believes it is at risk due to possible new taxes, or any other cost increase, it may include such a premium in its bid.

### 8. Payment Disputes

According to MWGen, Section 9.3 of the BGS SFC allows either party to withhold from the other any disputed amount billed under the contract. If it is ultimately determined that the party withholding the amount in dispute did so improperly, that party must pay to the other the amount due plus interest at a specified rate.

MWGen claims this provision could operate in a way that is substantially adverse to suppliers, and proposes that changes be made to the provision. Specifically, MWGen proposes the payment of a more compensatory rate of interest than the one proposed by the utilities (the so-called Federal Funds Effective Rate) and proposes an expedited method of dispute resolution. The purpose of these changes is to have the dispute resolved much more quickly than would be possible under the draft BGS contract and to reduce the incentive for the utility to withhold by increasing the financial cost to it of an improper decision to withhold. (MWGen brief at 11-12)

MWGen acknowledges that Section 9.3 of the Ameren proposed contract is not as potentially detrimental to suppliers as the ComEd contract, in one respect. Whereas under the ComEd contract the utility need not provide supporting documentation for the dispute until 90 days after the due date of the statement in question, the Ameren contract requires that the dispute be presented within five (5) business days, and supporting documentation provided within thirty (30) days, of the due date of the statement. MWGen asserts that the more expedited schedule for presentation of the dispute provided by the Ameren contract will tend to mitigate some of the adverse impacts that would otherwise flow from Section 9.3 of the BGS contract, but will not remove them entirely. (MWGen brief at 12)

According to Ameren, MWGen raises this issue for the first time in its brief. Ameren claims MWGen did not present any evidence on this subject in this proceeding and there is no record evidence regarding MWGen's concerns about Section 9.3 or showing that that provision is not commercially fair. Ameren says MWGen even points out that the Ameren SFC is not as potentially detrimental to suppliers as the ComEd

SFC. It is Ameren's position that MWGen's recommendation should be rejected. (Ameren reply brief at 69)

Having read the arguments, the Commission observes that it is bound to make decisions based on the evidence of record. In this instance, the issue appears to involve at least some questions of fact, but it was not raised during the evidentiary portion of this proceeding. As a result, MWGen's proposal is rejected at this time. However, the Commission believes MWGen has raised an interesting question and would be willing to reconsider its proposal at a later time.

### 9. Prudent Utility Practice Standard

#### a. Dynegy's Position

Dynegy proposed changes to the SFCs intended to put the onus of imprudent actions by Ameren, with respect to the Ameren Utilities' systems that caused the Suppliers to be unable to provide supply, squarely on Ameren. According to Dynegy, the general allocation of risk with respect to less (or more) demand developing on any given day and during any given hour is borne by Suppliers under the SFCs. Dynegy does not, in general, disagree with this allocation of risk. Dynegy states that either suppliers are in a better position to manage such risk or they are at least in no worse position than Ameren to manage it. Dynegy argues that when the cause of reduced load is Ameren's own imprudence in managing its systems, it would seem obvious that Ameren, not Suppliers, would be in a better position to manage that subset of demand risk. (Dynegy brief at 21-22)

It is Dynegy's position that, as between Ameren and Suppliers, the economic consequences of such events should be visited upon Ameren, not Suppliers. Dynegy claims that each Ameren Utility knows its own system and can manage its own actions in this regard, while Suppliers will have no control over that aspect of the supply chain. Dynegy argues that not only do the Ameren Utilities know at a much more detailed level how they are investing in their distribution systems, by acting prudently, they should be able to price this risk at zero because prudent actions should lead to no increase in their costs under the SFCs. Utilities should be provided incentives to act prudently. Placing the economic consequences of not doing so on them does precisely this, while placing those consequences on Suppliers actually creates the opposite incentive. (Dynegy brief at 22)

In response to the argument that Dynegy's proposal could lead to prudence reviews of every distribution outage and as such potentially lead to significantly increased costs for Ameren, Dynegy claims, for the most part, that outages are caused by reasons beyond Ameren's control. According to Dynegy, for any given outage, this will be readily apparent to everyone, including Suppliers, who have no reason to increase their own costs by debating every single outage. (Dynegy brief at 22)

Dynegy asserts that properly set, a threshold would serve to dramatically reduce the outages covered by the SFC clause and those outages would be much more likely to have known and well-studied causes due to their size. Dynegy also claims such a threshold should reduce Ameren's costs because such outages presumably receive further scrutiny and investigation even in the absence of a contractual clause. (Dynegy brief at 22-23)

Dynegy believes its proposal to incorporate a Prudent Utility Practice standard into the SFCs should lead to lower cost for retail customers because Suppliers will have one less risk to factor into their bids and Ameren should have little or no added costs. (Dynegy brief at 23)

**b. Ameren's Position**

It is Ameren's position that the BGS Suppliers should be paid only for the energy that actually was delivered to and consumed by the BGS customers. According to Ameren, Dynegy recommends that the SFC be amended in a manner by which the BGS Supplier would be paid for the energy that would have been used if not for a disruption of electric service to end-use customers due to an act of negligence on the part of the Ameren Companies. (Ameren reply brief at 69-70)

Ameren is concerned that this proposal might subject the Ameren Companies to a prudence review of every distribution system outage which could significantly increase their cost. These costs ultimately would be borne by the consumers. In this instance, Ameren believes having the BGS Supplier factor the risk of lost sales due to outages attributable to the Ameren Companies negligence into its bid price results in a more efficient process and, ultimately, the lowest cost to the end use consumer. (Ameren reply brief at 70)

Ameren states that most outages are caused by reasons out of the Ameren Companies' control. Dynegy takes this concept a step too far by suggesting that that the Ameren Companies should not be concerned about prudence reviews because "[o]f course, for any given outage" it "will be readily apparent to everyone including Suppliers . . ." that the cause of a outage was beyond the Ameren Companies' control. Ameren claims that while it wishes things were so black and white, matters such as these inevitably are subject to debate. Ameren says there are risks and costs associated with defending a prudence attack. Ameren urges the Commission to reject Dynegy's recommendation. (Ameren reply brief at 70)

**c. Commission Analysis and Conclusion**

The Commission takes no position on whether the Ameren Companies would be required to make payments to suppliers under the type of scenario described by Dynegy. Furthermore, nothing in this order should not be interpreted as adopting either Dynegy's position or Ameren's position on this issue, and no presumptions are created with respect thereto.

### 10. Payments from Defaulting ARES

#### a. Dynegy's Position

Dynegy proposes that any payments Ameren receives from a RES, if that RES' defaults causes additional load to be served under the SFCs, be passed through to Suppliers. Dynegy argues that if Suppliers know they will fully receive any penalties or other payments Ameren recovers from a defaulting RES, this will reduce the risk Suppliers face from such an event. Ameren, on the other hand, proposes that it be able to retain some portion of such payments and only pass through the remainder. (Dynegy brief at 23)

Dynegy contends that it is Suppliers who face the risk that more load will need to be served due to a RES default or that Ameren's distribution service is unaffected by such an event since, regardless of who supplies the commodity to the customer, Ameren delivers it. Despite having two opportunities to do so, in rebuttal and surrebuttal, Ameren has been unable to describe a single additional cost it might incur if a RES were to default. Dynegy complains that Ameren did not (1) elaborate on what types of costs Ameren could possibly have, (2) explain how those purported costs would be calculated and by whom, or (3) explain how any of these statements were reflected in any of the operative language of the SFCs. (Dynegy brief at 23-24)

Dynegy says Ameren's assurances about full pass-through if Ameren in fact has no cost, while reassuring, are no substitute for contractual language clearly delineating what costs are at issue and how they will be calculated. Dynegy does not deny that Ameren should be entitled to its validly incurred costs and losses under a RES default scenario. Here, however, Dynegy argues that Ameren has been unable to point to any such possible costs or losses, and insists on vague contractual language. According to Dynegy, this combination unnecessarily increases Suppliers' risks in the event of a RES default. Dynegy says its proposal properly addresses that, at no identifiable cost to Ameren. (Dynegy brief at 24)

In its reply brief, Dynegy says it concerned that a third party could mistakenly or inadvertently be the trigger of a Default under the SFCs. Dynegy states that such a Default would be one for which no cure period were permitted. (Dynegy reply brief at 8)

Dynegy asserts that Ameren raises a red herring that SFC Defaults result from any action or inaction of the BGS Supplier, not the MISO. According to Dynegy, Ameren never explains how a Default that by its terms reads, inter alia, "or the MISO holds . . ." (Resp. Ex. 18.1 (revised), § 5.1(vii)), can be solely due to the actions or inactions of the Supplier. (Dynegy reply brief at 8-9)

Dynegy also complains that Ameren does not address Dynegy's larger concern that as proposed by Ameren, Suppliers would not have any cure period within which to demonstrate that MISO's actions were mistaken. To address this, Dynegy sought a

brief, but necessary, cure period so that, if the third party mistakenly took an action, it would not inadvertently trigger a Default for which there was no cure period. Dynegy argues that because Ameren has not explained why actions by a third party that could be due to an error or mistake should trigger an SFC Default, much less explained why such a Supplier should be provided no cure period in such a circumstance, Dynegy's proposed modifications should be adopted. (Dynegy reply brief at 9)

According to Dynegy, Ameren admits that reducing uncertainty leads to more aggressive bidding, which in turn should lead to lower auction-clearing prices. Yet, Dynegy argues, Ameren fails to recognize that removing the uncertainty that a third party could erroneously trigger a Default for which there is no cure period will do precisely that. (Dynegy reply brief at 9)

**b. Ameren's Position**

The Ameren Companies say they agree with Dynegy's concept so long as the Ameren Companies are provided an offset right to account for any costs or losses it incurs due to the default. The Ameren Companies assert that the SFC includes these pass-through and offset rights. Ameren says Dynegy objects to the Ameren Companies' right to recover its costs through the ARES payments simply because the costs have not been identified up front. (Ameren reply brief at 70)

The Ameren Companies say they committed that any amounts retained under the offset right would be no greater than appropriate to offset their costs or losses attributable to the ARES' default. If no such costs exist, then the Ameren Companies will not retain any portion of the ARES payment. In Ameren's view, the SFC language is not vague and discretionary. Ameren claims the retained amounts cannot be arbitrarily determined by the Ameren Companies. (Ameren reply brief at 71)

**c. Commission Analysis and Conclusions**

Dynegy alleges there is a lack of specificity in the SFC about what costs Ameren will be allowed to recover in the event of ARES default as well as how those costs are calculated. Dynegy argues that due to the lack of specificity Ameren should not be allowed to retain any amounts recovered from a defaulting ARES. Ameren argues, in essence, that the specific types and levels of such costs cannot be determined on an ex ante basis.

As discussed elsewhere in this order, the Commission has adopted mechanisms whereby annual public hearings will be conducted for, among other things, reviewing the accuracy of purchased power costs incurred pursuant to the approved auction relative to cost recoveries. Otherwise, the Commission makes no further findings on this issue at this time.

### 11. Delivery Point Definition

#### a. Dynegy's Position

In its direct testimony, Dynegy asserted that the definition of Delivery Point in the SFCs was not artfully drafted because it mixed concepts of the place to which a Supplier is required to provide power and energy with other concepts such as the Supplier Responsibility Share. Dynegy requested a better definition be provided by Ameren in rebuttal. (Dynegy brief at 25)

Dynegy complains that Ameren, in rebuttal, did not adequately respond to its request. Dynegy says it has provided two possible ways to alter Ameren's definition to make it more acceptable - using ComEd's definition in its SFCs, suitably modified or language based on Ameren's existing supply agreements. (Dynegy brief at 25-26)

With regard to Ameren's point about MISO load zones, Dynegy asserts that (1) MISO permits Elemental Pricing Nodes to be allocated by percentage to more than one Commercial Pricing Node and (2) Suppliers can serve their slice of the Ameren load and settle at a load zone LMP. According to Dynegy, the allocation Ameren said was not possible can be made. (Dynegy brief at 26)

Dynegy also claims that Ameren's concern about multiple Ameren Utilities is readily resolved by Dynegy's proposal to split the auctions and SFCs into three. Dynegy also complains that Ameren's surrebuttal testimony does not mention, much less discuss, Dynegy's two possible ways to craft better language, including its proposed replacement language. According to Dynegy, we have the surreal situation of Dynegy providing exactly what Ameren requested, with Ameren asking yet again for the same thing and otherwise professing an inability to discuss the proffered language. (Dynegy brief at 27)

It is Dynegy's position that if Ameren cannot craft better language itself, then Dynegy's proposed language in DYN Ex. 1.2, n.2 should be adopted. Dynegy contends that this issue reinforces the need for Ameren to split the contracts (and auctions) so as to clearly separate each utility. (Dynegy brief at 27)

#### b. Ameren's Position

Ameren states that the MISO's current business practices require the Delivery Point definition to recognize three BGS Supplier-specific load zones for each BGS Supplier (one in each of the three Ameren Company control areas). The Ameren Companies seek to define term "Delivery Point" in a manner that is consistent with the MISO energy markets. Ameren claims that the definition recognizes that MISO will require each BGS Supplier have separate load zones and that those load zones will be defined as encompassing the BGS Suppliers share of the BGS load of a given Ameren Company.

Ameren says the definition also recognizes that each BGS Supplier will need separate load zones for each of the three Ameren Company control areas. Ameren believes the basic principles that are embedded in this definition are appropriate and should remain in the Ameren Companies' SFCs. (Ameren reply brief at 71)

Ameren says there is no evidence in the record that rebuts the fact that the MISO only permits one Market Participant to be designated per load zone.

Ameren claims Mr. Blessing's acknowledgement that MISO permits Elemental Pricing Nodes to be allocated by percentage to more than one Commercial Pricing Node is consistent with the Ameren Companies' position that a separate load zone/Commercial Pricing Node will be created for each of the Suppliers and that each such load zone will be equivalent. Similarly, Ameren asserts that serving their slice of the Ameren load and settling at a load zone LMP is consistent with the concept of having multiple, effectively equivalent load zones/CP Nodes, each unique to a given supplier. (Ameren reply brief at 71-72)

According to Ameren, even if multiple market participants are able to schedule and settle with MISO against a particular load zone/CP Node, Dynegy has failed to identify how the other supplier obligations could be met without having a unique (albeit equivalent to the others) load zone for each BGS Supplier. Ameren asserts that the obligations and responsibilities include responsibility for the bidding of their load share at the appropriate load zone, input of any financial schedules or physical bilateral schedules from resources to the appropriate load zone, meeting resource adequacy requirements, nomination and management of Fixed Transmission Rights ("FTRs") related to their load share and the direct settlement of all costs other than the network service related to the load with MISO. Ameren says the BGS Suppliers will also be responsible for their own credit relationship with the MISO. (Ameren reply brief at 72)

The Ameren Companies intend for the BGS Suppliers to be responsible for more than just the provision of energy. The BGS Suppliers' ability to directly nominate and hold FTRs in particular is expected to lower the overall cost of supply. Dynegy cannot simply wish away a MISO requirement. MISO is not obligated to modify its tariff or business practices to accommodate a non-conforming provision in the SFC. Ameren maintains it would be improper to include provisions in the SFC which conflict with such tariffs and business practices. Ameren says such changes can be made and incorporated prior to the issuance of the Auction documents. Ameren argues that while a more precise definition of delivery point is not required, the SFC finalization process identified above is the proper time and place to resolve Dynegy's concerns. (Ameren reply brief at 72)

### c. Commission Analysis and Conclusions

Dynegy complains about the definition of Delivery Point in the SFCs. Among other things, Dynegy argues this supports its proposal to split the three Ameren auctions and contracts. Ameren argues that Dynegy's proposal is inconsistent with

MISO's requirements and this is not the proper time and place to resolve Dynegy's concerns.

Dynegy's proposal to split the Ameren auction and associated contracts into three was rejected earlier in this Order and the Commission, therefore, rejects this rationale for revising the definition at issue.

Although the record is not completely clear on this point, it appears that Ameren's proposed definition comports with MISO's business practices. In conclusion, the Commission does not adopt Dynegy's proposed revisions. Looking to the future, the Commission is open to revisiting this issue, and welcomes input from other parties beyond just the two who are battling over numerous contract provisions.

### 12. Changes to MISO Rules

#### a. Dynegy's Position

Dynegy states that the MISO markets and associated rules were extremely new. Therefore, changes, possibly substantial ones, are likely to occur. Thus, Dynegy suggests imposing all of the risk of changes on Suppliers is inappropriate, especially when there was no recourse over the term of the SFC and the changes could undermine the economics of the deal. In light of the uncertainty associated with these changes, Dynegy believes there could be less Supplier participation in the auctions or withdrawals of tranches at higher prices.

Although Dynegy did not offer specific contractual language, it provided several options to reallocate the risk associated with possible changes, e.g., automatic price adjustments, contract reopeners and sharing the risk. Dynegy says it proposed deleting the relevant Ameren SFC language as "a placeholder" and that after the basic solution to this issue is reached, contract language can be crafted and inserted. (Dynegy brief at 27-28)

Dynegy asserts that Ameren's rebuttal was less than responsive, consisting of only two points and only one substantively. First, Ameren stated that the SFCs used the Delivery Point as the "demarcation line" between those MISO risks borne by Suppliers and those borne by Ameren. Second, Ameren stated that change is inevitable and Ameren's demarcation point was appropriate for allocating any risks attendant with changes, even in new markets.

In Dynegy's view, the mere statement that Ameren has drawn the demarcation line at one particular point is no response to whether that is where the allocation of risk should be made. Dynegy asserts that completely lacking from Ameren's rebuttal was any explanation of why the allocation proposed by Ameren was the correct one, especially when even Ameren agreed that changes were inevitable. (Dynegy brief at 28)

Dynegy claims there was a very specific example of recent events, occurring after Dynegy filed its direct testimony, that underscores the need for a better allocation of the risk of MISO markets and rules changes. The specific issue related to MISO uplift charges. According to Dynegy, the issue in this instance was not delivery point-driven but rather made doubly risky for Suppliers because the charges at issue apply to both the load and demand side of the equation and the SFCs impose both risks on Suppliers. In an effort to reduce the cost to consumers, Dynegy proposed that Ameren provide daily forecasts as a means of reducing the Suppliers' risks. Dynegy claims Ameren was uniquely qualified to provide these forecasts because for years its utilities have prepared and used such forecasts and have assembled the tools and data to make them. (Dynegy brief at 28)

Dynegy says Ameren's surrebuttal disagreed with the requested forecasts and Ameren provided no discussion of the need for a better allocation generally nor did they provide alternative solutions to address the larger problem. Contrary to Ameren's suggestion, Dynegy did not request forecasts by customer class because no such thing is needed. Under Ameren's proposal, one needs only a forecast for customers below 1 MW and one for customers above 1 MW. Dynegy asserts this is hardly a daunting problem. According to Dynegy, the Ameren Utilities have load research programs and ratepayers are paying substantial amounts for them. Dynegy claims that Ameren has not explained why its ratepayers should not be given the fruits of their dollars. Dynegy argues that even if that data somehow duplicates what Suppliers might be able to create, ratepayers would presumably want to see such a check on the system used if it meant lower costs to them. (Dynegy brief at 29-30)

It is Dynegy's position that the forecasts at issue will help in a timeframe much closer to real time than substantially staler data provided prior to the auction or 5 and 20 days prior to actual day at issue, although that data may help inform both Suppliers and Ameren. The reduction in uplift charges by using better data requires much more current data. Ameren's concern about liability for inaccurate forecasts make little sense in light of Dynegy's prior willingness to discuss that issue. Ameren merely asserts one possible solution without providing any accompanying reasoning. (Dynegy brief at 30)

In any event, Dynegy believes Ameren should be required to provide forecasts as it proposes. Equally importantly, in Dynegy's view, Ameren should be required to discuss and implement more sensible allocations of risks relating to changes in MISO rules and markets. Dynegy suggests a workshop process would be one way to accomplish this. (Dynegy brief at 30)

**b. Ameren's Position**

The Ameren Companies readily acknowledge that changes to MISO's markets and market rules likely will occur as the market matures. This is one of the many risks that the SFCs must allocate between the BGS Suppliers and the Ameren Companies. The question asked by Dynegy is where the risks of MISO changes should fall as

between the Ameren Companies, the retail consumers, or the BGS Suppliers. (Ameren reply brief at 73)

According to Ameren, Dynegy states that the Ameren Companies did not justify the use of the delivery point as the point in which these risks shift from the BGS Suppliers to the Ameren Companies. Such a justification, in Ameren's view, is so obvious. The BGS Suppliers have a duty to deliver their product to the delivery point. At that point, the BGS Suppliers delivery duties end.

Ameren asserts that the affect of MISO market changes should be allocated among the parties based upon their respective delivery obligations. It does not seem fair for the Ameren Companies or the retail consumers to share the risk that, for example, MISO might alter the energy market rules or membership rules in a way that increases the BGS Suppliers costs. (Ameren reply brief at 73)

Ameren says that Dynegy suggests that requiring the Ameren Companies to provide daily load forecasts could somehow reduce the BGS Supplier's risks of a change in MISO's rules or markets. Ameren states that although requiring it to produce a forecast that the BGS Suppliers could and should produce independently would reduce the BGS Supplier's costs (assuming the BGS Supplier choose to not produce its own forecast as well), the link between a daily forecast and changes to MISO markets and rules stretches the imagination. (Ameren reply brief at 73-74)

In Ameren's view, Dynegy's proposal is based on false assumptions and premises. Dynegy incorrectly assumes that the Ameren Companies currently and for years prior have (1) prepared and used similar forecasts; and (2) assembled the tools and collected the data needed to provide accurate forecasts. The Ameren Companies claim they do not prepare and have never prepared such forecasts (i.e., forecasts differentiated by customer class, and incorporating customer switching data).

Ameren says Dynegy would have the Commission believe the load research programs which may be in place at the Ameren Companies would somehow enable them to prepare such forecasts, yet there is nothing in the record to suggest that this is true. Ameren asserts that load research does not equal a detailed, day-ahead load forecast by customer class (even if it is only two classes). Dynegy would now have this Commission believe that such a forecast was the intended fruits of the customer's dollars. (Ameren reply brief at 74)

To prepare the load forecasts that Dynegy is proposing would, according to Ameren, require significant changes to existing models. Ameren asserts that the load research programs are used to produce other important utility related analysis whose value is not questioned by Dynegy. (Ameren reply brief at 74)

It is Ameren's position that BGS Suppliers, like Dynegy, will have the historic data and certain forecast data available to it to produce its own daily forecasts. Ameren

claims the BGS Supplier ultimately bears the risks associated with inaccurate load forecasting. (Ameren reply brief at 75)

If the Commission requires the Ameren Companies to provide some forecasting services to the BGS Suppliers, Ameren believes the contract language must be clear and unambiguous that any such forecast data is non-binding, that its accuracy is not warranted or guaranteed in any fashion and that the Ameren Companies will not liable for any consequences arising from the use of such data by a BGS Supplier. Without these protections, the Ameren Companies are concerned they will be put at risk of significant liability should a forecast not accurately predict the BGS Suppliers actual load with great specificity. (Ameren reply brief at 75)

**c. Commission's Analysis and Conclusions**

Dynegy expressed concerns about the potential risk to suppliers that stems from the possibility that MISO may make rule changes that impose costs on suppliers. Dynegy suggests that such costs should be shared. Apparently, Ameren believes that suppliers should bear all of the risk associated with changes in MISO rules.

The Commission certainly understands Dynegy's concern; however, the only two proposed solutions were to either pass the cost of associated MISO rule changes directly on to ratepayers, or to conduct workshops and revisit the issue. The Commission is not inclined to approve a mechanism where increased costs incurred by suppliers are passed directly through to ratepayers. The Commission prefers the alternative, where suppliers assess the possible impact of MISO rule changes on them and include in their auction bids the value that they place on that risk.

Dynegy also requests that Ameren be ordered to provide two load forecasts: one for customers with demand below one megawatt and one for customers with demand above one megawatt. Ameren objects to this request arguing, among other things, that it does not currently make such forecasts, and would have to make significant changes to its existing models to accommodate such a requirement. Finally, Ameren says if it is required to provide forecasts to suppliers, the SFCs would require language to indicate that the Ameren Companies will not be liable for any consequences arising from the use of such data by a BGS Supplier.

The Commission is not surprised that Ameren has not previously prepared the forecasts Dynegy requests, given that one of the many changes resulting from this proceeding is a major restructuring or regrouping of customers. Ameren is directed to use its best efforts to provide to BGS suppliers the forecasts identified by Dynegy. The Commission believes these forecasts have the potential to benefit suppliers and improve bids in the auctions. Ameren is authorized to modify the SFCs to incorporate the conditional language related to the forecasts identified at page 75 of its reply brief, providing that Ameren will not be liable for the consequences arising from the use of such data.

### 13. Proposed Clarifications and Modifications Accepted by Ameren

Throughout the proceeding, the Ameren Companies made various revisions to their proposed SFCs where they believed it was appropriate in response to feedback received from BGS Suppliers and Staff. Some of these modifications are described in Ameren's brief at pages 104-106. Similarly, Staff describes some of these modifications at pages 111-113 of its brief.

The contested issues regarding the SFC are described above the immediately preceding Sections of this Order. To the extent no party objects to Ameren's proposed modifications of the SFCs, they are hereby approved by the Commission.

## VI. PROCUREMENT PROCESSES ALTERNATIVES

### A. AG's Position

Section VI.A-B of AG's brief is called "active portfolio management and request for proposal." (AG brief at 57-63) The AG asserts that the Ameren Companies' proposal is notable for its rejection of any role for the utility in purchasing decisions. The AG argues that customers would end up paying more than necessary if any another product or mix of products could be purchased for less through an auction or obtained through other procurement methods.

Electricity procurement and management involves at least two, well defined functions: (1) product or portfolio design and (2) procurement. Product or portfolio design is the identification of customer needs and constraints, such as tolerance for risk, identification of the types of resources necessary and appropriate to meet those needs and constraints, and managing those elements to acquire electricity at a price that is as low cost and reliable as possible. The AG asserts that procurement is the process whereby resources are actually acquired. There is a range of procurement alternatives, including bi-lateral agreements, affiliate contracts, requests for proposals, and auctions.

Active portfolio management would allow the utility to consider a wide range of products, including standard market products (e.g. baseload, peak, super-peak, full requirements or load following), unit contingent products (contracts for output from specific facilities), various contract durations, and various pricing options (fixed price, tolling, index) and some spot market purchases. These products reflect varying degrees of risk, and enable the buyer to negotiate to capture the lower costs associated with baseload plants (e.g. nuclear powered, coal powered) as compared to the higher costs of peaker plants, which use more expensive fuel (e.g. natural gas), but are needed for less time. By contrast, under the auction clearing price proposal, one pays the price of the most expensive offer for all power used. (AG brief at 58)

Multilateral negotiations can yield lower prices than a simultaneous descending clock auction. Direct participation allows a shrewd buyer to implement price caps by

holding firm and refusing to purchase from suppliers at prices above which the buyer expects they can afford to accept.

The Ameren Companies' proposal would forego the benefits of a customized and flexible procurement strategy, such as multilateral negotiations or a request for proposal process, for an approach that is rigidly limited to one type of product and one type of procurement method. Ameren would relegate the management of supply to a process that minimizes discretion, insulates Ameren from any responsibility for the prices consumers would be forced to pay, allows suppliers to set the price paid by consumers, and removes Commission oversight of prices entirely. (AG brief at 60)

The mandatory transition period in the 1997 Amendments has given Ameren and the other utilities significant time to learn how to obtain supply. The Ameren companies have been the purchaser of supply for Illinois consumers for several years since the transfer of their generation facilities. Active portfolio management or a request for proposal process would allow it to continue to act as the agent of monopoly consumers and to use all of the variables that go into purchasing to the advantage of consumers. These variables include timing, portfolio design, bargaining power and use of cost and market data. (AG brief at 61-63)

Active portfolio management would enable Ameren to space its purchases to minimize or hedge risk. Although no one can claim to know exactly when to buy to obtain the lowest long term price, spreading purchases over time minimizes the risk that any one purchase will have a major, disruptive impact on prices.

The AG also addresses the affiliate contract alternative. (AG brief at 64-67)

The AG asserts that the Ameren Companies minimize the possible benefits, either to Ameren utility customers or its generation affiliate, which could result from using its substantial buying power to negotiate with Ameren Energy Generating or other affiliates or local generators to continue supplying electricity in 2007 and beyond. The Ameren Companies attempt to justify its recalcitrance by suggesting that it would not be productive to pursue this procurement alternative because FERC and the United States Constitution somehow bar sales of electricity for less than "market price."

The AG says no party has suggested that the Ameren Companies purchase electricity (from an affiliate or otherwise) at less than "market price." (AG brief at 66) The AG has urged Ameren to take off the conceptual blinders regarding the range of market prices that exist. The AG argues that the meaning of the term "market price" is not limited to the clearing price in the proposed auction or the various MISO markets – and neither FERC's Edgar standard nor the United States Constitution guarantee sellers of electricity the MISO market price or the artificially high clearing price that would be produced in Ameren's proposed auction.

There are many different market prices because there are many different types of buyers and sellers of electricity, buying and selling different types of services for varying

terms at a number of price points -- through bilateral contracts, multilateral contracts, bidding regimes, day-ahead markets and hourly markets for electricity. Absent coercion or collusion, none of these arrangements between buyers and sellers are barred by FERC or the Constitution – and all of these transactions establish valid "market prices" for electricity.

Ameren should use its substantial buying power to negotiate with its generation affiliate, Ameren Energy Generation, to purchase low-cost electricity from the generating plants that the customers of Ameren's public utilities paid to build and maintain. (AG brief at 67-68)

**B. CUB's Position**

CUB argues that the Ameren Companies should have presented the ICC with a full exploration of the range of options for procuring resources to serve default service customers, comparing them objectively in terms of their impact on the costs and risks. Such a proceeding could have allowed a reasoned determination of which approach would best satisfy the needs of ratepayers and other parties.(CUB brief at 22-25)

The Ameren Companies would have certain advantages in managing its own portfolio, including experience, access to the best information about customers and their requirements, ongoing real time data collection, and potentially lower equity return requirements and debt rates. Diversified, actively managed procurement would allow flexibility in procurement decisions and negotiations. If properly managed and utilized, this flexibility can provide benefits that would not be possible under rigid auction rules.

The full range of opportunities and benefits to the supplier - including non-monetary benefits, such as a stable income stream, the value of a business relationship, or any aspect of the transaction that has value to the supplier and lead it to reduce the price vis-à-vis an alternative - must be considered for this comparison.

There are many products that the Ameren Companies can combine into an actively managed portfolio design. A few of the products that should be evaluated to determine how their costs and risk profiles would affect default service rates include standard wholesale electric power market forward contracts of various lengths from a month to a number of years and a wide range of starting dates; spot purchases; bilateral negotiated contracts of varied terms, sizes or start dates; unit-specific power contracts with owners of existing units; non-unit-specific power contracts with owners of groups of existing units; residual load following contracts; options to buy (or sell) power at various prices at various times; and at-cost, fixed price, turn-key or other types of arrangements for power from new or existing units at various locations. (CUB brief at 23)

The Ameren Companies would have significant bargaining power and could bring discipline to the wholesale markets. Choosing a diverse portfolio of resources, actively managed for the benefit of default service customers would allow the Ameren Companies to pick and choose among offers of different types, opt for short-term or

open positions if markets do not produce reasonable results, or fall back on any or all of the many other product choices listed above, all in an infinite range of combinations driven by the actual offers available.

The Ameren Companies, as a buyer, also could optimize their portfolio with a different objective (protecting customer interests and risk preferences) than suppliers that will optimize based upon their own risk preferences. A diverse, actively managed portfolio can be readily adapted to cope with changes in markets, both supply and demand. The Ameren Companies' proposed portfolio design and procurement method not only passes through to default service consumers all the costs and risks of that procurement, but actually exacerbates some of those risks by placing all the default service load on single-product, single-date auctions. (CUB brief at 24)

The Ameren Companies propose to deprive default service customers of the benefits that could be obtained from a more diversified portfolio and procurement process, simply so it can avoid the responsibility for making portfolio design and management decisions. These are tasks it once routinely performed and are routinely performed by its affiliates today (albeit not for the benefit of ratepayers), and by commodity managers for all sorts of businesses.

The Ameren Companies misrepresent both the breadth of procurement options open to it, as well as the considerable flexibility given to it under Illinois's restructuring legislation. They continue to have all the flexibility they always did in choosing resources and procurement methods, plus additional, new flexibility in how it runs its business. Clearly prudent utilities have relied on a wide range of products, term lengths, and procurement methods to manage risk and cost. Few, if any, have had the temerity to place their entire resource portfolio in a "blind trust." (CUB brief at 25) Given the magnitude of the costs and risks from uncompetitive wholesale markets, it is not appropriate for the Ameren Companies to simply give up on protecting consumers from those costs and risks without seriously examining the alternatives.

### C. Ameren's Position

The Ameren Companies argue that no party offered any meaningful or realistic alternative to the competitive auction procurement process proposed by the Ameren Companies. (Ameren brief at 113) They disagree with the AG and CUB's positions regarding alternative methods of procurement.

The Ameren Companies claim the vertical tranche approach promises procurement efficiencies as the difficult tasks of least-cost resource portfolio selection, risk management, and day-to-day portfolio management utilize the experience and expertise of wholesale suppliers in deregulated power markets, without the need to duplicate these functions and capabilities within the regulated utility. In addition, the approach allows for participation of a wide, diverse group of suppliers and provides stable but market-based rates that customers can compare easily with other retail

market options. Such straightforward comparison of choices for consumers furthers the development of retail competition.

In contrast, the portfolio management approach, which is more akin to traditional integrated resource planning and "energy plans" used prior to the introduction of retail access, would allow for somewhat more procurement flexibility by the utility. It also may require less supplier sophistication, as single-asset suppliers can sell directly to the utility and suppliers can bid traditional energy and capacity products. However, the apparent accommodation of less sophisticated suppliers is not a true advantage, as wholesale markets already accommodate single-asset suppliers and the sale of traditional energy and capacity products.

The drawbacks of the portfolio management approach include significantly more complex resource selection and bid evaluation criteria that reduce the transparency of the procurement process and can result in a lengthy and more contentious regulatory process as procurement decisions are second-guessed based on after-the-fact analysis.

The Ameren Companies are now primarily in the business of delivering power to their customers, and do not have the internal resources to perform the generation portfolio management responsibilities. A principal reason for selecting the procurement approach being advocated by the Ameren Companies was to continue to focus their resources on delivery services, and avoid unnecessary or duplicative generation operations.

There is no reason to believe that the managed portfolio approach would yield lower costs than the market. The managed portfolio option is not going to consistently produce below-market costs over the long-term. (Ameren brief at 116)

Regarding RFPs, Ameren does not believe a proposal to use a "request for proposal" or sealed bid approach has been advanced. This was one of the options that Dr. Steinhurst listed as an available procurement mechanism under the active portfolio management approach. The Ameren Companies believe that an auction is preferable to an RFP and, accordingly, have proposed an auction. (Ameren brief at 117)

In Section VI.C of their brief, "Affiliate Contract," The Ameren Companies state that their affiliates are under no legal obligation to sell even a single kilowatt-hour to the Ameren Companies. (Ameren brief at 117-118) If the Ameren Companies are waiting for their affiliates to sell to them at a price below market, they may be waiting a very long time. There is no reason for any company to sell to the Ameren Companies at a price below market.

A no-bid, below market transaction between the Ameren Companies and an affiliate would not satisfy FERC's Edgar standards. The ICC has no authority to dictate the rates of a wholesale transaction or to override the FERC's requirements for a wholesale transaction.

In addition, requiring the Ameren Companies to enter into affiliate agreements instead of competitively bidding their power supply would contradict the conditions the ICC imposed when Ameren Corporation acquired CILCO and IP. The ICC specifically required that the Ameren Companies competitively bid power supply, and Ameren closed the transactions on that basis. The Ameren Companies do not believe that the ICC may alter the conditions it imposed now, to the detriment of parties who relied on those conditions. (Ameren brief at 118)

### D. Staff's Position

Staff argues that other than the auction procurement proposal, the only alternatives that have been presented in the record are vague or incomplete. Thus, Staff recommends against their adoption by the Commission in this docket. (Staff brief at 143)

AG and CUB witnesses argued in favor of so-called "active portfolio management" that includes utilization of the many other standard products available in the market, and the possibility of negotiating prices and other contract terms with suppliers. Staff opposes that approach, recommending that the Commission reject it.

First, active portfolio management, by definition, places significant discretion in the hands of the utility company with regard to purchasing power and energy. Staff notes that ComEd and Ameren both have large power generating and marketing affiliates. Their existence supplies the utilities with a conflict of interest. Thus, in what would amount to a beauty contest between one complex procurement plan and another complex procurement plan (with a multitude of criteria for selection), it would probably be as difficult for the utility to avoid playing favorites as it would for the Commission to determine if that were happening. This type of problem is avoided to a tremendous extent through the vertical tranche auction approach, where all the criteria for selection have worked out in advance and presented to the Commission for its approval, and the focus of the auction is on only one completely objective criteria: price.

What CUB and the AG miss is that when the portfolio management service is in the hands of the competitive market, as it is in the Auction Process proposed by Ameren, the competitive suppliers are the ones who will decide how efficient it is to leave some of the position open. The competitive suppliers will factor any such advantages directly into their bids. Customers will get the benefit of such cost minimizing strategies, and they will get this benefit at a fixed price.

In summary, there is not sufficient evidence in the record to reject the proposed auction approach for what some witnesses have referred to as "active portfolio management." Indeed, even those witnesses who seem to be most inclined toward active portfolio management have not gone so far as to actually recommend that the Commission order the utilities to utilize the approach.

Rather, they prefer to let ComEd and Ameren make that decision, themselves, at their own peril. In contrast, there are several disadvantages associated with active portfolio management that have been firmly established in the record. Thus, for all the above reasons, Staff respectfully recommends that the Commission reject active portfolio management at this time. (Staff brief at 151)

Regarding RFPs, Staff states that requests for proposals, auctions, bilateral negotiations, and purchases from the centralized MISO markets are all alternative ways of obtaining contracts for power from markets. Using a request for proposal does not imply that the utility can avoid going to markets. At one extreme, RFPs could be used to solicit bids for new generating equipment--either turn-key operations or components. Several different RFPs could be used to solicit bids for base load, intermediate load, and peaking load consistent with the "active portfolio management" approach discussed previously.

At the other extreme, RFPs could be used to solicit bids for vertical tranches (i.e., percent of full-requirements load), as in the Companies' proposal. In other words, a request for proposal is merely an alternative to using an auction process for soliciting bids from potential suppliers.

As far as Staff can tell, no witness has actually proposed that the Ameren Companies utilize RFPs as a means to solicit bids for power in the post 2006 era. Hence, Staff respectfully recommends that the Commission reject substituting one or more RFPs for the proposed auction process, at this time. (Staff brief at 153)

Regarding affiliate contracts, Staff asserts that pursuant to the Customer Choice and Rate Relief Law of 1997, the Ameren Companies were allowed to divest their generating assets. Thus, unless the generating assets are bought back by the Ameren Companies, the cost of those plants and the cost of operating them cannot directly form the basis for a reassessment of the Ameren Companies rates following the rate freeze. These plants are now a part of "market" supply. From the Ameren Companies' perspective, the cost of producing power and energy from these plants is not and may never again be determined by an accounting of the cost of building and operating these plants.

Staff agrees that it would be desirable for ratepayers if wholesale suppliers could be convinced to provide power and energy to Illinois utilities at below-market prices. However, Staff is of the opinion that it is highly unlikely and unrealistic to assume that the Ameren Companies can acquire power and energy at below-market prices, and there is no viable plan for making it happen.

Staff argues that the Commission simply cannot prevent Ameren Generating from being enriched by such sales, if Ameren Generating's costs happen to be lower than those market based prices. (Staff brief at 155) Assuming no accounting or rate design improprieties, such market-based purchases are fully consistent with the Ameren Companies having "cost-based" rates. Staff recommends that the Commission take no

action to direct the Ameren Companies to acquire power from affiliates, but that the Commission recognize and accept that the proposed auction may result in the Ameren Companies affiliates supplying part of the Companies' full-requirement needs. In addition, Staff recommends against the Commission dictating to the Ameren Companies that the Company must negotiate or demand purchases from affiliates at anything other than FERC-approved prices, whether or not they are market-based. (Staff brief at 155)

### E. Commission Conclusion

The Commission has reviewed the positions of the parties on this issue. The parties have identified various procurement strategies, and have set forth their opinions on the relative strengths and weaknesses of each.

One fact is clear. Ameren will need to procure supply to serve customers after the transition period ends on January 1, 2007.

For reasons stated elsewhere in this order, the Commission believes, subject to the modifications and conditions imposed herein, that the auction proposal advanced by Ameren represents a reasonable approach for obtaining supply. Despite some arguments to the contrary, it is intended to obtain reliable full supply requirements for each auction on a competitive, least-cost basis.

It is also transparent, and will be conducted by a third-party manager in conjunction with Staff. Thus, by its design, the auction will provide access to the benefits of supply, including affiliated supply, in a competitive setting. This consideration is relevant, because the reality is that the Ameren utilities cannot be ordered by this Commission to extend their existing affiliated supply contracts. Further, the record does not support a finding that the cost of supply available from affiliates is likely to be lower via contracts than it will through their participation in the auction.

Based in part on the reasons noted above, and subject to the modifications and conditions imposed in this order, Ameren has made a case in this proceeding, with the support of Staff and some of the other parties, for using its auction proposal. Whatever the availability and potential benefits of other procurement alternatives may be in theory, the record in this case does not support a conclusion that any are more viable in terms of price, reliability and other pertinent factors for purposes of meeting Ameren's post-transition supply requirements.

Lastly, some parties find it ironic that AG and CUB claim the wholesale market from which Ameren plans to make purchases is not competitive, yet argue that there are infinite supply options available to Ameren through active portfolio management and similar techniques. In the Commission's view, if properly designed and implemented, an auction process can reasonably be expected, over the long run, to minimize the cost of supply from the resources that are available and choose to participate in the market.

# VII. TARIFF AND RATED DESIGN MATTERS

## A. Introduction

During the course of the proceeding, numerous auction-related rate design and tariff issues were addressed by the parties. Their positions on these issues, and Commission conclusions, are set forth below.

## B. Matters concerning Rider MV

### 1. Rider MV-Organization

According to the Ameren Companies, they agreed with Staff that the index for Rider MV should initially be uniform with that of ComEd's competitive procurement tariff. The Ameren Companies reserved the right to change the index, however, as circumstances warrant. (Ameren draft order at 93)

Staff recommends that the Commission adopt the uniform index for the Ameren Companies' Rider MV which was attached to Ms. Harden's testimony as Schedule 7.1. (Staff brief at 160-161)

In the Commission's view, there is no real contested issue here. The organizational structure agreed to by the Ameren Companies and Staff, as reflected in Schedule 7.1 attached to Staff Ex. 7.0, is hereby approved.

### 2. Rider MV-Definitions

#### a. Customer Supply Group Definitions

The Ameren Companies described nine Customer Supply Groups defined under Rider MV: Residential Service Customer Group (BGS-1), Small General Service Customer Group (BGS-2), General Service Customer Group (BGS-3), Large General Service Customer Group (BGS-4), Dusk to Dawn Lighting Customer Group (BGS-5), Optional Real-Time Pricing Customer Group (RTP), Real-Time Pricing Large Customer (RTP-L), Self-Generating Customer Group, and Partial Requirement Customer Group. (Ameren draft order at 93)

#### b. Peak and Off-Peak Period Definitions

The Ameren Companies recommended the use of the MISO on-peak and off-peak time periods in determining the forward prices that are used to serve as proxies to facilitate the results of the rate prism.

Staff witness Lazare recommended that the Ameren Companies utilize the period from 10:00 a.m. to 10:00 p.m. for the on-peak period, suggesting the MISO periods were too broad and not in accord with the timing of demands on the system. The

Ameren Companies agreed, for purposes of this case, to accept Mr. Lazare's proposal. (Ameren draft order at 94)

Staff recommends that the Commission reject any proposal to revise the definitions of peak and off-peak periods for retail customers. Instead, Staff says the Commission should adopt Staff's proposed definitions that maintain consistency with the current definitions of peak and off-peak. (Staff brief at 161)

With regard to peak and off-peak definitions, the Commission believes there are no longer any disputed issues. The Commission finds reasonable, and hereby adopts, the definitions agreed to by the Ameren Companies and Staff.

### 3. Rider MV–Specification of Competitive Procurement Process

The Ameren Companies state that Rider MV provides for an overview of the CPA, which describes the general CPA process, matters pertaining to the CPA participants, CPA documents, the credit requirements required to be met, as well as the CPA timeline. Rider MV, as it relates to the competitive procurement auction process, outlines the rules that must be followed by the Ameren Companies, suppliers, auction manager, and Staff. (Ameren draft order at 95)

### 4. Rider CPP–Retail Customer Switching Rules

#### a. Enrollment Window

##### i. Ameren's Position

The Ameren Companies propose a 30-day open enrollment period for customers interested in the BGS-LFP product to decide whether to take that product. The BGS-LFP product is the one-year fixed price product offered to customers with demands greater than 1 MW. CES recommended increasing the open enrollment period to 75 days. The Ameren Companies oppose increasing the enrollment period, as increasing the enrollment window beyond 30 days means that price for the BGS LFP product will unnecessarily increase. (Ameren draft order at 96, reply brief at 82)

The Ameren Companies state that the impact of increasing the open enrollment period will not be to the Ameren Companies, but instead to the customers that eventually take the BGS-LFP product. They assert that increasing the window requires the BGS-LFP suppliers to hold their price open for an additional 45 days. This will increase the resulting auction price for the BGS-LFP product. According to the Ameren Companies, the 30-day open enrollment period was a compromise between giving customers enough time to weigh their options and minimizing the risk premium associated with requiring the winning BGS-LFP suppliers to leave that price open during the 30-day period. (Ameren draft order at 96)

The Ameren Companies are also concerned that leaving bids open for extended periods would increase their risk, and that this optionality risk would be recovered by increased bid prices. If the wholesale market price increases during the extended open enrollment period, ARES may be less competitive relative to the BGS-LFP price, in which case more customers will stay with that product than the BGS-LFP suppliers had anticipated when making the bid. In this instance, the winning BGS-LFP supplier might be under-hedged and may need to require additional supplies at the now higher market prices. Conversely, if wholesale prices fall, the ARES are able to undercut the BGS-LFP product price and customers will take their product, and so the winning BGS-LFP supplier is now over-hedged and may need to sell off its excess supply at the now lower market price. (Ameren draft order at 96)

In response to CES' contention that extending the enrollment period would give customers more time to consider their options, the Ameren Companies state that IIEC, who are actual customers that have considered third-party supply offers, made clear there is no need for the additional time. The Ameren Companies contend that prices are not static. They move, and the customer and third party supplier can review terms and conditions of any proposed transaction prior to the enrollment period. According to the Ameren Companies, the customers have the ability to coordinate their request for proposals prior to the time that the BGS-LFP auction price is announced. The Ameren Companies argue that if the customer requires 90 days to develop and finalize its RFP, the customer can, well before the finalization of the BGS-LFP product price, initiate discussions with the ARES to review terms and conditions and other related considerations. (Ameren draft order at 96)

In its reply brief, Ameren expressed surprise that Staff moved away from its position in testimony and now suggests that an enrollment window of 40 or 45 days is acceptable. Ameren says Staff is more interested in looking for a compromise than coming to the correct decision. Ameren asserts that Staff's own evidence counters its efforts to seek a compromise where one is not needed. (Ameren reply brief at 82-83)

Ameren argues that aside from Staff's empirical analysis, it is intuitively obvious that there will be an additional cost associated with the BGS-LFP product with an extended enrollment window. (Ameren reply brief at 83)

The Ameren Companies agree that the propriety of an enrollment window other than 30 days is something that should be further evaluated. If circumstances warrant, then additional adjustments can then be made. Ameren suggests that the 30-day window might be too expansive and costly, and that a shorter window may be preferred. But, according to the Ameren Companies, today the weight of the evidence on record advocates against changing the 30 day window period to anything longer, even by an additional 10 to 15 days. (Ameren reply brief at 84)

The Ameren Companies refute CES' reliance on the ComEd 75-day PPO enrollment window, claiming it is an inappropriate basis for establishing the enrollment window for the BGS-LFP product. PPO prices are administratively-determined, based

on a limited snap shot view of the wholesale market condition, while the BGS-LFP product will be priced based on the wholesale market, meaning there is no price comparability as CES implies. They also claim that the length of the PPO sign-up window has no effect on PPO prices, which the Ameren Companies says shows the lack of comparability. Finally, the Ameren Companies assert there is nothing magical about a 75-day PPO window, noting that AmerenIP's PPO has an enrollment window of 30 days. (Ameren reply brief at 85)

The Ameren Companies also dispute CES' claim that customers need more than 30 days to make fully informed decisions. The Ameren Companies suggest that this is simply an argument by retail suppliers who would stand to benefit from an extended enrollment period, while the opposite position is advanced by the very customers who CES claims to be protecting, and who are submit that 30 days is more than sufficient. According to the Ameren Companies, CES points to the limited number of industrial customers who are making their positions known with regard to the 30-day enrollment window as somehow being meaningless. The Ameren Companies respond that there are fewer suppliers that make up the CES group than there are number of customers that make up the IIEC. (Ameren reply brief at 85-86)

According to the Ameren Companies, CES complains that the Ameren Companies have presented no empirical analysis or customer survey. The Ameren Companies state that Staff provided the very empirical analysis that proves an extended enrollment period means additional cost to the BGS-LFP product. The Ameren Companies also suggest that CES benefits directly from a larger enrollment window because CES does not hold its price, but expect the BGS-LFP product to remain the same for not just 30 days, but 75 days. (Ameren reply brief at 86)

The Ameren Companies state that CES also argues that it is unrealistic to expect customers to pre-negotiate contracts. In the Ameren Companies' view, when CES argues that neither customers nor RESs would have information necessary to pre-negotiate contracts before the auction occurs, one has to question the legitimacy of such a conclusion. The Ameren Companies argue that no basis in fact is offered for this contention, only a self-serving conclusion. RESs such as CES surely intend to have customers enter into written contracts, and these contracts have certain terms and conditions that are unrelated to price. It stands to reason, according to the Ameren Companies, that these terms and conditions can be reviewed and negotiated before the price is known. (Ameren reply brief at 86)

The Ameren Companies also argue that CES' references to evidence or positions taken in the ComEd Docket 05-0159 should be disregarded. (Ameren reply brief at 87)

In response to IIEC's suggestion that if the Commission does extend the enrollment period, that it should still maintain a 30-day window for customers 3 MW above, the Ameren Companies complain that IIEC does not explain why smaller

customers should bear the additional cost at the expense of IIEC. (Ameren reply brief at 87)

It is the Ameren Companies' position that if the Commission does extend the enrollment period, it should do so for all customers eligible for the product. Otherwise, the Ameren Companies complain, they will have the administrative burden and cost of managing two separate enrollment periods, as well as the affected price for the same product. They assert there is also likely to be confusion among customers. Of all the choices before the Commission, the Ameren Companies believe IIEC's proposal is surely the poorest. (Ameren reply brief at 87)

The Ameren Companies say that DES/USESC alone argues for no restrictions on minimum stays or enrollment windows. The Ameren Companies state that this recommendation comes from firms that are not even certified as ARES, and have no experience in the Illinois retail market. More importantly, according to the Ameren Companies, their positions assume a regulatory paradigm that simply does not exist in Illinois. (Ameren reply brief at 87)

**ii. CES' Position**

CES says it did not object to Ameren's proposal to include an enrollment window for its BGS-LFP product. CES disagreed, however, with Ameren's proposed 30-day duration of the enrollment window. CES proposed revisions to Ameren's customer groupings, enrollment window and switching rules to make them consistent with those presently advocated by ComEd in its own procurement proceeding. CES reasoned that, if the Commission were to direct Ameren to revise the Companies' customer groupings to comport with those advocated by ComEd, it likewise would be reasonable for the Commission to direct Ameren to adopt ComEd's proposal to establish a 50-day enrollment window for the initial auction and a 45-day enrollment window for subsequent auctions.

However, CES believes that unless and until Ameren adopts more customer-friendly and competition-friendly rules in its service territories, the Commission should direct Ameren to adopt the 75-day enrollment window, as originally proposed by the CES. According to the CES, the 75-day enrollment window has proven fair and workable. Unless other revisions to Ameren's proposal are adopted, the record does not include any evidence to support a shorter window in Ameren's service territories. (CES draft order at 40-42)

Despite ComEd's support for a 50-day enrollment window for this initial auction, Ameren continues to support a 30-day enrollment window within which customers may choose between Ameren's revised products and RESs' products. Despite the fact that no party has suggested giving customers less than 30 days to make their enrollment decisions, Ameren now characterizes its 30-day proposal as a compromise. CES contends it is precisely this kind of ardent opposition to providing customers with

competitive options that has resulted in a dearth of competition in Ameren's service territories. (CES reply brief at 21-22)

In its reply brief, CES requests the Commission to direct Ameren to adopt a 75-day enrollment window or, as part of a comprehensive revision of Ameren's retail rules to make them mirror those now proposed by ComEd, order Ameren to adopt a 50-day enrollment window for the initial auction and a 45-day window for subsequent auctions. (CES reply brief at 22)

In a competitive environment, the theoretical premiums asserted by Ameren, IIEC, and Staff likely will be squeezed out of bids and, therefore, will not be reflected in the final prices bid into the wholesale auction. (CES reply brief at 22)

According to CES, even if Staff's premium figures are accepted at face value for the sake of argument, this theoretical premium is a small price to pay to afford customers a meaningful opportunity to evaluate, negotiate, and execute their choices while, at the same time, provide sufficient time for the utility to make the appropriate changes, should an error be discovered during the enrollment window. (CES reply brief at 22-23)

If the enrollment window is too short, many customers simply will accept the utility supply option, not because it is the most economical option, but rather because customers simply lack sufficient time to implement and complete the decision-making steps necessary to meet their supply needs. Unlike the very large customers represented by the IIEC, most BGS-LFP customers do not have personnel or offices dedicated to buying electricity. Many of these customers simply require more than 30 days to analyze their electricity choices, move proposals through the corporate or institutional chain of command, negotiate contracts, and, finally, execute purchase transactions. (CES reply brief at 23)

In summary, CES claims an appropriately defined enrollment window, because it directly affects customers' abilities to assess supply options, is critical to the development of the Illinois retail electric market. CES asks the Commission to direct Ameren to adopt a 75-day enrollment window or, as part of a comprehensive revision of Ameren's retail rules to make them mirror those of ComEd, order Ameren to adopt a 50-day enrollment window for the initial auction; and 45 days for subsequent auctions. (CES reply brief at 24)

#### iii. Staff's Position

According to Staff, Ameren's selection of the 30-day enrollment period was not based on any empirical analysis. All parties recognize it would be appropriate to impose a switching restriction in the form of an enrollment period on BGS-L customers, since BGS-L customers have demonstrated a significant propensity to switch from the Companies' service to service from a RES. These parties recognize that there is a trade-off between accommodating retail competition, the possibility that bidders may

add a risk premium to their bids as a result of the uncertainty in estimating the size of the BGS-L load they would have to serve and the possibility of adverse market price movements during the enrollment period. (Staff brief at 163)

In response to claims that it would be impossible to verify whether a risk premium would exist if the enrollment period were increased from 30 days to 75 days, Staff witness Dr. Schlaf presented an option pricing model to estimate the size of the risk premium that suppliers might be expected to add to their bids if the duration enrollment period were increased by a given number of days. The rationale for using this type of option pricing model is that customers hold an option for a certain number of days to buy the annual service product at a fixed strike price. While customers are considering this option, offers from RESs presumably will be available in the market and their prices would follow the volatility of annual forward contracts. (Staff brief at 165-166)

According to Staff, suppliers might be expected to add about 3.2% of the forward price if the enrollment window were set at 30 days. For each additional 10 days that the size of the enrollment window is increased, bidders might be expected to add another 0.4% of the forward price to their bids. For an increase in the enrollment window from 30 days to 75 days, the model shows that suppliers might add about 1.8% of the forward price to their bids. Staff considers the extra 1.8% a significant amount of additional cost, and says such costs would be paid by the customers that are the least able to attract offers from RESs. Staff also points out that no other party presented any empirical evidence on this issue. (Staff brief at 166-167, reply brief at 75)

Staff suggests one way to resolve this issue is to compromise on an enrollment window duration that is between 30 days and 75 days, with the understanding that enlarging the window would inevitably lead to somewhat higher costs for customers that remain on BGS-L service for the entire supply period. Staff witness Dr. Schlaf testified that enrollment windows of 45 and 40 days would be reasonable. Staff argues that such enrollment periods would give RESs and BGS-L customers more time to negotiate deals, but at a cost. (Staff brief at 167-168)

Staff believes that an enrollment window between 30 and 75 days would more appropriately balance the competing interests at stake than the end-point positions advocated by the witnesses. Staff recommends that the Commission direct the Ameren Companies to modify its tariff so that BGS-L customers would have an enrollment window of 40 or 45 days. In Staff's view, this represents a significant increase in the time available to customers to make an election, while at the same time avoiding the imposition of a significantly increased risk premium.

Staff recommends against selection of an enrollment period longer than 45 days, given the level of added cost such larger enrollment windows would impose on BGS-L customers. Finally, Staff recommends that the Ameren Companies be required to study the issue of the appropriate duration of the enrollment period, and bring the results of its analysis to the attention of Staff and other parties prior to the next auction. (Staff brief at 168, reply brief at 75)

### iv. IIEC's Position

IIEC supports the Ameren Companies' proposed 30-day enrollment window for customers electing service under the Ameren Companies' annual fixed-price product. It is IIEC's position that proposals to expand the sign-up window for the annual fixed-price product to 75 days should be rejected because it will increase risk to potential suppliers and in turn increase auction prices. IIEC believes 30 days represents a reasonable balance of the competing interests of offering customers time to make decisions on competitive supply options and keeping the bid price premiums to a minimum. (IIEC brief at 39)

IIEC supports the 30-day sign up window because it believes the evidence in this docket indicates that a longer signup window would produce a risk premium from suppliers which would in turn increase auction prices. (IIEC brief at 39)

According to IIEC, CES supported its request for a 75-day window by comparing the sign up window for the fixed-price product with the current 75-day sign up window that applies to ComEd's PPO service. IIEC argues that the comparison of the annual fixed-price product to PPO is misplaced because PPO prices are administratively determined, based on limited snapshot views of wholesale market conditions. In contrast, the annual fixed-price option in this case is an actual power supply offer, which wholesale suppliers take on risk to provide. The length of the PPO sign up window has no effect on PPO price. (IIEC brief at 40-41)

IIEC notes that Staff witness Dr. Schlaf stated in cross-examination that some number of days between 30 and 75, such as 40 or 45, would be a compromise between the two positions. IIEC says he ultimately confirmed that he would not have a problem if the Commission adopted the 30-day enrollment window. (IIEC brief at 41)

According to IIEC, proposals to extend the enrollment period ignore the empirical analysis performed by Staff witness Dr. Schlaf, which demonstrated the impact of increasing the enrollment window on auction prices. IIEC states that the total risk premium for the 75-day window would be over 5%. (IIEC reply brief at 30)

Ironically, IIEC asserts, CES relies in large part on the testimony of its witness Dr. O'Connor, Vice-President for the Illinois Market for Constellation NewEnergy and ignores the testimony of Michael Smith, Vice President of Regulatory and Legislative Affairs for another Constellation company, Constellation Energy Commodities Group, Inc. IIEC says Mr. Smith testified that it was likely suppliers would price an auction premium into their bid to account for the optionality associated with the period of time the customer would have to choose to take CPP-A service.

IIEC says another potential supplier, Dynegy, also testified that the more risk and uncertainty suppliers are required to accept, the higher the auction clearing prices will

be, and that time-related uncertainty is one of the reasons prices are not kept open by suppliers for extended periods of time. (IIEC reply brief at 30-31)

IIEC states that CES reasoned that customers require more time to decide on taking the BGS-LFP product and that giving these customers additional time is worth the additional premium (price increase) customers would pay. However, IIEC argues, CES does not speak for larger customers who have stated they do not require additional time and prefer not to pay the additional premium. In addition, IIEC says the Commission should remember that CES is a coalition of retail electric suppliers who will not pay the premium, but rather will benefit from it. (IIEC reply brief at 31)

IIEC states that while Staff would not support a window in excess of 45 days, it would accept as a compromise a 40 to 45-day enrollment window and recommends that Ameren be required to study the appropriate duration of the enrollment window and report to Staff and the parties on the results of its analysis. IIEC disagrees with Staff's suggestion. In IIEC's view, the record demonstrates that the market clearing price in the auction will be higher than it would have otherwise been as a result of extending the enrollment window. (IIEC reply brief at 31-32)

IIEC believes the Commission should adopt a 30-day enrollment window. If for any reason the Commission determines a longer enrollment window is needed for small customers, the 30-day enrollment window should apply to larger customers (3 MW and over). (IIEC brief at 41-42, reply brief at 32)

### v. CCG's Position

CCG does not take a position as to the duration of the enrollment window and only makes an observation that the duration could impact price. Since the BGS-LFP customers will have a period of time within which to choose to take the BGS-LFP service, it is likely that the generation supply rates for BGS-LFP customers will be higher as suppliers will likely price an auction premium into their bids to account for this optionality. (CCG brief at 18-19)

### vi. DES-USEC's Position

DES-USEC argues that in order to develop a competitive market capable of producing sustained, long-term benefits for Illinois electric consumers, there should be no restrictions placed on switching between electric suppliers. Restrictions on switching suppliers, such as enrollment windows and minimum stay requirements, impair the ability of customers to take advantage of competitive offers already in the market; discourage competitors from entering the market; and serve to enrich the wholesale providers by decreasing their risk that customers will switch providers while at the same time allowing wholesale providers to charge a premium for their long term contracts. (DES-USEC brief at 25)

The premium associated with "migration risk" is especially pronounced under Ameren's proposal, with its heavy reliance on long-term wholesale supply contracts. DES-USEC argue that under their proposal, with its monthly and quarterly auction products, potential migration risk is reduced exponentially. As a result, there is no need under the DES-USESC proposal for minimum stays or enrollment windows. They contend that under their proposal, suppliers do not have an ongoing commitment beyond the upcoming month or quarter, and customers would be able to decide to switch on a monthly or bill cycle basis without having to pay an exit fee. (DES-USEC brief at 25)

#### vii. Commission's Analysis and Conclusions

As discussed above, there are many parties with widely divergent views on the appropriate length of the enrollment window. The positions of the parties are stated in some detail above and will not be repeated here.

In the Commission's view, the length of the enrollment period is a matter of judgment on which reasonable people can have different views. The challenge is to strike the right balance between providing customers with sufficient time in which to make decisions, on the one hand, and on the other, the higher premium that would likely result if suppliers were forced to hold out fixed price call options for longer periods of time.

Based on the evidence in the record, the Commission finds that a longer enrollment window will in all likelihood lead to higher auction prices. The Commission finds that the evidence presented by Staff on this point is convincing and unrefuted. While CES' position that customers require sufficient time to make informed decisions has merit, the Commission cannot ignore the fact that the CES members benefit directly and proportionally from higher auction prices and longer enrollment windows. In the Commission's view, the record simply does not support an enrollment period anywhere near 75 days in length. The record shows that the additional cost is simply too great.

Given the Commission's concern regarding the absolute level of retail prices, the Commission concludes that, at this time, the enrollment window should be no longer than 40 days. In the Commission's view, the record supports a finding that while smaller customers may benefit from an enrollment window somewhat longer than 30 days, larger customers do not need or desire additional time. Therefore, the Commission adopts the recommendation of IIEC to adopt a 30-day enrollment window for customers with demands greater than three megawatts. The Commission adopts an enrollment window of 40 days for customers with demands less than three megawatts.

The Commission understands that Ameren does not like IIEC's alternative recommendation, which is adopted herein. Of course, Ameren will face increased administrative activities and costs associated with managing two enrollment periods. However, given that the shorter enrollment period is limited to the relatively small number of the largest customers, the problem of customer confusion should not be

significant. The Commission believes the benefits that will be enjoyed by small and large customers of adopting IIEC's alternative recommendation outweigh the disadvantages.

Finally, the Commission adopts Staff's recommendation that Ameren study the appropriate duration of the enrollment period and report on the results of its analysis prior to the next auction.

### b. Opt-In vs. Opt-Out and Other Switching Rules

#### i. Ameren's Position

The Ameren Companies' say their proposed switching rules are defined in proposed Rider MV. New customers that start BGS-L service after the beginning of the supply must take BGS-L service for the remainder of the supply term. According to the Ameren Companies, there appears to be no opposition to these switching rules. (Ameren draft order at 99)

The Ameren Companies originally proposed that customers interested in the BGS-LFP fixed-price product would need to affirmatively opt in for this particular product. (Ameren draft order at 98)

Staff witness Dr. Schlaf testified there may be Rider BGS-L customers who did not have any interest in moving away from bundled service, but who would inadvertently be forced off that service because they failed to make an enrollment election. He further testified that a customer's failure to make the Rider BGS-L service election could result in the customer being placed on the real time service Rider RTP-L, and recommended that Rider BGS-L service become the default service, rather than Rider RTP-L. Under Staff's proposal, customers taking bundled service who do not make a different supply choice during the 30 day enrollment would remain on the bundled service and would be automatically transferred to the Rider BGS-L service. (Ameren draft order at 98-99)

The Ameren Companies have agreed for purposes of this proceeding to accept Dr. Schlaf's recommendation. (Ameren draft order at 99, reply brief at 87)

With regard to large customers who lose third-party supply, Ameren continues to propose that Rider RTP-L should be the default service.

#### ii. Staff's Position

Staff states that under the Ameren Companies' proposal, all customers that wish to take BGS-L service, except for new customers, must enroll for that service during the enrollment window. RES customers would be prohibited from moving to BGS-L service during the supply period, but could switch to hourly service. As noted above, the Ameren Companies first proposed that bundled customers that have not made a supply

selection would be switched to the hourly service, but later adopted Dr. Schlaf's recommendation that bundled customers who do not make a supply selection during the enrollment period could remain on supply service.

New customers that start BGS-L service after the beginning of the supply must take BGS-L service for the remainder of the supply term. Staff does not oppose any of these proposals. (Staff brief at 169)

#### iii. IIEC's Position

IIEC did not address this issue in its Initial Brief. However, in its reply brief, IIEC claims Dr. Schlaf's opt-out recommendation threatens to nullify the benefits of prequalification that have been identified by Staff and IIEC. Therefore, IIEC proposed certain modifications to it. (IIEC reply brief at 32-34)

#### iv. Commission's Analysis and Conclusions

Ameren and Staff agree that customers taking bundled service who do not make a different supply choice during the enrollment period would remain on bundled service and would automatically be transferred to Rider BGS-L service. That is, their default service would be Rider BGS-L, rather than BGS-RTP, unless they opted-out. Additionally, new customers that start BGS-L service after the beginning of the supply must take BGS-L service for the remainder of the supply term. With regard to large customers who lose third-party supply, the Commission agrees with Ameren that Rider RTP-L should be the default service.

IIEC suggests that if the Commission adopts the "opt-out" default rate proposal agreed to by Staff and Ameren, the benefits of IIEC's proposed prequalification proposal could be diminished or eliminated. As a result, IIEC recommended a modification to Staff's default rate proposal. The Commission observes, however, that IIEC's modification, which does affect other parties, was not made until IIEC's reply brief. Thus, other parties did not have an opportunity to respond to it. Accordingly, the Commission does not adopt IIEC's modification at this time.

### 5. Rider MV–Limitations and Contingencies

Purchases made in the event of under-subscriptions, supplier defaults and other contingencies are addressed elsewhere in this order.

### 6. Rider MV-Translation to Retail Charges

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

##### i. CES' Position

CES expressed concern regarding Ameren's proposed translation mechanism alleging it failed to appropriately include an adjustment to reflect the migration risk within each customer group. CES says Ameren's proposed translation methodology contemplated relative costs associated with electric energy, generation capacity, and ancillary services. Unlike the translation tariff proposed by ComEd in its procurement proceeding, CES contends that Ameren's proposal failed to allocate the migration risk premium in order to recognize differing migration potential across customer classes. (CES draft order at 45-46, reply brief at 24)

Taking this step is imperative, according to CES, if the Commission allows Ameren to keep customers between 400 kW and 1 MW in the BGS-FP blended product group. CES recommends that the Commission direct the Ameren Companies to revise their proposed Prism to allocate the migration risk premium in a way that properly recognized these distinctions among customer classes. According to CES, Ameren failed to articulate a persuasive reason for failing to make this distinction. (CES draft order at 46)

According to CES, Staff inappropriately dismissed CES' proposal as arbitrarily applying conclusions from the ComEd proceeding to the Ameren proceeding. CES claims Ameren and Staff fail to recognize that CES members have spent the last five years interacting with customers and customizing solutions to their specific supply needs. In seeking to understand the Illinois market, stakeholders at every level will perform analyses designed to provide some certainty to an otherwise uncertain competitive landscape. (CES reply brief at 25)

Ameren consistently has opposed competition in its service territories and now it attempts to rely on the Companies' success in stifling competitive development as the justification to erect additional obstacles to bar customers in the Ameren service territories from experiencing the benefits of competitive choice. (CES reply brief at 25)

There is no foundation on which the Commission should believe that Ameren's migration risk factor resistance is isolated to this case only. Ameren is best judged by its actions, not by its words. (CES reply brief at 25)

Given the Commission's mandate to develop competition throughout Illinois, it is reasonable to make projections regarding one market using data from a neighboring, related market where ComEd generally embraced competition in its non-residential markets. Numerous expert witnesses have testified that wholesale suppliers will make assumptions about the migration risk factor, and that these assumptions will be

informed by the observations and experiences of prior switching behavior. (CES reply brief at 25-26)

CES argues that although there is a dearth of the kind of quantitative metrics that Ameren and Staff seek to calculate a migration risk factor in the Ameren service territories, there nevertheless is a reasonable basis upon which the Commission may make assumptions about customer behavior generally. CES contends that the uniformity in auction procedures and products sought to be implemented through the instant proceeding should help to ensure that suppliers and customers will have the incentive to behave similarly within the ComEd and Ameren service territories.

CES says Staff endorsed the concept of Ameren and ComEd conducting parallel auctions because it believes that the Ameren and ComEd products would be viewed by bidders as having similar risks and characteristics. According to CES, in seeking to strive toward the competitive goals of the Choice Law, the Commission should seek to overlay ComEd's successes onto Ameren. (CES reply brief at 26)

The goal of the translation mechanism is to properly allocate costs (higher prices) to those customers who caused those costs (that is, who are responsible for the additional costs that cause prices to be higher). One of the relevant costs to be assigned is the cost associated with the possibility that customers may migrate away from the utility supply and to the competitive market. The Companies' rates should reflect the fact that, all else being equal, the auction price should be higher for a customer class that has exhibited a greater propensity to choose RES service rather than remain on utility supply. (CES reply brief at 26-27)

CES claims to have presented un-rebutted evidence that failing to properly allocate the migration risk premium would inappropriately shift costs onto smaller commercial and residential customers. Just as the prism contemplates the differences in load patterns among customer groups under 1 MW for computing supply charges, it should take into consideration differences in migration risk among customer groups. CES says Ameren admitted that wholesale suppliers are likely to consider these relative differences in migration risk when formulating their bids. Rather than failing to include any migration risk factor, CES recommends that the Commission order Ameren to revise its assumptions regarding customer migration so that it relies upon the available empirical data. CES asserts that by doing so, the Commission would ensure that costs are properly charged to the cost causers. (CES reply brief at 27)

### ii. Ameren's Position

The Ameren Companies oppose CES' proposed migration risk factor, on several grounds. First, the Ameren Companies state that there has been little switching by customers in the Ameren Companies' service territories. Therefore, the Ameren Companies believe that there is no justifiable basis on which to establish a migration risk premium for input into the rate prism, and that any number that would be

incorporated into the rate prism would be unsupportive and speculative. (Ameren draft order at 100)

Second, the Ameren Companies believe that reliance on ComEd's switching data, as CES does, is not useful. The Ameren Companies contend that there is no valid basis to believe that switching data in the ComEd service territory would necessarily apply to the Ameren Companies' service territories. There are a number of material differences, including customer density, urban versus rural areas and commercial versus industrial, as bona fide reasons why switching in the ComEd service area is not a reliable metric for the Ameren Companies. (Ameren draft order at 100)

Third, CES has not explained why ComEd's switching data is applicable to the Ameren Companies' service territories, and has offered assertions without quantitative analysis. (Ameren draft order at 100)

Fourth, the Ameren Companies claim their resistance to a risk migration premium is for this case only. The Ameren Companies suggest that after the auction, and after there is some meaningful experience by which to consider or assess a risk migration premium once there has been switching, then such a charge could be incorporated into the rate prism. (Ameren draft order at 100)

The Ameren Companies say CES argues it presented un-rebutted evidence that failure to properly allocate the migration risk premium would improperly shift cost. Ameren disagrees with this argument, claiming that the testimony was that suppliers may consider switching, and to the extent they do, some risk premium may be assessed. (Ameren reply brief at 88-89 citing Tr. 493)

The Ameren Companies also says CES, in support of a portion of its argument, refers to evidence it offered in the ComEd docket. Specifically, in footnote 27 on page 49 CES refers to their witnesses' testimony filed in ICC Docket 05-0159. The Ameren Companies urge the Commission to disregard this evidence as it is not in the Ameren Companies' record. (Ameren reply brief at 89)

CES' claim that suppliers may look to other retail markets in order to assess the respective migration potential, is pure speculation. The Ameren Companies argue that no evidence from any suppliers is noted and there has been no credible showing to suggest or even imply that the switching data in the ComEd service territory is applicable to the Ameren Companies' service territories. (Ameren reply brief at 89)

#### iii. Staff's Position

It is Staff's position that the Commission should reject the proposal by CES to implement a migration risk factor for the Ameren Companies customers. Staff believes the CES proposal is flawed in both theory and practice. Staff states that because the Ameren Companies have failed to develop a migration risk factor proposal of their own, CES proposed a factor that was based upon the migration risk factor that ComEd

proposed in its procurement proceeding (Docket No. 05-0159). According to Staff, CES not only relied on the ComEd proposal as a starting point for its Ameren proposal but also relied on the evidence presented in the ComEd docket. (Staff brief at 172)

Staff found the argument for the CES proposal to be incomplete. Staff asserts that there are two key questions that need to be addressed concerning the migration risk factor: (1) is a migration risk factor appropriate for the Ameren prism? and (2) if such a factor is appropriate, how should it be estimated? (Staff brief at 172)

In Staff's view, CES has failed to adequately answer these questions. According to Staff, CES does not explain why a migration risk factor should be adopted for the Ameren Companies; instead, CES takes the position that the discussion of the proposal in the ComEd docket is sufficient basis for it to be accepted in the Ameren case. According to Staff, instead of making a case for the migration risk factor, CES suggests that the burden lies with the Ameren Companies to explain why it should not be implemented in the Ameren service territories. (Staff brief at 172-173)

Staff says such a position presumes that migration risk is a well-established cost for suppliers and that the utility has the onus to demonstrate why it should not be included in the translation prism. Staff argues, however, that CES provides no convincing evidence to demonstrate that it is a meaningful cost for suppliers that should be factored in the equation. (Staff brief at 173)

CES argues that in this proceeding, the Commission should adopt the ComEd migration risk factor as revised by CES in Docket No. 05-0159. According to Staff, CES provides no arguments why the specific approach proposed by ComEd should be used for the Ameren Companies. Staff states that CES simply reprises its arguments from the ComEd docket for adopting its proposed revisions to ComEd's estimation methodology. (Staff brief at 173)

In Staff's view, the logic behind the CES argument is flawed. Staff asserts that the foundation for its proposed migration risk factor is the estimation formula proposed by ComEd. Staff further contends that CES presents no discussion or accompanying evidence in this docket as to why the ComEd approach should be used for the Ameren prism. It is Staff's position that the lack of support for the general formula renders moot the arguments by CES for revising ComEd's migration risk factor estimation formula. (Staff brief at 173)

Staff says that CES also proposes that the Commission use switching data for ComEd in calculating the migration risk factor for the Ameren Companies to address the lack of competition in the Companies' service territory. Staff argues that CES fails to provide sufficient support for the proposal. According to Staff, CES does not provide evidence that elimination of any obstacles to switching in Ameren's service territory would produce switching levels on a par with ComEd, which is the assumption behind its proposal. In Staff's view, CES proposes to arbitrarily apply conclusions from the ComEd proceeding to the Ameren proceeding. Staff believes this argument should be

rejected along with the entire proposal for imposing a migration risk factor on the Ameren prism. (Staff brief at 173-174)

In its reply brief, Staff says 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. However, Staff claims CES provides no meaningful evidence to demonstrate it is a meaningful cost for suppliers that should be factored in the equation. (Staff reply brief at 76)

#### iv. Commission's Analysis and Conclusions

CES contends that Ameren's proposal failed to allocate the migration risk premium in order to recognize differing migration potential across customer classes. CES recommends that the Commission order Ameren to revise its assumptions regarding customer migration so that it relies upon available empirical data from ComEd service area.

Both Ameren and Staff oppose the application of a migration risk factor for the reasons stated above.

The Commission has reviewed the record, as well as the arguments of the parties, regarding migration risk factors. In the Commission's view, it seems logical that when developing bidding strategies and bid prices, suppliers will consider the likelihood and level of possible customer switching. However, there is not sufficient information in the evidentiary record to support the inclusion a specific migration risk factor at this time.

The divergence of opinions regarding the anticipated level of customer switching, and the lack of evidence in this record quantifying future migration, makes an administratively established migration factor problematic.

Therefore, for purposes of the initial auction, the Commission finds the better course is to allow suppliers to include in their bids their expectations of customer migration. At this time, the Commission does not adopt the proposals to include an explicit migration risk factor.

With respect to future auctions, the Commission finds that this issue should be revisited so that the migration risk factor can be quantified and reflected in the prism as appropriate.

### b. Market Cost Information – Market Energy Costs

For purposes of translating the auction final clearing prices into Retail Supply Charges, the Ameren Companies indicate that forward prices will be used for each month corresponding to the period for which Retail Supply Charges are being

determined. They state that these forward prices serve as proxies to help facilitate or illustrate the use of the rate prism. (Ameren draft order at 101)

Staff originally proposed use of historical Locational Marginal Prices ("LMPs") instead of the forward prices recommended by the Ameren Companies, but in response to the Ameren Companies' rebuttal testimony, Staff agreed to the use of forward prices as an input to the rate prism. Staff found determinative the Ameren Companies' testimony that LMPs would present a problem because prices in non-summer months have exceeded summer prices over each of the past three years. Staff thus recommends that the Commission use forward energy prices in developing the market energy costs that serve as the foundation for the translation prism. (Staff brief at 174-176)

Having reviewed the record, the Commission finds that the evidence supports the use of forward prices in translating the auction final clearing prices into the Retail Supply charges. Forward prices are hereby adopted for that purpose.

### 7. Rider MV – Supply Procurement Adjustment

#### a. Ameren's Position

According to the Ameren Companies, the costs constituting the Supply Procurement Adjustment ("SPA") listed in Rider MV are directly or indirectly associated with the procuring and administering of the power supply procurement, and are not recovered by any other tariff or by any other means. Specifically, the Ameren Companies say the SPA costs include professional fees, cost of engineering, supervision, insurance, payments for injury and damage awards, taxes, license, and any other administrative and general expenses not already included in the auction price for power, and not recovered from the supplier fee. The SPA would also include any capital and operating cost for generation resources incurred outside the power procurement process and any costs assigned to the power supply administration function. (Ameren draft order at 101)

In their reply brief, the Ameren Companies dispute CES' reference to the SPA costs as identified as being general cost categories. The Ameren Companies say this description would be correct if the description of SPA costs is limited to "overhead and administrative expenses with the procurement of power and energy" but that is not the description. Rather, the Ameren Companies say they have expressly detailed and identified the costs to be included such as professional fees, costs of engineering, insurance, and the like.

In the Ameren Companies' view, a more detailed description of the costs to be recovered cannot be envisioned. Whatever the description, according to the Ameren Companies, the burden remains on them to justify and explain in the next delivery service rate cases why these costs are properly included as SPA costs. The Ameren

Companies believe this requirement alone should alleviate CES' concern. (Ameren reply brief at 102)

Unlike the treatment of uncollectible expense, which the Ameren Companies agreed with Staff could be set as test year expenses in the utilities' next delivery service rate cases, the Ameren Companies believe the SPA costs should be tracked through Rider MV. The Ameren Companies assert that an annual true-up is needed with regard to the collection of the authorized level of SPA costs, in order to ensure that the Ameren Companies are not in an over- or under-recovery situation. Otherwise, the Ameren Companies contend that due to the level of customer switching between RES service and utility bundled service, the SPA amount would fluctuate – not because the utilities are incurring more or less costs, but because the kilowatt hours consumed will change. They argue that the other factor that favors tracking SPA costs in the Market Value Adjustment Factor ("MVAF") is the consistent change in customer consumption levels from month to month. (Ameren draft order at 101-102)

The Ameren Companies state that the MVAF only tracks the actual SPA costs that have been found to be appropriate in the context of the utilities' delivery service rate case. Whether SPA costs actually change between rate cases is irrelevant; the actual amount of SPA costs will not be recovered, but instead only the test year level. (Ameren draft order at 102)

The Ameren Companies provide an example where the SPA costs are set at $1 million and would be recovered over 10 million units, or kWh; this would result in a 10 cents per kWh charge. If because of customer switching or a change in the consumption levels, the number of units or kWh by which to recover the SPA cost is now nine million, the $1 million is SPA costs are still recovered but over fewer units. In this instance the charge would be 11.11 cents per kWh. (Ameren draft order at 102) The Ameren Companies present a similar example in their reply brief. (Ameren reply brief at 90-91)

In their reply brief, the Ameren Companies argue that it is important for the same level of costs for the same services to be recovered irrespective of the change in kilowatt hours. They intend for the BGS costs paid by customers to mirror what they would pay if they were buying the same product and the same services in the market. According to the Ameren Companies, CES will have individuals whose responsibility is to procure supplies for their customers.

The Ameren Companies assert they will have someone who will be responsible for procuring power in the auction. That person's wages and benefits remain the same irrespective of the number of customers being served, or more importantly, the number of kilowatt hours they are selling. Therefore, in order to achieve equal footing, the Ameren Companies are proposing a method by which the SPA costs are tracked through the MVAF in order to ensure a comparable market price for the product and service that is being offered. (Ameren reply brief at 91)

The Ameren Companies dispute Staff's assertion that CES' proposal would isolate a single cost element and force recovery of that cost element to an unchanging, predetermined amount regardless of the level of service provided or amount of cost actually incurred. According to the Ameren Companies, the error in the Staff position lies with its understanding or belief with regard to the level of service provided or amount of cost actually incurred. The Ameren Companies aver that the level of service to be provided remains the same as will the cost as determined by the Commission in the Ameren Companies' next delivery service cases. (Ameren reply brief at 90)

**b. CES' Position**

CES argues that Ameren's SPA should be improved in three substantive ways. First, while CES generally supported Ameren's proposed allocation method in terms of allocating the SPA on a ¢/kWh basis, CES contends that Ameren failed to provide enough detail to determine how this allocation would be distributed among the various customer classes. Second, CES states that although Ameren included examples of a number of cost categories, the SPA should be revised to ensure proper recognition and assignment of costs (capital/non-capital, direct/indirect, labor/administrative overhead) that are attributable to the Ameren Companies' new procurement model and are intended to be recovered through the SPA. Lastly, the SPA should be tracked in the MVAF. (CES draft order at 48, reply brief at 28-29)

CES avers that the assignment of costs to cost-causers benefits retail customers and contributes to the overall fairness of rates. Citing Sections 16-110(c)(ii) and 16-112(k), CES further contends that this approach, under which cost-causers pay their appropriate costs, is consistent with the structure outlined in the Act. CES asks the Commission to direct Ameren to equitably allocate the SPA costs so that these costs are assigned to the cost-causers. (CES draft order at 49)

CES believes that all direct and indirect costs associated with the service of arranging for the supply of electric energy supplied by the utility should be allocated taking into consideration the relevant characteristics of the customers' demands on the electric utility's system. It follows, according to CES, that all costs Ameren incurred as a result of procuring its power through the proposed auction process should be included in the SPA. (CES draft order at 49, reply brief at 29)

Specifically, CES wants the Commission to assure that generation supply costs are not allocated to delivery services for collection. CES' concern is that an improper allocation of costs will distort the true generation supply costs, distort the market, create false price signals, and frustrate customer choice and competition. CES asserts that Ameren will incur a variety of direct costs as a consequence of the auction methodology, including costs related to conducting the auction process itself; expenses of various employees' time in reviewing the results of the auction; communicating the auction results to the Commission and other parties; incorporating the results into the billing system; and other similar auction-related direct expenses. (CES draft order at 49-50)

CES avers that Ameren will also incur a variety of indirect costs as a consequence of the auction methodology. These costs arise out of a variety of responsibilities related to Ameren's ongoing role as a provider of electric energy at retail, even though it would be acquiring the related wholesale energy through the auction.

CES asserts that Ameren will incur indirect costs related to processing and tracking customer accounts that leave for RES service or opt in to BGS-LFP; communicating changing load characteristics to the winning suppliers as customers migrate; paying the suppliers each month; calculating the MVAF on an ongoing basis; communicating to large accounts and smaller accounts through in-person and call center communications respectively; utilizing and/or upgrading billing and communications systems; and producing marketing or communication pieces for distribution to customers regarding new supply options and applicable auction and product rules.

These costs, according to CES, should be allocated to the energy component of customers' bills. (CES draft order at 50)

CES claims there is precedent for identifying and allocating marketing expenses related to energy supply is well-established. Similarly, CES asserts that such expenses should be allocated as supply administrative overhead, in addition to the specific employee time and capital expenses, and should be correlated to the relevant indirect supply-related activities and thusly tracked. (CES draft order at 51)

CES argues that the SPA should be tracked in the MVAF to ensure that Ameren neither over- nor under-collects these expenses. According to CES, the per-kWh allocation approach properly accounts for the fact that the average non-residential customer account used more kWh than the average residential account, and that more of Ameren's own internal resources and indirect supply administration costs under the proposed auction methodology will be directed toward the non-residential classes in administering the tariffs. This allocation method produces a more accurate allocation of these costs consistent with the requirements of the Act and is consistent with the method Ameren has already proposed for the application of the MVAF. (CES draft order at 51)

Although CES agrees that the Commission should set the actual charge and the actual allocation in Ameren's yet-to-be-filed rate case, CES argues that the Commission also should ensure that a "placeholder" is properly designed within the instant proceeding. According to CES, Ameren failed to appropriately describe the parameters of such a placeholder and the Commission should address the types of costs that should be included in the SPA. CES also recommends that the Commission address the proper allocation method and the manner in which the SPA is to be set. (CES draft order at 51-52, reply brief at 28)

Since the Commission already is addressing the mechanics associated with Ameren's proposed retail tariffs in this proceeding, CES contends that Ameren did not provide any rationale for delaying consideration of the mechanics of the SPA. According to CES, if the Commission does not address the SPA collection and allocation methodology in this proceeding, Ameren may have to further revise tariff language (assuming it altered how the "placeholder" is currently drafted) sometime in 2006. CES is concerned that such future revisions would make it more difficult for RESs to educate customers on how the auction works, resulting in additional market uncertainty at a time when customers are supposed to be formulating their energy purchasing strategies. (CES draft order at 52)

**c. Staff's Position**

According to Staff, the Rider MV tariff as proposed is the rate mechanism by which the wholesale market price incurred by Ameren in the Auction is reflected in retail rates. As part of Rider MV, the Ameren Companies have proposed two separate adjustment mechanisms – one for supply obtained from the auction (MVAF) and another one for supply purchased outside the auction (Contingency Supply Factor). The MVAF tracks the monthly differences between retail customer revenue for supply services and the wholesale power supply costs for each of the auction categories under contract that are obtained through the standard auction process. The MVAF's purpose is to ensure equality between amounts paid to suppliers and amounts billed to retail customers. (Staff brief at 176-177)

According to Staff, CES recommends that the SPA and uncollectible adjustment be tracked through the MVAF to ensure that the Ameren Companies neither over recover nor under recover these costs and Ameren witness Mill indicated the Ameren Companies' acceptance of this recommendation with respect to the SPA. (Staff brief at 177)

Staff disagrees with the CES' proposal, arguing that tracking the SPA and the uncollectible adjustment through the MVAF would not accomplish CES' stated goal of ensuring that the Ameren Companies neither over nor under-recover these costs. In order to accomplish the kind of true-up intended by CES' proposal, Staff claims one must reconcile costs incurred in a particular period with recoveries for that same period. Staff maintains that tracking the SPA and the uncollectible adjustment through the MVAF would not accomplish this kind of true-up.

Instead, CES' proposal would reconcile recoveries for the Determination Month with the absolute dollar amounts from the test year in the last rate case. This would result in a mismatch of costs and recoveries from two different periods. According to Staff, these two different periods would likely reflect different levels of sales and different levels of costs. (Staff brief at 177, reply brief at 79-80)

Staff also argues that such a true up is not necessary for the SPA and the uncollectible adjustment, both of which will be set in rate cases. Staff states that 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. So long as the relationship between costs and the level of service reflected in that rate remains within appropriate parameters, Staff says appropriate cost recovery occurs even when the level of service varies over different periods of time. (Staff brief at 177-178)

Staff contends that the Companies argument - that without the adoption of the CES proposal to track the SPA through the MVAF, the Companies will always be in an over or under recovery position with respect to the SPA costs - is without merit. Staff maintains that to achieve the kind of true up CES and the Ameren Companies seek, one must reconcile costs incurred in a particular period with recoveries for that same period. According to Staff, CES' proposal, which the Ameren Companies accept, reconciles recoveries for the Determination Month with the absolute dollar amounts from the test year in the last rate case. Staff believes such a reconciliation results in a mismatch of costs and recoveries from two different periods, which would likely reflect different levels of sales and different levels of costs. As a result, this kind of mismatch would not accomplish the true-up of costs and recoveries that is desired. (Staff brief at 178)

CES' proposal would not accomplish a legitimate true up; instead, it would isolate a single cost element and force recovery for that cost element to an unchanging, predetermined dollar amount regardless of the level of service provided or amount of cost actually incurred. (Staff brief at 178)

Contrary to the Ameren's Companies assertions, Staff never assumed that the MVAF would track SPA costs recovery against actual SPA costs as they develop prospectively. Staff reiterates its position that the problem with CES' proposal is that it would isolate a single cost element and force recovery for that cost element to an unchanging, predetermined dollar amount regardless of the level of service provided or amount of cost actually incurred. (Staff brief at 179) Staff recommends that the Commission reject the CES' proposal, to which the Company has agreed in part, to track the SPA and uncollectible adjustment through the MVAF.

According to Staff, 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. The evidence actually shows that the Company seeks to apply a novel ratemaking theory based upon facts not established in evidence in order to recover what it expects to be an insignificant amount. Furthermore, Staff argues, the evidence shows that this proposal would not even accomplish its intended purpose of preventing over or under recovery. (Staff reply brief at 77-78)

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. 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. Staff contends this would be true regardless of either the costs actually incurred or sales actually made. In Staff's view, 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. (Staff reply brief at 78)

According to Staff, the Ameren Companies have presented no factual support for this proposal. The Ameren Companies' primary concern here, Staff states, is that the level of customer switching between RES service and utility bundled service could cause an over or under recovery. (Staff reply brief at 78-79)

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. (Staff reply brief at 79)

When the Ameren Companies were arguing against a migration risk factor they claim there has been little switching by customers in the Ameren Companies' service territories and that there is no justifiable basis on which to establish a migration risk premium for input into the rate prism because any number that would be incorporated into the rate prism would be unsupportive and speculative. In Staff's view, the proposal to track the SPA through the MVAF because of customers switching concerns is, similarly, not supported by any factual analysis presented in the record. (Staff reply brief at 79)

The evidence that the Ameren Companies did present indicates that the Companies themselves do not expect the magnitude of the SPA to be significant. Thus, Staff argues that the Ameren Companies apply a novel ratemaking theory, based on facts that are not in evidence, in order to recover an insignificant amount. (Staff reply brief at 79)

#### d. Commission's Analysis and Conclusions

The Ameren Companies propose that the SPA costs be tracked through Rider MV. The Ameren Companies assert that an annual true-up is needed with regard to the collection of the authorized level of SPA costs in order to ensure that the Ameren Companies are not in an over- or under-recovery situation.

While CES generally supported Ameren's proposed allocation method in terms of allocating the SPA on a ¢/kWh basis, CES contends that Ameren failed to provide enough detail to determine how this allocation would be distributed among the various customer classes. CES recommends that the SPA be revised to ensure proper recognition and assignment of costs that are attributable to the Ameren Companies' new procurement model and are intended to be recovered through the SPA. CES supports tracking the SPA in the MVAF.

Staff opposes tracking SPA costs through Rider MV, arguing among other things that it would not accomplish a legitimate true up. Instead, it would isolate a single cost element and force recovery for that cost element to an unchanging, predetermined dollar amount regardless of the level of service provided or amount of cost actually incurred.

Having reviewed the record on this contested and somewhat complicated issue, the Commission first finds that Ameren has adequately identified certain categories of costs that will be necessary to administer the power supply procurement process. Additionally, the Commission concurs with CES that all direct and indirect costs associated with arranging for the supply of electricity are not allocated to delivery service customers.

Because the level of cost of administering the power supply procurement will not be established in this proceeding, however, the Commission declines to specify here all of the types of costs to be recovered through this charge. In the Commission's view, CES' proposal in this regard is premature and it would be best to make such a decision with the benefit of a complete evidentiary record. In other words, the Commission will decide the specific categories and associated levels of costs to be recovered through the supply administration charge either in Ameren's next delivery services rate proceeding or another appropriate proceeding.

As the Commission understands it, Ameren has proposed a mechanism where certain costs associated with administering the power supply procurement are set in delivery service rate cases but the actual charge will vary depending on kWh sales. Most charges are established in a rate proceeding and do not vary between rate cases.

An alternative to the traditional ratemaking process is the rider mechanism. A rider mechanism may be appropriate for cost recovery when a utility is faced with unexpected, volatile, or fluctuating expenses, among other situations. With a rider mechanism, however, actual costs are typically tracked and there would normally be some sort of true-up mechanism. Under Ameren's proposal, actual costs would not be tracked and it does not appear to true-up actual costs with actual revenues. Instead, actual revenues would be tracked and trued-up with the level of costs approved in a rate proceeding.

Ameren has demonstrated that certain costs will be incurred to administer the power supply procurement process, and Ameren is entitled to recover prudent and reasonable costs associated with these activities. However, it is simply not clear to the Commission how costs associated with procuring and administering the power supply are so fundamentally different from other types of costs that a totally different rate recovery mechanism is warranted. While the Commission understands that Ameren is concerned about the possibility of under-recovery due to fluctuating kWh sales, the Commission is not prepared to adopt Ameren's proposed Rider MV tracking mechanism for SPA costs at this time.

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

#### a. Ameren's Position

The Ameren Companies state that during the course of the proceedings, they accepted a number of the Staff's recommendations regarding provisions in Rider MV as well as provisions regarding the MVAF and CSF. The accepted recommendations include the following:

- Agreed to modify the phrase used to represent costs in Rider MV setting forth the MVAF from "Payments that the Company makes to suppliers" to "expenses the Company incurs";
- Included the wording of Term C in Rider MV in order to be consistent with Commonwealth Edison Company's Rider CPP; and
- Agreed to include a Factor O to the MVAF and CSF formulas in Rider MV.

(Ameren draft order at 103)

The Ameren Companies did not accept Staff's recommendations that the Remaining Balance Factor (RB Factor) for the MVAF and CSF should include a provision for interest, on grounds that including interest to the RB Factor would add additional complexity and cost to the administration, and unduly require additional record keeping and accounting measures. The Ameren Companies state that there would be approximately 60 days between the time an MVAF or CSF is billed and the time when the resulting RB Factor is reflected in the subsequent MVAF or CSF charge. According to the Ameren Companies, Staff agreed to withdraw its recommendation to include interest in the RB Factor in the MVAF formula, acknowledging that such an adjustment would not be material. (Ameren draft order at 103)

The Ameren Companies state that Staff continued to maintain that there should be an interest charge associated with contingency supply. In response, the Ameren Companies recommended an approach for reflecting the interest or carrying charges in the CSF if the Ameren Companies are required to procure power under a contingency basis. Specifically, under the Ameren Companies' tariff, in the event of a supplier default which would require procuring contingency supplies, there would be determined a certain level of default damages. The Ameren Companies say the default damages would be amortized over the remaining months of the defaulted supply contract. The Ameren Companies assert this approach would allow the default payment to more closely track the future period for which the contingency power costs are related, providing better matching between the retail power prices and the replacement power supply costs. The Ameren Companies claim this results in customers receiving the benefit of better price signals and cost recovery is synchronized. (Ameren draft order at 103)

The Ameren Companies propose that a carrying charge be established that would compute the interest associated with any unrefunded default damages. The

Ameren Companies believe that such interest is appropriate because the Ameren Companies would have use of those funds until they are returned to customers. The accrued interest would be added to the default damage principal and would be amortized over the remaining months on the contingency period. According to the Ameren Companies, adoption of this proposal requires the definition of the CPC Factor to be modified and no changes should be made to Factor RB for interest. (Ameren draft order at 103)

**b. Staff's Position**

In its brief, Staff identified those MVAF tariff provisions to which the Ameren Companies and Staff had reached agreement. (Staff brief at 180)

Staff indicates that during the proceeding, it and the Ameren Companies ultimately agreed on how the tariffs should provide for interest; by revising the definition of the CPC Factor rather than the RB Factor. (Staff brief at 181)

Having reviewed the record, it appears that Ameren and Staff are in agreement with regard to the above issues. Their proposals should be adopted.

**9. Rider MV – Subsequent Accounting Review and Reconciliation**

Staff witness Knepler proposed four Commission oversight recommendations regarding monthly informational filing dates, public reconciliation hearings, internal audits and annual reports. (Staff Ex. 10.0 at 10) His recommendations were as follows:

- The MVAF and CSF mechanisms should be modified so that monthly filings are postmarked by the twentieth day of the filing month, any report filed after the twentieth but before the first day of the effective month would be accepted only to correct a previously filed timely report;

- Rider MV should be modified to indicate that the Commission will initiate annual public hearings to reconcile the cost of electric power and energy purchased with cost recoveries;

- Rider MV should be modified to require the Companies to file annual reports with the Commission;

- The Companies should perform annual internal audits of costs and recoveries recovered through Rider MV and submit such reports with the Manager of Accounting by April 1 for the previous calendar year.

On behalf of the Ameren Companies, Mr. Robert Mill accepted Staff's recommendations; however, he proposed that the three proposed annual reports (the reconciliation, the Rider MV report and the internal audit report) be combined into a single report and that the filing deadline of such a report be extended from April 1 to

April 30. Mr. Mill further requested that should the annual report submitted to the Commission contain confidential information, that it be filed with the Chief Clerk's Office under such status. (Resp. Ex. 16.0 at 7-9)

In rebuttal testimony Staff witness Knepler found the proposed modifications discussed by Mr. Mill to be reasonable. Staff and the Ameren Companies are now in agreement with respect to Staff's Commission oversight recommendations. (Staff brief at 182-183)

Having reviewed the record, the Commission finds that the above-referenced Commission oversight procedures recommended by Staff, as modified by the Ameren Companies, are appropriate and are approved. As noted, these recommendations include, among other things, annual public reconciliation hearings.

### 10. Alternative Proposals Regarding Interruptible Service

IIEC believes that demand response is critical for mitigating very high market prices and maintaining supply adequacy during periods when supply adequacy is very tight. In its direct testimony, IIEC offered a proposal related to demand response resources. In its rebuttal testimony, IIEC offered an alternative proposal for Interruptible Demand under Rider RTP-L. A more complete description of IIEC proposal is contained in IIEC's brief. (IIEC brief at 42-44)

IIEC says that while Ameren raised some concerns with IIEC's recommendations on Demand Response Resources and Interruptible Demand in its rebuttal and surrebuttal testimony, Ameren ultimately entered into a Stipulation with IIEC on these interruptible electric service issues. (IIEC brief at 44) IIEC believes this Stipulation is a reasonable compromise for the purpose of resolving the interruptible electric service issue in this proceeding. IIEC claims it secured Ameren support for IIEC's alternative for Interruptible Demand Service for hourly pricing customers 5 MW and larger in exchange for IIEC dropping pursuit of its Demand Response Resources proposal in this proceeding. Moreover, it is consistent with the Commission's intent to encourage energy efficiency and demand response programs. IIEC recommends that the Commission approve the Ameren/IIEC Stipulation on Interruptible Electric Service. (IIEC brief at 44)

The Ameren Companies state that in the Ameren/IIEC Stipulation and Agreement, the Ameren Companies stated their willingness to adopt the IIEC alternative recommendation as set forth in IIEC Ex. 5, pages 7-9, whereby the Ameren Companies would offer an interruptible demand service for BGS-LRTP customers with demands of 5 MW or greater. According to the Ameren Companies, the service offers a non-fixed price product by providing a choice of BGS-LRTP service or a combination of BGS-LRTP and MISO interruptible service to those customers who are required to be eligible for BGS-LRTP and who also meet the MISO interruptible demand requirements. The Ameren Companies agreed to file the necessary tariff by which to offer this service

within 90 days after the entry of a final order, assuming all other conditions stated in the agreement have been met. (Ameren draft order at 104-105, reply brief at 93)

The Commission has reviewed the record on this issue. IIEC and Ameren have reached an agreement acceptable to both parties, and it appears no other party has objected to it. The Commission concludes that the IIEC and Ameren proposal will be beneficial to large customers and it should not have an adverse impact on other customers. The Commission finds this agreement to be reasonable and it is hereby adopted.

### 11. Other Issues

#### a. Staff's Position

Staff proposed language changes to the introductory paragraph of Section 7. H, Adjustments to Retail Supply Charges of each respective Rider MV, in order to clarify what is included in the adjustments to retail supply charges. Staff states that the Ameren Companies accepted this proposed language. Thus, Staff recommends that the Commission adopt the Staff and the Ameren Company agreed-upon language. (Staff brief at 183-184)

#### b. IIEC's Position

IIEC states that Ameren has proposed to offer its self-generation customers, 5 MW or larger, hourly pricing under Rider RTP-L. These customers include, but are not limited to, customers with generation facilities that are Qualifying Facilities under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). (IIEC brief at 44-45)

According to IIEC, Rider RTP-L customers would be charged a capacity charge derived from Ameren's proposed BGS-LRTP auction. These customers would pay for energy based on the real-time locational marginal price for their load zone within the MISO. (IIEC brief at 45)

IIEC asserts that self-generating customers generally have a very low load factor and generally only draw energy during limited periods of the year, mostly confined to maintenance outages taken during off-peak times of the year. IIEC argues that capacity charges for self-generating customers should reflect their ability to schedule generation maintenance during off-peak periods of the year and the unlikely occurrence of outages during peak system load conditions or simultaneous with other outages.

IIEC believes that if capacity charges are not specifically developed in this manner, such capacity charges should only apply for those days on which a self-generating customer actually draws energy. IIEC contends that FERC regulations related to PURPA require consideration of these factors for utility rates for back-up power and maintenance power sales to Qualifying Facilities. (IIEC brief at 45)

IIEC understands that Ameren proposes to bill capacity charges for Rider RTP-L customers on a per kW-day basis, but claims Ameren's language in its proposed Rider MV is not consistent with this approach. Specifically, IIEC asserts that Ameren's proposed Hourly Auction Supply Charge (HASC) in Rider MV applicable to Rider RTP-L customers has been defined on a per kW-month basis rather than a per kW-day basis. (IIEC brief at 45)

In response to IIEC's concern, Ameren's rebuttal testimony indicated that Ameren will bill Rider RTP-L customers for capacity on a per kW-day basis. (IIEC brief at 46)

IIEC supports Ameren's proposed use of a per kW-day approach for billing Rider RTP-L customers for capacity because it appropriately only bills self-generation customers for capacity on the days they actually draw energy from Ameren. However, IIEC says Rider MV needs to be modified to reflect per kW-day billing. To this end, IIEC recommends the Commission require Ameren to modify its proposed Rider MV such that Rider RTP-L customers will be assessed the HASC (i.e., capacity charges) on a per kW-day basis rather than a per kW-month basis, consistent with Ameren's stated intention. (IIEC brief at 46; IIEC reply brief at 35-36)

#### c. Ameren's Position

According to the Ameren Companies, also as part of the Stipulation and Agreement reached between the Ameren Companies and IIEC, the Ameren Companies agreed to implement a cost-based demand charge in the fixed price rate design for whatever rate or tariff applies to a 3 MW and over customer by the third auction. These parties also reached agreement regarding other matters pertaining to the filing of the proposed demand charge design. (Ameren draft order at 105)

#### d. Commission's Analysis and Conclusions

The language Staff proposed for the introductory paragraph of Section 7.H., Adjustments to Retail Supply Charges of each respective Rider MV, is useful clarifying language and it is hereby approved.

The Commission has some misgivings about certain aspects of the Stipulation and Agreement entered into by IIEC and Ameren. Specifically, it is not entirely clear that capacity charges billed on a per kW-day basis as agreed to here accurately reflect costs imposed on Ameren. As a result, the Commission believes that this issue may warrant further attention in future rate proceedings. Nevertheless, the record of this proceeding is not sufficient to reject this proposal. Thus, with some reluctance, the Commission approves this aspect of the Stipulation and Agreement between IIEC and Ameren.

### 12. Staff's Rate Increase Mitigation Proposal

#### a. Staff's Position

Staff proposes a rate mitigation plan to prevent what it describes as undue bill impacts arising from the auction process. Staff claims that without its plan, customer classes will be left to the vagaries of the auction process whose results will not be known for a number of months. The potential exists for individual classes to receive inordinate increases relative to other classes. Staff believes its proposal is essential to mitigate against any excessive increase in power costs individual classes may receive. (Staff brief at 184)

The Staff proposal would apply only to the BGS auction whose customers have the fewest alternatives to bundled power. Staff's proposal would limit overall bill increases for these customers to the greater of the following: 20% or 150% of the overall BGS auction average. If the overall bill increase for customers within that auction is 13.33% or less, the maximum increase for any group of customers within the auction would be 20%. For an overall increase greater than 13.33%, the 150% of auction average limit would apply. (Staff brief at 184)

According to Staff, utility bills can be a significant cost for ratepayers, both residential and non-residential. Significant increases in utility bills can have a disruptive effect on ratepayers' budgets. If the changes are sudden, ratepayers may not have sufficient time to make changes in their behaviors to absorb the higher cost. Thus, Staff claims it may be necessary to limit those increases to give affected customers the opportunity to adjust to the new paradigm by introducing rate changes on a gradual basis. (Staff brief at 184-185)

It is Staff's position that bill impacts are a key regulatory issue in the current regulatory environment. Staff claims they were a central component of the Restructuring Act which enacted a rate freeze for non-residential customers and actual rate reductions of 5% to 20% for residential customers. By the time that new rates go into effect in 2007, this rate freeze and reduction will have been in effect for nine years. Staff further asserts that the Commission has a long history of considering rate impacts in designing rates. (Staff brief at 185)

According to Staff, there are two reasons why bill impacts should play a central role in this case. One is the lack of information about Post-2006 rate levels. The Ameren Companies' Rider MV contains formulas but no hard numbers; therefore, the actual power costs that customers will pay in the Post-2006 environment will depend on the input of future data into those formulas. This uncertainty also makes it difficult to develop proposals for mitigating bill impacts. In Staff's view, any remedy in this area must be prospective and designed to address potential scenarios that may or may not come to pass. (Staff brief at 186)

Staff also argues that the Ameren Companies are proposing a significant consolidation and realignment of bundled classes which can have a significant impact on bundled rates. The consolidation entails combining separate rates for customers for the three Ameren operating companies into one new set of rate classes. This consolidation and realignment can create adverse bill impacts independent of any change in power costs. These changes combined with the prospect of higher power and delivery costs provide good reason for concern about significant adverse bill impacts for customers. (Staff brief at 186-187)

Under Staff's proposal, the maximum of 20% for overall auction increases of 13.33% or less recognizes that when the overall increase is lower, the relative increase for individual classes can be greater. Conversely, for overall increases greater than 13.33%, Staff's proposed limit of 150% of the average recognizes that when the increase is greater, it must be distributed more equally. (Staff brief at 187)

Staff explains that the adjustment process would take place after all components of the bundled ratemaking process are complete. Staff says the process would include the current proceeding, the auction and the delivery service rate case. Then, the overall level of increase for customers would be used to determine which maximum, 20% or 150% of the BGS auction average, should apply. After that, current and Post-2006 bills for each proposed rate class must be calculated.

If the increase for an individual rate class climbs above the applicable proposed maximum, then the power price for that class would be set at a level that brings the class back down to the designated maximum and the resulting revenue shortfall would be allocated on an equal percentage basis to all remaining classes. If that reallocation served to raise a class above the maximum, then the maximum would be applied to that class as well and the revenue shortfall would be reallocated again among classes not subject to the maximum. (Staff brief at 187-188)

The Staff proposal is tied to the conduct of the auction. Under the translation tariff, power prices will be updated annually (after an initial 17-month period) to incorporate the results of auctions to replace expiring power contracts. Each time power prices are updated customers within the auction group would again be subject to the limit of the maximum of 20% or 150% of the average for the auction group. Staff says this would provide an opportunity to bring the power costs that customers pay further into line with the power costs they cause suppliers to incur, subject to these limits. Because future auctions will affect only a portion of overall power costs and not impact delivery services rates, there will be considerable latitude to bring the power costs that customers pay in line with the costs they cause to be incurred. (Staff brief at 188)

Staff proposes that bill impacts be addressed solely within the context of the BGS auction. If total bills were capped for a group of customers, only customers within the BGS auction would be subject to an offsetting increase in power costs. Under Staff's proposal, customers in the BGS-L auction would not be subject to an increase in power

costs to offset a limit on bill increases for residential customers in the BGS auction. (Staff brief at 188-189)

Staff's proposal does not extend in any way to the BGS-L auction for larger customers. The auction replaces the concept of a translation prism with a single, uniform price for power to be paid by all customers. There would be no room for any additional rate mitigation proposals under the concept of a single auction price for power. Staff argues that it would not make sense to have customers in one auction subsidize power costs paid by customers in another auction. That could create differences between the overall power costs paid by customers and power prices received by suppliers within an auction, and would add an unneeded level of complexity to the process. (Staff brief at 189)

In Staff's view, it would be best to address this issue in the current docket, rather than later, for a number of reasons. This is an issue directly related to the translation prism; therefore, the reasons why the translation prism is addressed in advance of the delivery services case would apply to bill impacts issues as well. (Staff brief at 190)

Staff further argues that delaying the issue would prevent bidders in the upcoming auction from receiving a key piece of information concerning the recovery of power prices from customers. If the billing impacts issue is addressed in the delivery services case, the auction will be held before suppliers find out whether power costs would be subject to bill impacts constraints. Staff believes this would undermine the goal of clarifying for suppliers how the translation would take place in advance of the auction. (Staff brief at 190)

According to Staff, postponing the issue to the delivery services docket would produce only one piece of additional information for Staff to craft a proposal on this issue. Staff says the Company's proposed delivery services revenue requirement would become known, but the auction prices and other inputs into the translation prism would remain unknown. (Staff brief at 190)

The Ameren Companies, in Staff's view, incorrectly state that the Staff rate mitigation proposal applies to both power and delivery costs. While the proposal does take into consideration overall bills, Staff says the only component of those bills that it adjusts is the cost of power. Staff claims its 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. (Staff reply brief at 81)

While the Ameren Companies claim that suppliers will learn the mechanics but not the actual bill numbers, they 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. (Staff reply brief at 81-82)

With regard to CCG's assertion that there is uncertainty about the impact of the Staff plan because it must await the implementation of the auction, Staff states that all aspects of procurement costs are uncertain before the auction is run. However, Staff believes this uncertainty only underscores the importance of adopting a plan that limits the adverse impacts that may befall ratepayers. Staff asserts that its 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 Staff claims its rate mitigation addresses that concern by limiting the uncertainty that ratepayers face. (Staff reply brief at 82)

Staff says it disagrees with CCG's argument, which Staff describes as a simple unsupported statement that the Staff plan is not needed. (Staff reply brief at 82)

According to Staff, 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. (Staff reply brief at 83)

Staff contends that this argument amounts to empty speculation by Dynegy. In Staff's view, 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. According to Staff, its proposal could serve to either raise or lower the power costs of the customers most susceptible to migrate to RES-supplied power. The uncertainty for suppliers could either rise or fall. There is no evidence for Dynegy to assert that the Staff mitigation plan will increase prices offered by suppliers in the auction process. Staff maintains that the benefits of the Staff rate mitigation plan far outweigh any drawbacks Dynegy might imagine could take place. (Staff reply brief at 83)

Staff opposes the Ameren Companies' proposal to modify the Staff rate mitigation proposal to permit Ameren to apply a single power cost for each rate class of all its operating companies. Staff says that under Ameren's modification, residential customers from AmerenCILCO, AmerenCIPS and AmerenIP would be lumped together as a single group for determining bill impacts. This would enable Ameren to achieve its goal of uniform BGS pricing throughout the Ameren Illinois footprint. (Staff brief at 190)

Staff argues that the Ameren Companies' modification would undermine the objective which the bill impacts proposal seeks to achieve. Staff believes that a constraint that extends across the three Ameren operating companies will not necessarily prevent an increase for customers within an individual operating company from exceeding the bill impacts maximum. Also, it is not known today how much such an increase for customers from an individual operating company could exceed those

maximums. This could leave a large group of customers facing an increase that far exceeds the levels deemed reasonable under Staff's bill impacts proposal.

Staff recommends that the Commission adopt Staff's rate mitigation proposal and reject the Ameren Companies' revisions to the Staff proposal. (Staff brief at 190-191)

**b. Ameren's Position**

The Ameren Companies do not necessarily object to the bill impact proposal, subject to assurance of full and complete cost recovery with regard to the purchased power cost. In their view, the better time to consider in full a rate mitigation or bill impact proposal would be the utilities' next delivery service rate cases, as Staff's bill impact proposal intends to apply to the totality of both the power supply costs and the delivery service costs. The Ameren Companies anticipate filing delivery service rate cases later this year where, as a consequence, delivery service charges will change.

They claim that the yet to be determined delivery service revenue requirement will set the ceiling for recovery of the revenue requirements. Ameren says this ceiling level will provide the Commission with additional guidance in terms of the need for, or the level of, any rate mitigation. (Ameren draft order at 105-106, reply brief at 93-94)

The Ameren Companies dispute Staff' assertion that suppliers will still benefit today if they know the bill impact will work prior to the auction. According to the Ameren Companies, while they may know the mechanics, the suppliers will not know the BGS or DS final costs – in effect, the customer's bill. Suppliers will not be able to accurately assess how revenues will shift within the affected rate classes. If the Commission truly intends to consider a bill impact proposal, it stands to reason the Commission should know first what the "bill" is. (Ameren draft order at 106)

Even if the Commission considers and adopts the bill impact proposal in these proceedings, there is nothing to prevent any party, Staff, and even the Commission from considering a new or different bill impact proposal in the next delivery service rate cases. The Ameren Companies question the timeliness of considering a bill impact proposal in these dockets. (Ameren draft order at 106)

The Ameren Companies indicate that they do not object to Staff's bill impact proposal in concept, but suggest consideration be delayed until the next delivery service rate cases. The Ameren Companies do object to the uniform application of the Staff proposal. (Ameren brief at 138)

One of the Ameren Companies' goals in this filing is to have uniform BGS pricing throughout the Ameren Illinois footprint. They desire that each residential customer in the three separate utilities pay the same rate regardless of which Ameren Company is providing the commodity service. This is appropriate and justifiable because the power supply being procured for the residential customers will be at one price only and not three different prices for the three different Ameren Companies. A pure application of

Staff's proposal would result in shifting revenues among the three classes of customers that are taking the BGS service at issue (BGS-1, BGS-2 and BGS-3). If the Staff proposal is accepted, the residential customers in the three different Ameren Company service territories will pay a different price for the same commodity, purchased at the same price, in the same wholesale market. (Ameren brief at 139, reply brief at 94)

According to the Ameren Companies, the Commission has long embraced the goals of customer understandability and rate simplicity and this is not the time for these goals to be ignored. Finally, the Ameren Companies contend that their proposed modification does not offend the bill impact proposal in any significant way. The Ameren Companies assert that under their proposal, rate impacts can still be dampened, even if not to the fullest extent intended. (Ameren brief at 139)

In their reply brief, the Ameren Companies dispute Staff's assertion that the proposal for all residential customers (of all three Ameren Companies) to pay the same price for the commodity would undermine the objective associated with the bill impact proposal. The Ameren Companies argue that at best, ensuring that the residential customers throughout the Ameren Companies footprint pay the same price will only somewhat modify Staff's bill impact proposal. Staff never addresses the Ameren Companies' main concern directed to issues of customer understandability and simplicity. (Ameren reply brief at 94)

Staff's only counter is that because it is not known how much of an increase there will be for customers within an individual company, possibly a certain group of customers could face an increase that exceeds the level deemed reasonable under Staff's bill impact proposal. Ameren claims there is no evidence to suggest that any group of customers taking the subject BGS product will face an increase that far exceeds the levels deemed reasonable under Staff's bill impact proposal. (Ameren reply brief at 94-95)

Staff attempts to show an inconsistency in the Ameren Companies' position by noting that residential heating customers will receive a declining block rate during the non-summer months, which mitigates concerns surrounding customer rate impact. In response, the Ameren Companies say the reasoning for the declining block rate is as much about rate design as anything else. The BGS rate design is intended to reflect proper causation principles. The translation prism takes into account seasonal variations, on-peak and off-peak distinctions, and at certain customer levels, voltage differences.

These rate design factors, including the declining block rate as indicated, serve to mitigate concerns of undue customer rate impact. While proper rate design does mitigate against undue rate impacts, the Staff proposal is not about rate design in any sense; it is about shifting customer class cost responsibility irrespective of rate design. (Ameren reply brief at 95)

In some ways the Staff argument explains the Ameren Companies' reasoning for putting off a final decision until the delivery service rate case. Staff acknowledges until the auction is conducted and the delivery services rate case is complete, potential bill impacts will not be known and that this uncertainty makes it difficult to develop proposals for mitigating the bill impact. In Ameren's view, the problem is developing the parameters of a bill impact proposal without knowing the required inputs. (Ameren reply brief at 95-96)

According to the Ameren Companies, Staff argues that the consolidation and realignment of Ameren Companies' rates can create adverse bill impact independent of any change in power costs. The Ameren Companies counter that Staff cannot know what, if any, adverse bill impacts will result from rate consolidation, and at this point in time, neither do the Ameren Companies. The Ameren Companies are concerned with prematurely determining what the appropriate parameters are associated with any bill impact or rate mitigation proposal. (Ameren reply brief at 96)

Staff does not explain why the relevance of the translation prism in these dockets means that in a later proceeding, the Commission could not consider a bill impact proposal which incorporated appropriate parameters that would affect the translation prism in another docket, namely the delivery service cases. There is nothing sacrosanct about the Commission's decision affirming Rider MV, which incorporates the translation prism in these proceedings, but then in a later docket considering rate changes that might have bearing on Rider MV, specifically the translation prism. As a practical matter, rates often undergo design changes. (Ameren reply brief at 96)

The Ameren Companies dispute Staff's assertion that if the bill impact issue is addressed in the delivery services case, the auction will be held before suppliers find out whether power costs would be subject to bill impacts constraints. Suppliers can now postulate as to what they believe the prices for power will be coming out of the auction; they can perform this analysis later. In fact, as the time to the auction grows nearer, it is reasonable to assume their estimates will be better and more accurate than, say, now, as Staff presupposes.

When the Ameren Companies file their delivery service cases later, information within that filing will prove to be useful to the suppliers. Suppliers will know, as will the Staff, what the Ameren Companies intend in terms of their full delivery service revenue requirements. It is reasonable to assume that suppliers, in conjunction with their estimates of power prices, can make some assumptions about the post-2006 level of the bundled revenue requirement and, consequently, have better information than they do currently. (Ameren reply brief at 96-97)

In response to Dynegy, the Ameren Companies state that customers' bills will be made up of essentially two parts, the delivery service charges and the BGS charges. The Ameren Companies claim Dynegy surely can estimate what the commodity price will be, and no doubt will have better information as to what that price will be closer in time to the auction. Similarly, the Ameren Companies claim that when they file their

next set of delivery service cases, Dynegy and other suppliers can take that information in estimating the customers' bundled bill. (Ameren reply brief at 98)

The Ameren Companies argue that if the auction is held in September 2006, and the delivery service rate cases are filed later this year, and the Commission directs the Staff to re-file the same bill impact proposal, or whatever bill impact proposal Staff then believes appropriate in conjunction with the next set of delivery service cases, the suppliers will have more and better information nearer in time to the auction than they do currently. (Ameren reply brief at 98)

**c. Dynegy's Position**

According to Dynegy, rate impacts are a valid concern, with the decision whether or not to mitigate rate increases essentially being a policy judgment. Dynegy agrees that as structured, Staff's proposal would not alter the payment stream to Suppliers because the mechanism merely spreads any excess rate increase across different classes in the same auction group. Nonetheless, Dynegy is concerned that if adopted, Staff's proposal could have the perverse effect of raising prices, not lowering them. (Dynegy brief at 31)

As the price to different customer classes artificially varies from that which would be obtained without Staff's proposal, those customers who pay less will have an incentive to stay with the utility while those who pay more will have an incentive to find an alternative supply option. This additional switching risk will need to be factored in by Suppliers and will likely raise the final, auction-clearing price. In deciding whether to adopt this rate mitigation proposal, the Commission should consider this unintended consequence. (Dynegy brief at 31-32)

In any event, Dynegy recommends that the Commission reject the proposal by Ameren to deal with this issue as a part of the Ameren Utilities' upcoming delivery services rate cases. Although 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, Dynegy argues that there is no reason to cause Suppliers even more uncertainty as to the effect, if any, of final, approved rate mitigation plans. (Dynegy brief at 32)

According to Dynegy, while Staff's proposal may cause additional migration risk as described above, at least Suppliers will know whether that plan is adopted as a part of the final Order in this proceeding. They will thus be able to factor its effects into their bidding strategy. Ameren's proposal makes the matter substantially worse for Suppliers: they will have to bid without knowing whether a rate mitigation plan will be adopted as a part of the rate case, much less knowing the contours of any adopted plan. Without any way to know or mitigate their risk, Suppliers will need to include a much larger risk premium. Ameren's proposal can only serve to drive up the auction-clearing price and thus should be rejected. (Dynegy brief at 32-33)

**d. CCG's Position**

CCG's concern about the proposed rate moderation plan is its potential impact on the migration analysis. In preparing their bids, suppliers assess the risk of migration from bundled service to competitive supply and from competitive supply to bundled service and account for that risk in their prices. Since there will be uncertainty as to the mitigation plan until after the auction, the migration analysis cannot be completed before the auction. This adds an additional level of uncertainty which cannot accurately be modeled before the auction and thus adds an additional risk premium. (CCG brief at 19-20, reply brief at 10)

Additionally, CCG believes that there is no need to have a plan to artificially mitigate the bundled rates of customers after completion of the auction or to soften the impact of any potential rate shock. The Illinois Auction Proposal is designed to generally ensure that the proper price signal is developed through the competitive bidding. The resulting rates would therefore be the actual operating electricity market as it exists at the time of the auction. (CCG brief at 20)

Should the Commission approve a rate mitigation plan, then CCG requests that the mitigation plan not be allowed to impact the generation prices. According to CCG, all winning bidders must be paid the auction clearing price applicable to the tranches they are selected to provide. (CCG brief at 20, reply brief at 10)

Any mitigation plan should not create uncertainty for potential and actual bidding suppliers. Uncertainty increases risk which tends to increase prices. Any mitigation plan should thus operate in such a way that the full retail prices of affected bundled customers can be calculated for various auction generation price results (i.e. the "rate prism" is established and fixed) prior to the commencement of the auction and such prices will not change after completion of the auction. (CCG brief at 21)

**e. The AG's Position**

The AG asserts that Staff's rate increase mitigation highlights the uncertainty resulting from the Ameren Companies' proposal in this docket. Although bill impacts are a critical public concern, it is impossible to determine the bill impact of the Companies' proposal. The uncertainty associated with approving a future process, with no history in Illinois or estimated effect on rates, is compounded by formula rate design, which is dependent on variable inputs.

Staff's attempt to limit the bill impact on consumers is a welcome attempt to protect consumers from the results of an unorthodox proposal, with unknown bill and rate impacts. (AG reply brief at 47)

Staff's rate mitigation proposal is crucial to protect consumers from rate shock. Rate impact mitigation is a valuable regulatory tool that recognizes the essential nature

of electric service and the statutory and social need to keep it affordable so that its use by all segments of society is preserved. (AG reply brief at 48)

Although the AG agrees that the final bundled bill will determine what consumers pay, a mitigation plan that imposes limits on generation costs could send a signal to both generators and the utility that affordability of essential electric service is a key public policy. (AG reply brief at 48)

According to the AG, this case does not set a bundled rate, and it may be premature to establish a rate mitigation plan in this docket when other dockets are pending and costs are unknown. Although Staff has tried to present a plan to accommodate all of the unknown elements of future rates, the AG claims that ultimately a bill mitigation plan will change the cost allocations and rate design substantially, based on factors outside this docket. As a result, the AG asserts that the Commission should conclude that a rate mitigation plan is appropriate in the event it approves the Company's proposal, but retain the discretion to set rates that serve the public interest after all of the currently unknown elements have been established. (AG reply brief at 48)

A rate mitigation plan or formula will not be necessary if the Commission rejects the Company's proposal and requires the Company to submit tariffs with the charges that consumers will be asked to pay. In that case, the Staff and other parties will be able to assess the actual, rather than the speculative, effect of the tariff changes, and propose a rate design that can be assessed both for fairness among customer classes and for bill impact. (AG reply brief at 48-49)

#### f. MWGen's Position

In its reply brief, MWGen states that it shares some of CCG's concerns regarding Staff's – or any other – rate increase mitigation proposal. MWGen asserts that a rate mitigation plan has the potential to adversely affect suppliers in two ways: first, through the potential threat that the price paid to suppliers will be reduced to the extent that Ameren is not allowed to collect the full price from its customers, and second, through the possibility that a rate mitigation plan may threaten Ameren's financial viability and thus undermine its ability to honor its contracts. (MWGen reply brief at 6)

#### g. Commission's Analysis and Conclusions

Staff proposed a mitigation plan in an effort to alleviate concerns about potential rate shock for some of Ameren's customers. Under the Staff proposal, if the overall bill increase for customers within that auction is 13.33% or less, the maximum increase for any group of customers within the auction would be 20%. For an overall increase greater than 13.33%, the 150% of auction average limit would apply. Staff's proposed plan would apply only to the BGS auction.

The AG is in favor of Staff's proposed mitigation plan and Ameren says it is not necessarily opposed to the plan. Both Ameren and the AG, however, suggest it would be better to approve a final rate mitigation plan in Ameren's next delivery services rate case. CCG suggests Staff's mitigation proposal is unnecessary and will interfere with proper price signals.

Additionally, in the event a rate mitigation plan is adopted, Ameren wants it implemented in a manner that allows each of the three Ameren Companies to charge the same residential rate. Ameren claims the cost of providing residential service will be the same and all residential customers should pay the same rates. Staff objects to this proposal because Staff believes it would defeat the purpose of the rate mitigation plan.

CCG, Dynegy and MWGen all have some reservations about Staff's proposed mitigation plan. They are concerned about the possible impact on customer migration to alternate suppliers, increasing bids by suppliers and whether winning bidders will be paid the auction clearing price.

The Commission understands that adopting a rate mitigation plan could increase uncertainty for auction bidders which could in turn increase the prices resulting from an auction. Nevertheless, the Commission believes that all things considered, Staff's mitigation proposal offers important protections to ratepayers and should be adopted. The Commission believes it is appropriate to adopt the rate mitigation proposal here to provide both customers and suppliers as much advance notice and certainty as possible.

Next, the Commission appreciates Ameren's desire to have uniform BGS pricing throughout the Ameren Illinois footprint, and the Commission understands that uniform BGS pricing could provide benefits to both customers and Ameren. However, the Commission agrees with Staff that it is more important at this point in time to mitigate potential rate increases than achieve pricing uniformity. Furthermore, uniform BGS pricing throughout the Ameren service territories will occur under Staff's plan, although not as soon as Ameren would prefer.

Finally, the Commission wishes to assure bidders in the auction that the rate mitigation plan adopted in this Order will simply reallocate revenue responsibility between customers and will not have any impact on the total revenue collected by Ameren or paid to winning bidders.

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

There is a disagreement between the Ameren Companies and certain parties with regard to the applicability of Rider D - Default Supply Service Availability Charge, sometimes referred to as a "DSSAC." The issue relates to whether suppliers will be interested in bidding on the Ameren Companies' real time price power supply.

**a. Ameren's Position**

According to the Ameren Companies, Rider D is intended to be a charge applicable to all customers at or greater than 1 MW who opt for BGS-LRTP service (typically large customers), or third-party supply from a source other than the Ameren Companies. Given its nature, suppliers cannot know how many customers will actually take the product. They also cannot know or estimate the number of customers that may take the product because there is no historical basis.

Rider D is intended to set a proxy for the capacity planning costs these customers would impose on the BGS-LRTP suppliers. Rider D will produce a revenue stream to be returned to those suppliers who win the BGS-LRTP bid. Should it occur that no customers take the BGS-LRTP product or fewer than might have been anticipated (however that would be determined), the supplier knows it will more likely receive a revenue stream for at least holding the "option" that will be available to these particular customers. (Ameren draft order at 106-107)

Suppliers who bid on this load will have to reserve capacity or take the chance that when customers take the product, they will be able to acquire capacity in this market. If the supplier has reserved capacity, and nobody takes the product or not enough customers take the product commensurate with the amount of capacity reserved, the suppliers may lose money. Conversely, if there is no Rider D, and the supplier is successful in bidding on this product, it is a virtual certainty that the level of risk premium to compensate the suppliers for the unpredictability of the BGS-LRTP load will be higher. (Ameren draft order at 107)

The Ameren Companies contend they are following the lead of New Jersey in this regard, and the successes of New Jersey's auctions are well established. The Rider D charged in New Jersey was recently discontinued as a separate charge for customers that would take this particular product. Instead, the bidders are remitted an amount equivalent to the application of the Rider D charge from a "retail adder" fund. In effect, the New Jersey Public Utility Commission is recognizing that the capacity option premium is a fundamental cost with regard to this particular product. The Ameren Companies claim that the proposed $0.00015 per kilowatt-hour charge, while it may not be the exact value needed to entice suppliers to bid on the BGS-LRTP product, has been correctly shown to bear a relationship to the minimum charge needed to entice suppliers to bid. (Ameren draft order at 107)

According to the Ameren Companies, no party has suggested that BGS-LRTP bidders will not experience a capacity cost associated with providing BGS-LRTP service to large customers. Rather, parties opposed to Rider D want the supplier, or the Ameren Companies if there are no BGS-LRTP suppliers, to bear the risk without any guarantee or certainty of recovery of some or all of these costs. The Ameren Companies will not bear responsibility for this charge, nor will they benefit from the application of Rider D. If there are no BGS-LRTP bidders and the Ameren Companies are forced to go to the wholesale market to procure capacity, they will pass that cost

along to those customers no matter the price and, in the event Rider D is approved, all dollars received by the Ameren Companies would be remitted to the successful bidders for the BGS-LRTP product. (Ameren draft order at 107)

The Ameren Companies claim CES has an incentive to take issue with Rider D insofar as it is their potential customers who would bear this charge in the event they switch to third-party supply. The Ameren Companies further assert that IIEC members would also bear this charge if they, too, were to take third-party supply or RTP. (Ameren draft order at 107)

According to the Ameren Companies, Staff's opposition was that, first, there has been no demonstration suppliers for this particular product will decline to participate in the auction; and, second, the cost for this option is perhaps too high. The Ameren Companies reply that there has been no affirmation by any supplier that it would bid on this product. This approach has been successfully used in New Jersey, where suppliers are bidding on this product, so the incentive would seem to be working there. In terms of the cost of the option, the Ameren Companies contend it is nominal. (Ameren draft order at 108)

Rider D charge represents less than ½ percent of the range of total power supply charges. This estimate excludes the delivery service cost which also appears on the customers' bill and so the overall bill impact, a matter of concern to the Staff, is even less than the charges shown in Ameren witness Mr. Cooper's surrebuttal testimony. The customers who would pay this option are typically large customers with relatively large power bills. (Ameren draft order at 108)

The Ameren Companies say CES characterizes the Rider D charge as being anti-competitive and attempts to refute the charge as a form of insurance, as the Ameren Companies suggest. In the Ameren Companies' view, CES offers no credible explanation for the conclusory claim that the charge is anti-competitive. The Ameren Companies say the charge applies equally to all customers eligible for this product – customers who may at some point take the RTP product. (Ameren draft order at 108)

According to the Ameren Companies, IIEC says the Ameren Companies have not identified suppliers who would decline to bid. The Ameren Companies state that no suppliers have stated they would bid irrespective of Rider D's availability and also claim they must plan for all reasonable possibilities. For example, no supplier has said in these proceedings that they intend to specifically bid on the one-year fixed-price product (supported by IIEC), but still the Ameren Companies intend to seek bids for that load. (Ameren draft order at 108)

With time the Ameren Companies and suppliers interested in bidding the BGS-LRTP product will have available to them historical information in terms of the number of customers taking the product at any given time. Therefore, the Ameren Companies believe it stands to reason that in time there will ultimately be greater certainty as to how much this load will be served. (Ameren draft order at 108)

The Ameren Companies recommend that Commission allow the Rider D charge. It is a necessary element for ensuring the availability of a reasonably priced BGS-LRTP product. The Commission should not give way to arguments driven by parochial interests in deciding this particular issue. (Ameren draft order at 109)

In their reply brief, the Ameren Companies say the Commission's decision will ultimately come down to these considerations: Is the Commission assured that there will be suppliers interested in bidding on the BGS-LRTP load? If the Commission is so satisfied, then frankly the Rider D charge need not be imposed. If the Commission concludes that sufficient suppliers will bid on the BGS-LRTP load, but in fact they do not, what are the consequences? (Ameren reply brief at 98)

When a customer opts to take the BGS-LRTP product, or the customer loses its third party supply, and defaults to the BGS-LRTP product and there were no suppliers for the product, the Ameren Companies will have to procure capacity in order to serve those customers. What that price will be cannot be known at this time, and those customers will be subject to the whim of the market. Under Ameren's proposal to spread the Rider D charges across all BGS-LRTP customers and customers over 1 megawatt, a minute charge would result, in the event the Ameren Companies are required to procure capacity in the market for a select few customers who opted for BGS-LRTP product or ended up taking the product as a default because they lost the third party supply. These few customers will pay a much larger charge for capacity in the absence of the Ameren Companies' proposal. (Ameren reply brief at 99)

The Ameren Companies' goal is to eliminate or minimize this uncertainty by ensuring a revenue stream to the suppliers that may not otherwise be inclined to bid on this product. In the Ameren Companies' view, it makes more sense to err on the side of caution and have all customers who are eligible for this product pay a very small charge, and have greater assurance that suppliers will be interested in bidding on this load. (Ameren reply brief at 99)

**b. Staff's Position**

According to Staff, the Ameren Companies proposed to impose the Default Supply Service Availability Charge ("DSSAC") charge on all RES customers eligible for Rider BGS-L and the customers in the customer group that choose real-time pricing service under Rider RTP-L. DSSAC charges paid by customers and collected by the Companies would be forwarded to successful bidders in the Rider BGS-L auction. The DSSAC is set at $0.00015/kWh (0.015 cents/kWh). (Staff brief at 191)

Staff says the Ameren Companies are concerned that few, or possibly even zero, suppliers will bid in the BGS-LRTP auction, especially if they perceive that few customers will take Rider RTP-L. To address this problem, the Companies have proposed to provide an incentive to bid, because winning bidders will collect revenue even if they do not serve any customers. (Staff brief at 192)

Staff asserts that the Ameren Companies did not provided any evidence that winning bidders would reduce their bids by the amount of DSSAC, and instead, might simply pocket DSSAC revenue. According to Staff, no supplier has stated in this proceeding that it will not bid unless it receives the DSSAC revenue. Staff expresses a concern that RES customers would pay twice for capacity, once to their RES suppliers, and a second time in the form of the DSSAC. (Staff brief at 193)

Staff recognizes that the Ameren Companies must procure capacity for Rider RTP-L customers, should there be any. Staff also recognizes that the Ameren Companies' DSSAC proposal will very likely ensure that there will be at least one supplier willing to provide Rider RTP-L capacity, since suppliers might line up to bid for the chance to collect up to $1 million in DSSAC revenue, the amount that Staff estimated that RES customers would pay in DSSAC charges. Staff believes, however, that it is unfair to charge customers for a service, (i.e., Rider RTP-L), that most customers do not want and have no intention of taking. (Staff brief at 193, reply brief at 84)

The Ameren Companies' solution would potentially have a negative effect, albeit a small one, on retail competition. Staff recommends that the Commission reject the Ameren Companies' proposed DSSAC charge. (Staff brief at 193)

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. Staff states in its reply brief that since it is clear that the Ameren Companies will not accept responsibility for the charge, the only apparent option would be to charge RTP-L customers for all costs related to taking the service. (Staff reply brief at 84)

#### c. CES' Position

According to CES, the DSSAC constitutes a form of "exit fee" or "post-transition customer transition charge" for a service that RES customers do not utilize. It is anti-competitive and would deter customers from switching to RESs. CES recommends that the Commission reject Ameren's proposed DSSAC since Ameren failed to justify this charge. According to CES, Ameren admitted that it has no study or analyses to support its hard-coded anticipated charge. Even if Ameren were to identify specific costs associated with reserve capacity for hourly customers, those costs should be recovered solely and fully from customers who take service under Ameren's BGS-LRTP. (CES draft order at 54-55, reply brief at 30)

CES also quarrels with Ameren's characterization of the DSSAC as "insurance." Rider-D is not an insurance policy, is not like an insurance policy, and the related charges are neither insurance premiums nor are they like insurance premiums. If Ameren persists in its contention that the Rider-D charge is, in fact, insurance, then

wholesale suppliers would need to be licensed as insurers in Illinois or find themselves in violation of 215 ILCS 5/121. (CES draft order at 55)

According to CES, ComEd does not currently collect such a fee, even though it offers hourly pricing as a default service to customers with demands over 3 MW whose Rate 6L service has been declared competitive. In addition, CES states, ComEd did not propose to impose such a fee in the post-transition period on customers who would default to its hourly product. Therefore, according to CES, the imposition of the DSSAC would only serve to further frustrate development of competition in the Ameren service areas. (CES draft order at 55)

According to CES, Ameren suggested that opposition to the DSSAC is driven by "parochial interests" on this "particular issue." Yet, CES claims, as Ameren itself acknowledged, there is a range of opposition to the DSSAC from a variety of parties who do not agree on other important issues in this proceeding. (CES reply brief at 30-31)

CES says Ameren now describes the DSSAC as a proxy for the capacity planning costs imposed by BGS-LRTP customers that will produce a revenue stream to be returned to those suppliers who win the BGS-LRTP bid. Adding to the confusion, according to CES, Ameren pointed to New Jersey's historic experience to justify the proposed DSSAC, but then admitted that recently the Rider D charged in New Jersey was discontinued as a separate charge for customers. (CES reply brief at 31)

CES says Ameren suggests that CES has a vested interest in defeating the DSSAC because CES' potential customers will be the parties required to pay the DSSAC if they switch. CES responds that the DSSAC will impose an additional cost upon customers who switch, a cost that would not be borne by those same customers if they did not switch. All else being equal, the addition of such a cost makes it less likely that customers will switch. The DSSAC is palpably anti-competitive. (CES reply brief at 32)

Imposition of the DSSAC would further frustrate development of competition in the Ameren service areas. Because Ameren has failed to sufficiently justify the purpose of the fee, let alone the specific charges associated with it, the Commission should reject Ameren's proposed DSSAC. (CES reply brief at 32)

#### d. IIEC's Position

IIEC opposes the Rider D charge, asserting that it has no cost basis and applies Rider RTP-L related rates to customers who do not take service under Rider RTP-L. Rider D provides a known revenue stream for the BGS-LRTP suppliers, regardless of the number of customers who elect to take BGS-LRTP service via Rider RTP-L. According to IIEC, Ameren argued that unless Rider D is implemented, BGS-LRTP suppliers will include a risk premium in their auction prices to address the uncertainty of customer levels. (IIEC brief at 47)

IIEC argues that Ameren has provided no cost support for its proposed 0.015¢ per kWh Rider D charge. IIEC also believes that while it is appropriate to reflect any risk premium associated with a service in the rates for that service, it is inappropriate to reflect such a premium in a non-bypassable charge applicable to customers not currently taking the service. Ameren has merely copied a charge used by different utilities, in a different state with different markets.

BGS-LRTP bidders should simply be permitted to include any risk premium associated with the uncertainty of customer levels in their BGS-LRTP bids, allowing those suppliers to compete to cover this risk. Customers not taking BGS-LRTP service through Rider RTP-L would then not be inappropriately allocated the cost for a service they were not taking. (IIEC brief at 48, reply brief at 37)

Ameren has not established a need for Rider D. Ameren has failed to identify a single supplier who would not bid for the BGS-LRTP product or who would include a significant premium in the bid for this product if the Rider D charge were not implemented. As a further indication that Rider D is not necessary, ComEd (in Docket No. 05-0159) has not proposed a charge equivalent to Rider D. IIEC says no other party in this proceeding has supported Ameren's claimed need for the charge. (IIEC brief at 48)

Nobody knows whether there would not have been bidders in the hourly product auction in New Jersey if there had been no equivalent to Rider D in New Jersey. Ameren does not really know whether any particular supplier will bid on the BGS-LRTP product, regardless of whether Rider D is implemented. (IIEC brief at 48-49, reply brief at 37)

Even though the size of the proposed charge is small, Ameren has failed to provide any cost support for its proposed Rider D charge. It has merely copied a charge used in a different state with different markets. Ameren has presented no evidence showing that potential bidders believe they need Rider D implemented to make bidding on the BGS-LRTP product attractive, with or without risk premiums. (IIEC brief at 50, reply brief at 37-38)

Through Rider D, customers -- not the competitive suppliers -- bear the risk that fewer customers than anticipated will take a service, so that Ameren (which refuses to bear that risk) and the winning supplier (which Ameren believes should not bear that market risk) do not have to bear the risk of capacity costs associated with BGS-LRTP service. (IIEC reply brief at 36)

#### e. DES-USEC's Position

DES-USESC recommend that the Commission reject Ameren's Proposed Default Supply Availability Charge as unjustified, discriminatory, anti-competitive, and unjust. (DES-USESC brief at 26)

### f. Commission's Analysis and Conclusions

The Ameren Companies propose to impose the DSSAC charge on all RES customers eligible for Rider BGS-L and the customers in the customer group that choose real-time pricing service under Rider RTP-L. DSSAC charges paid by customers and collected by the Companies would be forwarded to successful bidders in the Rider BGS-L auction. Ameren proposes to set the DSSAC at $0.00015/kWh. The plan is intended to address a concern that few, or possibly even zero, suppliers will bid in the BGS-LRTP.

Staff, CES, IIEC and DES-USEC oppose Ameren's proposed DSSAC. Among other things, they claim it is not cost based and improperly imposes a charge on customers that do not cause Ameren to incur costs.

As the Commission understands it, Ameren is concerned that few if any suppliers will bid in the BGS-LRTP auction due to the cost of bidding combined with the risk that not enough customers will take BGS-LRTP product to make it profitable. Ameren claims the DSSAC is intended to compensate winning bidders for their capacity planning costs.

The Commission understands Ameren's concern and appreciates Ameren's proposal as an effort to avoid an undesirable outcome. The Commission, however, concludes that the proposal should not be approved at this time. As several parties have pointed out, the record simply provides no cost basis for the particular charge proposed.

Additionally, there is no way to know if the level of charge proposed by Ameren, some higher charge or even some lower charge would accomplish Ameren's stated goal. Just as the market will determine whether customers take the BGS-LRTP product, the market will determine how many, if any, bidders participate in the BGS-LRTP auction. Furthermore, as noted by some parties, no potential bidders, who are among the purported beneficiaries of the charge, have offered record support for it.

## 14. Treatment of Uncollectibles

It was the original position of the Ameren Companies that uncollectible expenses associated with customers taking service under the BGS rates would be adjusted between the delivery service rate cases. Staff recommended the level of the uncollectible expense be set in each delivery service rate case. The Ameren Companies agreed with Staff's proposal, that both the method as well as the test year expense level for uncollectible expense be determined in subsequent delivery service rate cases. (Ameren brief at 144, reply brief at 100)

The Ameren Companies believe the method and value associated with uncollectible expense should be developed in the context of the next delivery service

rate cases because at that time the entirety of the uncollectible expense for the test year will be known. Once the proper amount is allocated for delivery services, the Ameren Companies say the difference can then be allocated and recovered as part of the BGS rates. They assert this is the one fundamental difference between the SPA costs and uncollectible expense. According to the Ameren Companies, there will be no SPA costs associated with the provision of delivery services; there will be uncollectible expenses associated with both delivery services and BGS. (Ameren reply brief at 100)

The Ameren Companies argue that the other reason for treating uncollectible costs differently, again, is because the SPA costs are directly tied to the market products being offered and thus its importance in ensuring that SPA costs are properly reflected as part of the market price. (Ameren reply brief at 100)

Staff, in its initial brief, identified the specific language regarding the uncollectible adjustment to which Staff and the Ameren Companies agreed. (Staff brief at 194-196)

CES wants the Commission to order Ameren to account separately for uncollectible expenses between delivery services-related uncollectible expenses and energy-related uncollectible expenses, and to charge to customers accordingly. According to CES, Ameren properly identified "uncollectibles" as a supply-related cost component and discusses its ability to collect it. (CES draft order at 56, reply brief at 32)

CES states that Ameren previously agreed with CES' recommendation to separate uncollectible expenses between delivery and energy supply customers. In its Initial Brief, according to CES, Ameren additionally indicated that, pursuant to Staff's recommendations, the Companies would omit specific reference to establishing a "factor" based on the relative relationship of total uncollectible expenses to total bundled revenue amounts and instead agrees that the Commission should determine both the methodology and value for the uncollectible adjustment in Ameren's delivery services rate case. (CES reply brief at 32-33)

CES says it has no quarrels with this broader language proposed for Rider MV. However, CES maintains that Ameren should allocate energy-related uncollectibles to those customers who choose or remain with Ameren as their energy supplier. (CES reply brief at 33)

The Commission has reviewed the positions of the parties and it appears there is no contested issue here. The parties believe, and the Commission concurs, that it is appropriate to allocate responsibility for uncollectibles between bundled customers and delivery services customers. The record of this proceeding does not contain sufficient information to reasonably determine either the specific level or the proper allocation of uncollectibles. Thus, the Commission will defer to Ameren's next delivery services rate proceeding, or other appropriate proceeding, any further conclusions regarding uncollectibles.

### 15. Integrated Distribution Company Issues

#### a. CES' Position

CES requests that Ameren be directed to initiate a separate docketed proceeding for consideration of new procurement process communication materials to assist in providing objective educational materials to the public that are consistent with the Commission's "Integrated Distribution Company" ("IDC") rules. In its reply brief, CES recommends that the proposed proceeding be initiated within 30 days of the entry of the Order in the instant case. The scope of the proposed proceeding would be to review communication and marketing materials, as well as all related accounting issues. CES believes the Commission should be concerned about how Ameren may balance "good customer communications" with what may be construed as "marketing" of its new supply options. (CES draft order at 61-62, reply brief at 36)

CES argues that Ameren and other interested parties should have an opportunity to derive an appropriate balance between getting the word out to customers about the supply choices available from Ameren while ensuring there is no bias that would direct customers toward necessarily taking those supply options offered by the utility. As a result, CES recommends a new proceeding in which such communication and marketing materials would be reviewed, commented upon, and approved by the Commission. (CES draft order at 62, reply brief at 33-34)

In its reply brief, CES describes its proposal as modest and Ameren's opposition snide. CES claims a separate docketed proceeding is necessary precisely because Ameren is always in communication with its customers. The initiation of a separate docketed proceeding will acknowledge that the way in which the utility is to interact with its customers regarding their new supply options differs from those interactions that occurred during the transition period.

Ameren will develop materials to describe and explain customers' post-transition generation options, and these marketing materials will dramatically differ from marketing materials that Ameren might have developed during the transition period. Rather than wait for a misstep in communication that may yield a formal Commission complaint or investigation, Ameren should welcome the early opportunity to discuss these important pieces of consumer education. Furthermore, regardless of Ameren's interaction during the transition period, during which rates were frozen, the Commission should be concerned about the manner in which Ameren proceeds into the post-2006 period, when the Companies' supply may come from an affiliated company at a market-based price. (CES reply brief at 34-35)

CES is not seeking active litigation for each and every rule. Rather, it believes interested parties should be provided an opportunity in an open forum to ensure that Ameren strikes the appropriate balance between informing customers of available supply choices and ensuring that these materials contain no bias or favoritism nudging customers toward Ameren's supply options. (CES reply brief at 35)

Given Ameren's resistance to the development of retail competition and its failure to acknowledge these fundamental changes in the retail market, there is no reason for the Commission to trust that Ameren's "well-trained" employees would appropriately identify prohibited marketing materials. IDC rules should be implemented to ensure there is no bias that would direct customers toward necessarily taking those supply options offered by the utility. Given the present low level of competition in the Ameren service territories, initiating a separate docketed proceeding would be the most effective and efficient way of ensuring that the interests of competition are protected. (CES reply brief at 35)

**b. Ameren's Position**

The Ameren Companies argue that such an effort would be a waste of time and resources for the Ameren Companies, as well as for the Commission and its Staff. Utilities are always in communication with their customers because it is a necessary part of providing public utility service. It is not productive to pretend that a utility does not communicate or provide materials to its customers. Those personnel involved with customers are trained to understand the IDC rules and are fully aware of the prohibition against marketing, advertising and promoting the Ameren Companies' retail energy supply. (Ameren draft order at 109)

While providing communication materials and communicating with customers is an everyday, ongoing effort, they question at what point the docket suggested by CES would prove meaningful. According to the Ameren Companies, CES means for the Commission to open up a docket, for example, on February 1, 2006, and whatever communication materials were in existence at that time would be made part of the record and the parties could debate whether or not they are in violation of the IDC rules. The docket would come to a close but the provision of materials communicating with customers would continue. (Ameren draft order at 110)

Utility service is a heavily regulated industry and there are literally hundreds of rules in place that require compliance by the utility. IDC rules are no different in this regard and it would be purposeless to engage in active litigation for each and every rule that requires some amount of utility compliance. (Ameren draft order at 110)

In their reply brief, the Ameren Companies indicate their response to the CES statement that the Ameren Companies intend to get the "….word out to customers about the supply choices available from Ameren . . .," is that the Ameren Companies have been getting the "word out" for years since they were integrated distribution companies and there has been no concern with communications with customers. (Ameren reply brief at 100-101)

### c. Commission Analysis and Conclusions

CES recommends that the Commission direct Ameren to initiate a docketed proceeding for consideration of new procurement process communication materials, in order to assist in providing objective educational materials to the public that are in line with the Commission's IDC rules. Ameren objects to this recommendation, arguing it is inefficient and unnecessary.

Having reviewed the record, the Commission declines to order a new proceeding at this time. Although the Commission agrees with CES on the importance of striking an appropriate balance between informing customers of their supply choices while avoiding bias favoring utility service offerings, particularly in service areas where competition has not flourished, the Commission observes that IDC guidelines are already in place in 83 Ill. Adm. Code 452. To the extent such guidelines are not being followed, or are not effective, appropriate remedies may be pursued.

## 16. Credit Risk and Other Administrative Costs

CES wants the Commission to order Ameren to implement a revised methodology for allocating expenses incurred as a result of providing service under its "real-time pricing" or "RTP" hourly energy products. As rationale, CES contends that Ameren's proposed rate structure fails to fully allocate credit risk and administrative costs to customers taking service under Ameren's proposed Rider BGS-RTP products.

CES states that Ameren did not propose a methodology to account for or properly allocate all of the additional costs associated with BGS-RTP that are driven by the fact that the electric energy price varies on an hourly basis. (CES draft order at 58) These additional costs are due to (1) increased credit risk and credit exposure; and (2) increased administrative costs. (CES draft order at 58-59)

According to CES, customers taking service under the BGS-RTP auction products will be exposed to potentially wide variability in hourly prices. CES asserts that although there has only been limited experience with MISO to date, over the last year, the PJM Real Time Locational Marginal Pricing in the ComEd zone had over 100 hours with prices over $100/MWh. CES claims this uncertainty in the prices to be charged to these customers increases the risk that Ameren will have uncollectibles for customers taking service under this rate that well exceed levels incurred by Ameren in providing service under its annual and multi-year blended rates. (CES draft order at 59)

In addition, the CES argues that Ameren's uncollectibles risk associated with providing service under an hourly rate will be much greater under Ameren's proposed post-transition rate structure. Thus far, most customers relying on hourly priced products have done so on the basis of specific business programs for better adapting energy supply and costs to business operations and objectives. However, under Ameren's proposed post-transition rate structure, the hourly product would be the default product for certain classes of customers, resulting in customers taking service

under the BGS-RTP products who might not do so as a result of analysis and specific election. Thus, providing service to these customers naturally will involve a greater risk of uncollectible expenses.

CES avers that Ameren failed to provide an estimate of this additional cost component. Ameren also failed, according to CES, to propose an allocation or recovery methodology that would provide a high level of confidence that such costs would be recovered from the cost-causers rather than from others. (CES draft order at 59-60)

According to CES, serving hourly customers likely will cost more than serving customers receiving the fixed rate products for three reasons: (1) hourly products require more intervention which in turn increases costs to serve (e.g., acquiring, scrubbing, and inputting hourly data will take additional time to process); (2) hourly customers likely would have more questions about their bills, especially when prices are high; and (3) there is a much higher probability that BGS-RTP customer bills would be delayed due to a lack of data, resulting in increased working capital expenses. According to CES, the direct and indirect costs and related capital expenditures should be considered in calculating the total cost associated with serving hourly customers. (CES draft order at 60)

CES contends that for consistency and for equity purposes, these costs should be allocated evenly per kWh to all customers receiving the hourly product. CES further contends that these costs should be fully accounted for and allocated on a simple $/kWh basis as part of the energy charges to customers taking service under Rider RTP products. Lastly, CES avers that these costs should be updated annually to reflect changes in the cost structure. (CES draft order at 60)

Having reviewed the record, the Commission observes that CES has raised an interesting issue: the possibility that certain costs will be higher for customers taking hourly priced service compared to those taking fixed priced service. However, in the absence of actual cost data it difficult for the Commission to conclude with any certainty the extent to which certain costs will be higher for hourly priced service.

Thus, while the Commission agrees with CES that this issue warrants attention, the Commission believes the more appropriate forum would be Ameren's next delivery services rate case where parties can provide substantive evidence on relevant costs, methodologies and recovery mechanisms.

## VIII. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record, is of the opinion and finds that:

(1) Central Illinois Light Company, Central Illinois Public Service Company and Illinois Power Company are Illinois corporations engaged in the retail sale and delivery of electricity to the public in Illinois, and each is a "public

utility" as defined in Section 3-105 of the Public Utilities Act and an "electric utility" as defined in Section 16-102 of the Public Utilities Act;

(2) the Commission has jurisdiction over the parties and subject matter of this proceeding;

(3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and/or conclusions of law;

(4) subject to the determinations made and conditions imposed herein, the Commission has authority under the Public Utilities Act to approve the proposed competitive procurement process and the associated tariffs;

(5) subject to the determinations made and conditions imposed herein, the tariffs proposed by the Ameren Companies in their initial filing, as modified to reflect the findings herein, are just and reasonable; the Ameren Companies should be authorized to file and place into effect such tariff sheets, as modified;

(6) the new tariff sheets authorized to be filed by this Order should reflect an effective date not less than 30 days after the date of filing, with the tariff sheets to be corrected, if necessary, within that time period, and should reflect an operational date of no earlier than January 2, 2007;

(7) the Ameren Companies should be subject to the annual reconciliation proceedings related to its power purchases as described and approved in the prefatory portion of this Order;

(8) the Ameren Companies should be required to implement the rate mitigation proposal described and approved in the prefatory portion of this Order.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed Procurement Tariff Sheets filed by the Ameren Companies on February 28, 2005 are permanently canceled and annulled.

IT IS FURTHER ORDERED that the Ameren Companies are authorized and directed to file new tariff sheets with supporting work papers in accordance with the findings of this Order, applicable on and after the effective date of said tariff sheets and operational on and after January 2, 2007.

IT IS FURTHER ORDERED that the Ameren Companies shall be subject to the annual reconciliation proceedings related to its power purchases as described and approved in the prefatory portion and in the findings of this Order.

IT IS FURTHER ORDERED that the Ameren Companies are directed to file tariffs implementing the rate mitigation proposal as described and approved in the prefatory portion and findings of this Order.

IT IS FURTHER ORDERED that all petitions for leave to intervene, to the extent not heretofore ruled upon, are granted.

IT IS FURTHER ORDERED that any motions or objections other matters in this proceeding that remain unresolved are hereby deemed disposed in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Proposed Order of the Administrative Law Judge this 9th day of December 2005.

Administrative Law Judge