

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

AMEREN ILLINOIS COMPANY,	:	
d/b/a Ameren Illinois	:	
	:	12-0001
Rate MAP-P Modernization Action	:	
Plan Pricing Filing	:	

**REPLY BRIEF OF THE ILLINOIS INDUSTRIAL ENERGY CONSUMERS**

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## **IIEC REPLY BRIEF**

The Illinois Industrial Energy Consumers (“IIEC”)<sup>1</sup> present this Reply Brief in response to certain issues raised and arguments made by Ameren Illinois Company (“Ameren” or “Company”), and the Illinois Commerce Commission Staff (“Staff”) in their Initial Briefs (“Brief”) or (“Briefs”). IIEC’s lack of response to the Brief or arguments of any party should not be considered acceptance of, or agreement with, that brief or argument, unless specifically stated otherwise herein. IIEC’s failure to revisit any issue in its Reply Brief raised in its Brief, should not be considered an abandonment of that issue.

### **I. INTRODUCTION/STATEMENT OF THE CASE**

#### **B. Legal Framework and Standards**

Ameren’s opening remarks in its initial brief contort the language of the formula rate statute to avoid the over-arching objective of the statute -- recovery of Ameren’s actual costs during a particular rate year -- and the Commission’s implementation of that legal imperative. Ameren also is dismissive of ratepayer concerns about its impenetrable proposed tariff, which could determine rates for the next ten years.

Although Ameren’s brief purports to accept recovery of prudent and reasonable actual costs as the objective of the formula rate process, its proposals seek to implement a more self-serving definition of rate year actual costs than is described in the formula rate statute. Ameren departs from

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<sup>1</sup> Air Products & Chemicals, Inc. Archer Daniels Midland Company, Caterpillar, Inc., Enbridge Energy Company, GBC Metals, Keystone Consolidated Industries, Inc., Marathon Petroleum Company, Olin Corporation, Tate & Lyle Ingredients America, Inc., University of Illinois, Viscofan U.S.A., Inc., Washington Mills Hennepin, Inc.

the language of the formula rate statute and the Commission's holding on that issue. Ameren returns to test year concepts that were rejected when Ameren elected to become a participating utility under the formula rate statute. In particular, Ameren contends that the formula rate -- like immutable test year rates of indefinite duration -- should match costs during the year the rate is in effect, and not the rate year costs that will be used for reconciliation. (Ameren Br. at 40, 46). Ameren's novel interpretation of the formula rate statute contradicts the statute's language and structure, is inconsistent with the Commission's definitive implementation of the statute, and Ameren's own proposed tariff and is an unreasonable implementation of the statute's objectives.

In the summary of its positions on specific issues, Ameren presents a recitation of "actual cost" arguments interpreting the formula rate statute -- arguments that the Commission has already rejected. For instance, on issues IIEC contested, Ameren resurrected the following unpersuasive arguments.

- Ameren argues that the FERC Form 1 data used in determining formula rates "does not report an 'average' rate base" and that, therefore, use of an average rate base is barred.<sup>2</sup> (Ameren Br. at 1-2).

However, in the *ComEd Formula Rate Case*, the Commission concluded "that an average rate base should be used going forward in reconciliations in the manner set forth by the IIEC, the AG, CUB, the City of Chicago, the AARP and Staff."<sup>3</sup> (*ComEd Formula Rate Case* at 18). In

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<sup>2</sup> Ameren's Brief argues "The legislature proscribed (*sic*) the use of average data in several places on the EIMA, but rate base is not one of them." Though likely inadvertent, the statement is accurate. (Ameren Br. at 2).

<sup>3</sup> The Commission decision in *Commonwealth Edison Company*, Formula rate tariff and charges authorized by Section 16-108.5 of the Public Utilities Act, ICC Dkt. 11-0721, Order,

reaching that conclusion the Commission considered (*inter alia*) various IIEC arguments, including: “Section 16-108.5 requires only that the amounts used to set 11-0721 rates be ‘based on’ or ‘reflect’ FERC Form 1 cost ‘data’ and that the costs must be subjected to the Commission’s Article IX review.” (*Id.* at 15-16).

- Ameren argues “The EIMA requires adjustments to three specific FERC Form 1 rate inputs: (1) projected plant additions, (2) depreciation reserve and (3) depreciation expense.” (Ameren Br. at 2).

The formula rate statute also emphasized the continued validity and application of the PUA’s Article IX requirements for rate setting and regulation under the formula rate regime. That includes the PUA Section 9-211 limitation on the Commission’s authority to use an excessive rate base in ratemaking. As explained in a recent appellate court opinion concluding review of Ameren’s most recent electric rate case, that section requires consideration of ADIT.

- Ameren argues that “[t]he Company has no incentive to over-earn its return; if it does, updated rates will reflect a credit to customers, with interest.” (Ameren Br. at 4).

Like ComEd before it, Ameren argues -- without basis -- that the formula rate statute provides near-perfect protection for ratepayers, so that they do not pay more than the utility’s actual costs. Such false assertions are used as reasons for rejecting intervenors’ proposals for procedural protections or financial adjustments that address the reality that the formula rate statute does not purport to recover overpayments in its reconciliation. The reconciliation process examines only projected and actual revenue requirement determinations and adjusts rates going forward with no

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May 29, 2012, will be referred to as the “*ComEd Formula Rate Case*” or the “*ComEd Formula Rate Order*”.

consideration of the amounts actually collected by the utility. In addition, as to Ameren's specific assertion, the formula rate statute expressly permits a utility to over-earn or under-earn by as much as 50 basis points before there is any adjustment. (220 ILCS 5/16-108.5(c)(5) (the "collar")).

Ameren also asserts that "[T]he MAP-P structure and protocols have not generated substantial controversy." (Ameren Br. at 1). In fact, IIEC and Staff contest the structure of Ameren's proposed tariff. IIEC's challenge is both substantial and substantive. The substantive impact of an incomprehensible tariff was clear to the Commission, which made the following finding in the *ComEd Formula Rate Case*:

The Commission also notes that Section 16-108.5 of the Public Utilities Act is not easy to comprehend, but it will last for 10 to 11 years, unless it is dramatically altered by the General Assembly or the Appellate or Supreme Courts. (*ComEd Formula Rate Order* at 153).

### **C. Participation in EIMA/Formula Rates without AMI Plan Approval**

The parties addressing the question posed by the Administrative Law Judges, on the effect of the Commission's rejection of Ameren's AMI Plan on its status as a participating utility under Public Acts 97-0616 and 97-0646, were Ameren, Staff, IIEC, AG/AARP and CUB. All parties addressing the issue appear to have concluded that the Commission's denial of the AMI Plan could have an impact on Ameren's Status as a participating utility. (*See* Ameren Br. at 5-6; Staff Br. at 3; AG/AARP Br. at 10-12; CUB Br. at 8-10; IIEC Br. at 25-26.). There is not unanimous agreement (implicit or explicit) among the parties on the point in time Ameren's continued status as a "participating utility," eligible for the formula rate, must be determined. Ameren takes the longest view of the time period for making such a determination. (*See* Ameren Br. at 6 - suggesting

that a decision would be made after completion of any appeal it may file in relation to the Commission's Order in Docket 12-0244). Staff appears to take the shortest view of the time period within which such a decision should be made. (*See* Staff Br. at 3 - suggesting that Ameren would no longer be a participating utility if its plan is rejected for a second time on rehearing in Dkt. 12-0244).

IIEC notes that Ameren's position appears to be based upon the concept that it could "voluntarily commit" to proceed with its smart grid investment even if the AMI Plan is not approved.<sup>4</sup> (*See* Ameren Br. at 6). However, Section 16-108.6, which sets out the provisions relating to Smart Grid Advanced Metering Infrastructure Deployment Plans, provides in relevant part that the Commission will enter an Order approving or approving with modification the utilities AMI Plan if it finds, among other things, that the implementation of the AMI Plan will be "cost beneficial." (220 ILCS 5/16-108.6(c)). This Section further provides that "a participating utility's decision to invest pursuant to an AMI Plan approved by the Commission shall not be subject to prudence reviews in subsequent Commission proceedings. (*Id.*) Furthermore, "[a] participating utility shall be allowed to recover the reasonable costs it incurs in implementing a Commission-approved AMI Plan . . . and may recover such costs through its tariffs, including the performance-based formula rate tariff approved pursuant to subsection (c) of Section 16-108.5 of this Act." (*Id.*)

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<sup>4</sup> IIEC observes that a utility's indication that it may voluntarily commit it to make the investments required by Section 16-108.5(b), depending on the circumstances, is not the same as actually being committed to making such investments and therefor does not establish Ameren's eligibility for use of a formula rate. (220 ILCS 5/16-108.5(b)).

Thus, Section 16-108.6 clearly contemplates that a participating utility would only be allowed to recover the costs it incurs implementing a Commission approved AMI Plan.

If the Commission has refused to approve an AMI Plan, then the cost of AMI improvements would not be recoverable pursuant to a formula rate or the utility's other tariffs. If this were not the case, then the utility would be permitted to construct the smart grid improvements the Commission had determined are not cost beneficial. This would be contrary to the overall purpose of Section 16-108.6, which is to allow the utility to build and recover the cost of smart grid investments that are built pursuant to a plan approved by the Commission, provided such investment is found to be cost beneficial. Therefore, IIEC does not believe that Ameren would have the option to construct the subject Smart Grid improvements without an improved AMI Plan. Ameren, therefore, could not fulfill its voluntary commitment to make the infrastructure improvements contemplated by Section 16-108.5. Ameren then would no longer be considered a participating utility eligible for a formula rate in the first instance (assuming a formula rate had not been approved for Ameren) or to update its existing formula rate if the Commission had already approved a formula rate for Ameren.

## **II. RATE BASE**

### **A. Overview**

In its testimony and brief, IIEC identified three components of the rate base Ameren proposes to use for setting its formula rates that are problematic. They are Ameren's calculation of its cash working capital requirement, Ameren's proposed treatment of its accumulated deferred income taxes (ADIT), and the utility's proposed use of a year-end rate base as the principal element

of its actual capital costs during the rate year. Those issues remain problematic, as Ameren continues to support its original proposals.

**C. Contested Issues**

**1. Cash Working Capital**

**a. Pass-Through Taxes Revenue Lag**

Ameren proposed a revenue lag of 34.54 days for pass-through taxes, including the Energy Assistance Charges (“EAC”) for which IIEC proposes a zero-day lag. (Ameren Br. at 9). Ameren frames the issue of EAC cash working capital as a Commission decision on whether Ameren’s cash working capital calculation should reflect (a) the time that EAC collections are available to Ameren under statutory remittance requirements or (b) the time Ameren actually holds EAC collections before remitting them to the state. (*Id.* at 9-10).

Ameren’s argument is that its actual practices must determine what should be reflected in the CWC calculation, apparently without any legal constraint. “As Mr. Heintz explained, the cash working capital requirement attributable to pass-through taxes should be based solely upon the actual time during which Ameren has access to funds and the date the funds are remitted to the taxing authority.” (Ameren Br. at 10). Section 16-108.5 limits Ameren’s recovery of costs of delivery services to those “that are prudently incurred and reasonable in amount.” (220 ILCS 5/16-108.5(c)). Yet, Ameren’s brief never addresses the prudence of its management decision to remit

EAC funds ahead of the deadline or the reasonableness of the resulting higher rate base and capital costs.<sup>5</sup>

The issue here is not identifying the objective of a cash working capital study. The determinative question is whether Ameren's actual practice is prudent and reasonable. It is not. Ameren presented no evidence tending to show otherwise. Accordingly, Ameren should not be able to pass along to ratepayers the costs attributable to its management decision.

The formula rate statute and other applicable provisions of the PUA require the EAC treatment supported by IIEC, Staff, CUB, and AG-AARP. (IIEC Br. at 28-31; Staff Br. at 5-6; CUB Br. at 13; AG-AARP Br. at 15-18). "Ratepayers should not be burdened with higher rates because of the Company's business decision." (Staff Br. at 6). Neither the method used to collect EAC connection with EAC collections. Several such independently sufficient reasons for rejection of the Ameren proposal were identified by the non-utility parties in this case.

- Regardless of when the Company elects to remit the pass-through taxes, the funds were provided by ratepayers, not investors, and ratepayers should not have to pay a return on funds not provided by investors. (Staff Br. at 6).
- 'Ameren has made no showing that there is a need for CWC with respect to pass-through tax transactions,' since (as the Commission found) 'pass through taxes are completely funded by ratepayers, with the inflows and outflows earmarked for these taxes perfectly balanced.' (AG-AARP Br. at 15-16).
- Ameren's expert Heintz explained that 'the midpoint methodology presumes that payments occur ratably over the course of a month.' Yet Ameren reports forthrightly that its expert undertook no investigation to test whether the

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<sup>5</sup> In another context (MUT remittances), Ameren recognizes the relevance of consistency between statutory requirements and utility practice. (Ameren Br. at 11).

fundamental assumption underlying its CWC calculations actually bears any resemblance whatsoever to how Ameren's customers actually pay their bills. (IIEC Br. at 32).

It is IIEC's position that Ameren's imposition of the unnecessary costs of its management decision is neither prudent nor reasonable. (IIEC Br. at 28). Consider the following: What if Ameren Company chose -- at its discretion -- to pay its property taxes or payroll taxes earlier than required, thereby increasing its calculated CWC requirement? Would it be appropriate to recognize the increased CWC need and to set higher rates to reflect it? Of course not. Such an increase would not be "prudently incurred" and the inflated CWC amount would not be reasonable. When Ameren management elects to remit EAC collections in a manner that needlessly creates an additional revenue requirement for Ameren ratepayers, the inclusion of the added cost in rates is subject to an inquiry into, and a determination of, whether that election was prudent and the result was reasonable. In this case, Ameren has presented nothing to support the prudence of that decision, and ratepayers should not have to pay the unnecessarily increased costs. (IIEC Br. at 28-31; Rackers, IIEC Ex. 5.0 at 10:208-210).

Ameren's only support for its position is a favorable Commission order in Ameren's most recent gas rate case, Dkt. 11-0282, where the Commission pointed to special circumstances surrounding the EAC -- the possibility the state might suffer a revenue interruption -- that are no longer in play. Staff's Mr. Kahle reports that Ameren has determined that the state taxing authority "would be agreeable . . . to a change in the Company's remittance schedule which presumably does not create a hardship for the State." (Kahle, Staff Ex. 5.0 at 6:128).

More important, the Commission's most recent decision on this issue -- the Commission's only decision in the context of a formula rate determination -- rejected Ameren's position and the revenue lag for the EAC was set at zero. There, the Commission stated:

The Commission agrees with Staff and the intervenors' proposal to use zero revenue lag days for EAC/REC and GRT/MUT. This was also the decision of this Commission in the Company's prior docket, Docket 10-0467. The Commission notes that ComEd's process for collecting and remitting pass-through taxes has not changed since Docket 10-0467. The Commission finds that pass-through taxes should not be assigned a revenue lag because they are payable after revenues are collected from customers. ComEd's decision to pay the subject taxes and charges before they are due should not require its customers to pay the increased costs associated with increased cash working capital requirements. (*ComEd Formula Rate Order* at 45-46).

EAC revenues are payable after collection (the basis for the Commission's finding) for all Illinois electric utilities, including Ameren. Like Ameren, ComEd also persisted in its election to remit EAC funds according to management choice instead of statutory requirements. The Commission has ordered the same result (zero lag days) in a series of cases interrupted by the single case on which Ameren relies. (*See* IIEC Br.at 28). The sound basis for the Commission's prior consistent findings is shown by the evidence in this case, and the Commission should make the same finding (zero lag days) here.

**b. Revenue Collection Lag**

Ameren argues that the Commission should reject IIEC's proposed 21-day collection lag, which is based on the payment periods specified in 83 Ill. Adm. Code § 280.90. (Ameren Br. at 12). Ameren characterizes IIEC's proposal to use the 21-day payment period specified in 83 Ill. Adm.

Code § 280.90 as “arbitrary.” (Ameren Br. at 12-13). However, Ameren does not deny that the consequential deadlines of the Commission rule, after which late fees are permitted, do affect customer payment behavior. (IIEC Cross Ex. 3; IIEC Ex. 5.0 at 3:48-54). In light of the payment deadlines established by the Commission’s rules and the consequences of a failure to make timely payment, blind acceptance of a methodology that reports that the body of Ameren’s customers pay their bills (on average) almost 10 days late, is unreasonable. (IIEC Ex. 5.0 at 3:45-57). In fact, given that Ameren’s non-residential customers can be assessed late fees after only 14 days, the 21-day lag is a conservative proxy. (IIEC Ex. 5.0 at 3:58-60).

As explained in IIEC’s initial brief, IIEC’s proposal for a rule-based collection lag is a response to Ameren’s failure to provide a cogent data-based lag derivation. Ameren complains that IIEC’s rule-based 21-day lag does not reflect any real or measured customer payment pattern. (Ameren Br. at 13). At the same time, Ameren’s expert concedes that the basis for the utility’s study is not a reflection of actual customer bill payment behavior. (Heintz, Ameren Ex. 25.0 Rev. at 11:237-239). Ameren also criticizes IIEC’s proposal as failing to account for the effect on customer payment practices of the additional two-day grace period provided by the Commission’s rules.<sup>6</sup> (Ameren Br. at 14). However, because the 2-day grace period is not posted on customer bills and well-known to customers, it is unlikely to have any effect on their payment behavior. (Ameren Cross Ex. 16 (AIC-IIEC 5.02)).

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<sup>6</sup> At the same time, Ameren opposes any adjustment to recognize grace periods. (Ameren Br. at 14).

Ameren defends its cash working capital calculation of the revenue lag as superior because it is allegedly based on “an analysis of actual aged receivables data from the Company’s Customer Service System’ and “actual calculated collection lags.” (Ameren Br. at 12). However, Ameren’s excessive 30.67-day revenue lag rests entirely on the Commission’s acceptance in non-formula rate cases of an “aged receivables methodology” that depends on a “mid-point assumption” that Ameren has made no attempt to validate for its actual customer payments. (Heintz, Ameren Ex. 15.0 at 24-25:512-517). The imprecision of that never-validated assumption is not consistent with the formula rate statute’s emphasis on the recovery of a participating utility’s actual costs. Here, for the reasons explained in IIEC’s initial brief, past Commission practice must give way to the new dictates of the formula rate law. (*See* IIEC Br. at 15).

Indeed, even a cursory examination of the accuracy of Ameren’s analysis shows that it is the true arbitrary result. Ameren’s “aged receivables methodology” merely cloaks major deficiencies -- its untested substitution of snapshot receivables data for customer behavior data and its arbitrary mid-point assumption -- in a cloud of calculations that mask arbitrary base assumptions.

First, the actual data in Ameren’s analysis are twelve snapshots of Ameren’s receivable, which Ameren separated into four periods: 0 to 30 days; 31 to 60 days; 61 to 90 days; and 90+ days. Ameren’s expert, Mr. Heintz, agrees that it is not a reflection of “actual” customer bill payment behavior. (Heintz, Ameren Ex. 25.0 Rev. at 11:237-239). Moreover, as shown in IIEC Cross Ex. 2 -- an Ameren document showing the segregation of its accounts receivable balances -- Ameren’s base data do not show a 90+ period. (IIEC Cross Ex. 2 at 3). This component of Ameren’s analysis,

apparently Mr. Heintz' own creation, is not supported by the Ameren data or reports he provided as support for his rebuttal testimony. (IIEC Cross Ex. 2 at 1-4). Eliminating this 90+ days category of receivable and recalculating the revenue lag based on the statistics provided by Mr. Heintz to support his rebuttal testimony, reduces the calculated revenue lag from Ameren's proposal for an excessive 30.67 days to 23.5 days. This value is much closer to the 21 day level recommended by IIEC. (Rackers, IIEC Ex. 5.2).

Second, using the midpoints of the 4 periods Mr. Heintz defined as the average date when customers pay their bill is completely arbitrary, unsupported, and inconsistent with the way ComEd constructed its similar accounts receivable aging analysis. (IIEC Br. at 32; AG/AARP Ex. 1.0 at 24:535-559). Finally, Mr. Heintz attempts to address the effect of uncollectibles on his analysis by using a factor he cannot support and did not calculate. (IIEC Cross Ex. 5).

IIEC notes that Ameren's expert, Mr. Heintz, has never recommended this study method anywhere else. Indeed, Mr. Heintz has proposed or used only three CWC studies in the last ten years -- all here in Illinois and all using the arbitrary mid-point assumption. (IIEC Cross Ex. 4). Relying on past Commission orders, Mr. Heintz could offer no independent expertise or validation of that methodology. Ameren's proposal unlawfully places its cash working capital analysis calculation ahead of the explicit requirements of the formula rate statute. As Ameren has the statutory burden of proof, its proposal to retain this imprecise method, which is inadequate for a formula rate process centered on actual costs, should be rejected. (*See* 220 ILCS 5/9-201).

IIEC supports AG-AARP's call for "a systematic study of the timing of customers' actual remittances to more accurately estimate its revenue collection lag." (AG-AARP Br. at 22, 27-28). The Commission should not continue to rely on unsupported assumptions for such a significant rate base element.

## **2. ADIT - FIN 48**

Ameren characterizes the FIN 48 issues in this case as relatively new, and perhaps somewhat unsettled. (Ameren Br. at 19). Ameren proposes to treat deferred taxes from deductions covered by Financial Accounting Standard 48 ("FIN 48") differently from other deferred taxes.

Perhaps perceiving the weakness of its position, Ameren accuses Staff and intervenors of pursuing the mirror-image ("heads ratepayers win, tails the utility loses") of Ameren's apparent objective. Any such one-sided arrangement is suspect, including Ameren's proposal to be protected against every possible adverse FIN 48 outcome, at ratepayers' expense. (*See* Ameren Br. at 23). Under Ameren's proposal, there is no recognition of the more than \$40 million in non-investor capital. It is treated as if it had no value to the utility, even though it affects the determination of Ameren's rates, the utility enjoys any benefits of the capital during the period of uncertainty, the utility gets lower taxes (a benefit not shared with ratepayers), and Ameren enjoys the benefits of a larger rate base. These outcomes will persist until the taxing authority rejects or upholds the uncertain tax position. In the (according to Ameren) unlikely event that the FIN 48 tax position is upheld, the non-investor capital would then be recognized and Ameren would share future benefits of that determination with ratepayers, but only after the next rate proceeding. If the uncertain tax

position is rejected, the deferred taxes, and accrued interest are paid, and Ameren retains the fruits of having a larger rate base for the pre-decision period.

Ameren's Brief confirms that the utility's proposal is not an attempt to make the most accurate determination of its actual costs, but an effort to indemnify the Company against any FIN 48 eventuality and to increase its rate base above the value of investment actually used to provide service. (220 ILCS 5/9-211; 220 ILCS 5/16-108.5). In other words, it is Ameren asking the Commission for a "heads the utility wins, tails the ratepayers lose" treatment of FIN 48 amounts. Indeed, Ameren proposes that tens of millions in non-investor supplied funds be included in rate base despite knowledge that the status of certain claimed uncertain positions has been resolved or may no longer qualify as FIN 48 amounts. (*See* AG-AARP Br. at 37 *citing* Warren, June 22 Tr. at 583-584).

Ameren asserts that parties opposing its position do so because the FIN 48 amounts represent "free capital to the utility." (Ameren Br. at 20). However, that was not the sole reason presented for the proposals to offset rate base with the deferred tax amounts. Each witness supporting that proposal also pointed out that the FIN 48 amounts are not supplied by investors. Ameren is entitled to earn only on the value of investment devoted to providing service. Ameren's proposal seeks more.

Ameren complains that no party has made an alternative or compromise proposal that addresses its concerns. (Ameren Br. at 22). Specifically, Ameren is awaiting a proposal from another party that would assure that it could recover any FIN 48 interest accruals and costs. Ameren

misunderstands the obligations of the parties in this proceeding. Ameren has proposed a change in its rates, and it has the burden of proving that its rates and underlying practices are just and reasonable, and that its costs are prudent and reasonable. (220 ILCS 9-201(c); 220 ILCS 5/16-108.5(c)). Though Ameren has that burden, its proposal would relieve it of all responsibility for making prudent choices, and its argument would shift the burden of modifying its unreasonable position to others. Ameren makes no attempt at proposing an equitable treatment that recognizes that it has the use of a \$40 million loan in non-investor supplied funds for an indefinite period. (*See*, Staff Br. at 8; Warren, Ameren Ex. 18.0 at 13:278).

As IIEC noted in its initial brief, there are legal as well as policy issues at play with respect to this cost element. Possibly the most consequential (legally) comment from Ameren's brief is the utility's assertion that "[Fin 48] amounts, unlike ADIT, are not available to the utility to invest in rate base" because it is unsure<sup>7</sup> if or when it may have to pay the deferred taxes. The unfairness of this position is obvious in light of the length of time these funds have been shown to be available to the Company is considered. Some of these funds date back as far as 2005 and 2006. (*See*, AG-AARP Br. at 33). It is unreasonable to suggest that the benefit of non-investor supplied funds held for some six or seven years should remain with the Company and should not be recognized in the determination of Ameren's formula rates for 2012.<sup>8</sup> Further, if Ameren is suggesting that it has

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<sup>7</sup> The AG's expert Mr. Effron provides evidence (confirmed by Ameren witness Heintz) that the indefinite status and impact of Ameren's FIN 48 amounts are not as severe as Ameren suggests. (AG-AARP Br. at 34-37).

<sup>8</sup> Even if the funds are required to be paid by the IRS with interest, the rate is only 4% (CUB Br. at 20). Including those amount in rate base would earn a return at the Company's total

more than \$40 million held idle -- not available for use or investment to provide service, there are novel prudence questions the Commission must address. (220 ILCS 5/16-108.5(c)(1)).

If, on the other hand, the \$40 million is available for Ameren's use, those non-investor funds should be recognized in determining the rate base used to set Ameren's rates. (*See* Staff Br. at 8 - recommending "... the Commission accept the AG/AARP adjustment to ADIT for amounts that have been identified by the Company's tax experts as uncertain tax positions, since these amounts represent cost-free capital at the present time.").

### **3. ADIT - Projected Additions**

Ameren's position that accumulated deferred income taxes (ADIT) cannot be considered in setting its formula rates is based on two main contentions. First, Ameren contends that because ADIT is not listed in Section 16-108.5(c)(6), the formula rate statute bars any consideration of that rate base element in setting its rates. (Ameren Br. at 25). In IIEC's view, the General Assembly's explicit retention of Article IX and the Illinois Appellate Court's ruling establishing the meaning and effects Section 9-211 of Article IX dictate the opposite result. Second, Ameren contends that rates based on cost determinations that take account of ADIT would not reflect its "actual costs." (*Id.*). In IIEC's view, the interpretation of the formula rate statute required to support Ameren's contention cannot be sustained by logic or the governing customary statutory interpretations. (*See* IIEC Br. at 37-41). In support of its contentions, Ameren makes numerous subsidiary arguments.

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cost of capital, which is over 9%, plus income taxes.

(Ameren Br. at 25-28). Those individual arguments Ameren makes are addressed in greater detail below.

As support for its position that the formula rate statute bars consideration of ADIT in determining the rate base used to set Ameren's rates, the utility argues that "[t]he EIMA requires adjustments to three specific FERC Form 1 rate inputs: (1) projected plant additions, (2) depreciation reserve and (3) depreciation expense." (Ameren Br. at 2). Based on the legislature's reference to *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 405 Ill. App. 3d 389 (2d Dist. 2010), appeal denied, 350 Ill. Dec. 350 (Mar. 30, 2011), Ameren asserts that the legislature was aware of prior controversy concerning "offsetting" adjustments for ADIT associated with plant additions and that it determined not to require an adjustment for ADIT. (Ameren Br. at 25). However, ADIT was not an issue on the referenced appellate decision, an appeal of a ComEd rate case. However, ADIT was considered by the Illinois Appellate Court in the appeal of Ameren's most recent electric rate case. The ComEd appellate case addressed accumulated depreciation changes contemporaneous with plant additions. Moreover, the legislature determined that the judicial determination of the effect of Section 9-211<sup>9</sup> in the referenced decision should be respected. As explained in the recent Illinois Appellate Court opinion concluding the review of the decision in Ameren's most recent electric rate case, the same Article IX provision also requires consideration of ADIT. (*Ameren Illinois Company v. Ill. Commerce Comm'n*, 967 N.E. 2d 298, 359 Ill. Dec. 568

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<sup>9</sup> That provision is a part of PUA Article IX, which was expressly retained and emphasized by the legislature. (220 ILCS 5/9-211).

(4th Dist. 2012) (re: accumulated depreciation and ADIT)). That decision of law, as well as the Commission practice the decision sustained on appeal, also must be respected.

Ameren argues that the statutory construction principle “*inclusio unius est exclusio alterius*” implicitly bars consideration of ADIT in determining Ameren’s rate base. Application of that principle is not appropriate when, as here, more explicit language is used to enact (simultaneously) provisions that conflict with Ameren’s implied prohibition. The formula rate statute’s explicit incorporation of (and emphasis on) Article IX’s cost determination and rate setting provisions are topics Ameren never addresses.

Referring again to the ComEd appellate decision, Ameren opines that “the court’s opinion is of no import here.” Ameren argues the decision is irrelevant because that case was not an appeal of a formula rate case. Ameren suggests that concerns about an “overstated” rate base are misplaced under the formula rate regime. (Ameren Br. at 26-27). However, Section 9-211 is not conditioned on any of the factors identified in Ameren’s arguments. Under that Article IX provision, Ameren is not permitted to earn on an excessive rate base (as defined by Section 9-211) -- at any time.

More important, Section 9-211 is an express limitation on the Commission's authority, and it is not conditioned on the type of proceeding. The Commission lacks authority to use a rate base that exceeds the investment actually used to provide service in setting rates, even formula rates. (*Id.*). The basic Article IX requirement that “[a]ll rates or other charges . . . for any service rendered or to be rendered shall be just and reasonable” -- like Section 9-211, also applies regardless of the type of proceeding. (220 ILCS 5/9-101).

Ameren points to the absence of projected ADIT from its Form 1 reports of historical data as a factor disqualifying ADIT from consideration in determining the rate base used to set formula rates. (Ameren Br. at 2). Also Ameren argues that any variance among intervenor quantifications of the ADIT associated with Ameren's projected plant additions is evidence that ADIT cannot be "transparent information" reflecting 'actual costs' that will flow through to rates in a 'standardized manner.'" (*Id.*). First, ADIT projections are just as transparent, actual and standardized as Ameren's projected plant additions, which also are absent from its historical Form 1 data. Second, the accuracy and transparency of ADIT projections are directly related to the same characteristics for the plant addition projections on which they are based, and they are affected by the differing ADIT issues parties chose to address.

Separately, the alleged uncertainty regarding bonus depreciation (Ameren Br. at 26) is the same uncertainty that attends any tax deduction. Any tax provision that produces a deferral is subject to modification or repeal at any time by the Congress or by the General Assembly.

Ameren's final argument is an astonishing claim. Despite the formula rate statute's explicit mandate to apply Article IX ratemaking standards and its central focus on the use and recovery of actual costs, Ameren argues that its real intent is the opposite. As to actual costs, Ameren does not argue that its rate base and actual capital costs will not be affected by ADIT. According to Ameren, the formula rate process is meant to use a deliberately overstated rate base, so that utilities would have cash on hand to make required infrastructure investments, presumably avoiding a need to make

the shareholder equity infusions that justify the statutory equity return. (See 220 ILCS 5/16-108.5(c)(3)).

There is an obvious reason that the General Assembly included the adjustment for projected plant and depreciation reserve and expense: in a period of significant incremental capital expenditures, they intended to lessen the regulatory lag in the utilities recovering their capital expenditures so that they have the cash on hand to make the investments. (Ameren Br. at 27).

That interpretation of the statute is at odds with other explicit provisions of the statute itself. Also, as noted, the Commission is not authorized to approve rates that give utilities more than is required to recover their actual prudent and reasonable costs (220 ILCS 5/16-108.5(c)(1)) or are not just and reasonable (220 ILCS 5/9-101, 9-201). The improved certainty and pace of recovery of the formula rate statute, which Ameren characterizes as its purpose (Ameren Br. at 101), do not require or authorize an excessive rate base or excessive rates.

As it did with the determinative adverse opinions of the appellate court, Ameren ignores the Commission's own interpretations of the formula rate statute with regard to this issue. (*ComEd Formula Rate Case* at 59-60). As the agency charged with implementation and enforcement of the statute, even judicial authorities give its decision considerable weight. (See, e.g., *Milkowski v. Dept. of Labor*, 82 Ill. App. 3d 220, 222 (1<sup>st</sup> Dist. 1980)). Ameren ignores entirely the Commission's decision rejecting the utility's position. (*ComEd Formula Rate Order* at 59). As Staff point out,

there is no rehearing of the Commission determination that ADIT must be considered in determining the rate base used to set formula rates.<sup>10</sup>

The facts and the law are no different in this case. Further, the Commission rejected ComEd's request for rehearing on this issue. It would be unreasonable for the Ameren formula rate, which is based upon the same statute as ComEd's, to contain a different conclusion on the same issue as ruled upon in Docket No. 11-0721. (Staff Br. at 11).

#### **8. Average Rate Base - Projected Plant/ADR/ADIT**

Ameren's investment during any calendar year accretes or diminishes gradually over the course of that year. The infrastructure investment requirements of the formula rate statute require significant, continuing investments by Ameren over the period of the formula rate regime. (See IIEC Br. at 47-50; *see also*, 220 ILCS 5/16-108.5(b)(2)). For any year, this reality supports the use of an average year rate base, and its logic applies both to setting Ameren's rates on projected costs and to reconciling Ameren's rates based on actual costs. Correctly, those arguments were persuasive to the Commission in the context of the reconciliation process. The same reality is reflected in IIEC's proposal to use an average year rate base in setting rates based on projected costs. That proposal is also supported by the Commercial Group (CG). (CG Br. at 1).

Consequently, many of the arguments that respond to Ameren's contentions respecting the reconciliation process also apply to the initial rate setting process, and *vice versa*. IIEC has attempted to address Ameren's various arguments in the particular sections of the ordered brief

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<sup>10</sup> In other contexts, Ameren argues that a pending rehearing of a determination in the Commission's only formula rate decision to date undermines reliance on that decision. (Ameren Br. at 104 (re reconciliation interest rates)).

outline in which they occur. However, there is (in IIEC's view) some unavoidable overlap. Accordingly, IIEC asks that, in its deliberations on this issue, the Commission consider jointly IIEC's responses in this section and in the later section on the reconciliation process (Section VIII.C.1).

In support of its insistence that a year-end rate base amount be used for setting rates, Ameren turns first to language from the formula rate statute. Ameren argues that IIEC's proposal to set rates using an average year rate base should be rejected because "[t]he General Assembly's use of the words 'plus projected plant additions . . . for the calendar year in which the inputs are filed' does not include the word 'average.' Instead, it says 'for the calendar year,' which means the entire year." (Ameren Br. at 39).

In that passage Ameren makes three flawed arguments. The first is the implicit assertion that an unadorned reference to a particular category of projected costs precludes using the purpose of the cost projection or the statutory context to determine legislative intent as to the determination of those costs. That argument is not consistent with the law or with common sense. The formula rate statute clearly states the over-arching objective of the formula rate process as the recovery of the utility's actual, prudently incurred and reasonable costs of delivery services consistent with Commission practice and law. (220 ILCS 5/16-108.5(c)). Since the language Ameren relies upon does not specifically require (or even mention) either a "year-end" or an "average year" rate base, the legislature's plainly stated statutory objective must control as to the meaning properly given to the language of that provision. The statute must be construed to give effect to the intent of the

legislature. (*Gibbs v. Madison County Sheriff's Dep't*, 326 Ill. App. 3d 473, 476, 760 N.E.2d 1049, 1051 (5th Dist. 2001), appeal denied, 198 Ill. 2d 614, 264 Ill. Dec. 324, 770 N.E. 2d 218 (2002)).

The “terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out.” (5 ILCS 70/1.01 (Ill. Stat. on Statutes)). The Commission must be guided by the formula rate statute’s central focus -- the determination and recovery of Ameren’s actual costs for a specific year. Ameren’s actual investment costs for a year are not incurred all at once on the first day of a year, and they do not remain unchanged for the entirety of that year. (*See* IIEC Br. at 48-49). The gradual increase in actual costs from infrastructure improvements over a calendar year should be captured by the rate base determination the Commission uses. Ameren’s dynamic capital costs are best represented by the average of the beginning and ending rate base amounts for the year, not the year-end amount. (*Id.*). Second, as noted above, the statutory excerpt Ameren quotes does not include the word “average.” Ameren asserts that the legislature “was quite clear when it wanted an average to be used” (Ameren Br. at 39-40) and argues that, without an express reference, an average year rate base cannot be used. (Ameren Br. at 95-96 ). Yet, it is equally true that the phrase “year-end” also does not appear in the provision. If the absence of the word “average” means that approach cannot be used, the same must be true for use of a year-end rate base approach. Ameren’s absurd logic would preclude the use of either an average or year-end determination.

Where the General Assembly intended an end of year requirement in the formula rate statute itself, it did so in unambiguous language. (220 ILCS 5/16-108.5(c)(4)(D)) (“long-term debt cost of

capital as of the end of the applicable calendar year’’)). End of the year is also clearly indicated in other parts of the PUA -- where the legislature intended the use of that end of year data. (*See, e.g.,* 220 ILCS 5/21-1101(k) (“a report that includes, based on year-end data, . . . .’’)). The General Assembly simply did not do so with respect to the FERC Form 1 data from which the Commission must determine ComEd’s lawful and appropriate rate base for formula rate purposes.

Finally, Ameren reads more meaning into the phrase “for the calendar year” than the ordinary meaning of the words of the statute provides. If those words connote more than their ordinary meaning in the context of a process centered on actual costs, they must refer to the more accurate representation of dynamic plant addition costs -- the average year amount. Similarly, Ameren pours specialized meaning into the word “final.” (Ameren Br. at 39, 94). As IIEC explains in section VII.C.1 below, the word "final" is given that ordinary meaning in numerous instances in the formula rate statute, not the self-serving "end-of-year" definition Ameren would impose. With regard to Ameren’s gradually accreting rate base investment, the specialized meaning Ameren prefers would conflict – unnecessarily – with the statute’s objective of determining and recovering Ameren’s actual costs. (*See* IIEC Br. at 43-50; *also* 220 ILCS 5/16-108.5(c); 220 ILCS 5/9-101 *et seq.*).

For any year, both the average and year-end quantities can be determined from data appearing on Ameren’s FERC Form 1 for that year. (IIEC Br. at 43). The General Assembly left it to the Commission to decide what use of those data best defines Ameren’s actual costs for ratemaking. The evidence in this record establishes that an average rate base approach is the more

accurate measure of investment costs for a dynamic rate base. (*Id.* at 47-48; *also* CG Br. at 3 *citing* Hathhorn; Staff Ex. 1.0 at 13:280).

Ultimately, Ameren could support its year-end rate base proposal only through a very curious specification of the rate year for which costs are determined and rates to recover those costs are set. Ameren uses the period rates are in effect as the basis for reconciling revenue requirements and rates. “Because the rates go into effect in the year after the projected plant additions are expected to be in service, the projected plant additions will all have been placed in service and will be serving the customers who are paying the costs of those plant additions in their rates.” (Ameren Br. at 40). Ameren’s analysis resurrects a test year perspective, where rates are set for an indefinite period to recover representative costs from a test year, with no process for error correction. (*See* IIEC Br. at 46). That is the perspective Ameren discarded when it chose to participate in a formula rate process that sets rates for a fixed period, based on actual costs for a particular calendar year, with reconciliation to assure full recovery. When convenient, Ameren recognizes the difference.

Formula ratemaking is different. There is no “test year” under formula rates; . . . Indeed, under traditional ratemaking, “actual costs” incurred by a utility are relevant only insofar as the costs establish a starting point for developing a test year. (Ameren Br. at 27).

For the average versus year-end argument, however, Ameren embraces test year concepts:

The formula rate process is more like a historical test year, because it looks back to “actual cost information” for a prior, or historical year—the reconciliation year, at the time of reconciliation, is a fully historical period. (Ameren Br. at 98).

Ameren's costs during the period rates are in effect are statutorily irrelevant to setting rates to recover costs for a different period. Ameren's argument is based on its supposition that formula rates must replicate the test year approach they replace. (*Id.*). Ameren's interpretation assumes that the legislature intended the statute's actual cost ratemaking to be based on (and reconciled to) costs in a year that is never considered in the cost determination steps defined by the statute. Under Ameren's argument and proposed implementation, rates would be based on actual costs from Year 1, augmented by projections for Year 2. But, according to this Ameren argument, the rates are supposed to recover costs for Year 3, when the rates will be in effect, and the reconciliation will use actual costs from a calendar year that was never considered in setting rates, instead of the actual costs for the year during which Ameren incurs the costs used to set rates.<sup>11</sup> (Ameren Br. at 40, 94, 98).

Ameren also challenges IIEC's proposal on the basis of the Commission's order in the *ComEd Formula Rate Case*.

In its Final Order in Docket No. 11-0721, the Commission rejected the same proposal from IIEC to use an average rate base on an initial basis. *Commonwealth Edison Co.*, Order, Docket 11-0721 (May 29, 2012), p. 17. Mr. Gorman has not explained why the record in this case warrants any different result. (Ameren Br. at 40).

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<sup>11</sup> This is IIEC's understanding of the most coherent formulation of Ameren's argument. That understanding is uncertain, since Ameren's positions on major elements of the argument are not consistent. *Contrast, e.g.*, Ameren Br. at 94 ("on or before May 1, 2013, a filing is made to set a **2013 rate year revenue requirement** using 2012 actual costs plus 2013 plant additions.") with Ameren Br. at 99 ("Use of a year end rate base ensures a **match between the rates paid by ratepayers and the cost of the plant used to provide them service at that time.**") (emphasis added).

For its part, Staff also supports the Commission’s decision in the *ComEd Formula Rate Case*. (Staff Br. at 15).

First, IIEC notes that the same argument could be made with equal force respecting Ameren’s proposal to use a year-end rate base for reconciliation. Yet, Ameren has not “explained why the record in this case warrants any different result” when the same statute is implemented for Ameren. More important, in the *ComEd Formula Rate Case* decision, the Commission pointed to the unique interplay between ComEd’s early filing date and the statutory procedures based on a defined sequence of calendar years. (*ComEd Formula Rate Case* at 17-18). Because of ComEd’s early first filing, that sequence had potential effects that are not present in this case, which (unlike the ComEd case) was filed in the year after the statute was enacted. Since Ameren waited to make its filing, the anomalous results that concerned the Commission in the *ComEd Formula Rate Case* are not a problem in this (Ameren’s first) filing.

However, the inaccuracies in cost determination IIEC has identified are present in this case, and they will recur in the initial rate setting portion of future formula rate proceedings. To counter the evidence establishing that an average rate base best captures Ameren’s actual costs over the course of a rate year, Ameren offers only its inconsistent interpretations of the formula rate statute.

In its brief, the Commercial Group offered an analysis that is worthy of consideration by the Commission. The Commercial Group reasons that “the Commission should start by correctly interpreting and implementing the clearest of the relevant revenue requirement provisions – the

reconciliation revenue requirement – and working backward from there to the less-clear provisions [the initial rate setting].” (CG Br. at 2). The Commercial Group concludes:

Having started from the clearest of the revenue requirement provisions, a remaining question with respect to rate base is whether the projected plant additions (for setting the initial rates) should be averaged over the calendar year (as proposed by IIEC) or totaled for the entire year . . . using an average projected year to set the initial rate for ‘the calendar year’ makes the most logical sense since it mirrors the average-year reconciliation rate base that is required by the statute. (CG Br. at 3).

IIEC’s analysis of the reconciliation process is presented in section VIII.C.1.

## **V. RATE OF RETURN**

### **C. Contested Issues**

#### **4. Subsequent Discussions/Report on Capital Structure**

Ameren and the Staff agree that Ameren should be directed to work with Staff, to explore a more leveraged capital structure for Ameren on a going forward basis, and to provide the Commission with a report as part of Ameren’s 2013 Formula Rate Filing. (Staff Br. at 32, Ameren Br. at 73). Neither Staff nor Ameren suggest that other parties should be permitted to participate in this process. For the reasons stated below other parties should be permitted to participate in the process.

The Commission adopted a proposal similar to the Staff proposal in the *ComEd Formula Rate Case*. (*ComEd Formula Rate Order* at 132.) The *ComEd Formula Rate Order* implies, but does not specifically require, that other parties, such as IIEC, should work together with the Staff and the utility to explore a more leveraged capital structure. (*Id.*) The Commission should make

clear in the Order in this case that other parties, are permitted to participate in the discussions on a more leveraged capital structure.

The Staff proposal contemplates that the exploration process will generate a report to be filed with the Commission as part of Ameren's 2013 Formula Rate Filing. (See Ameren Br. at 73.) However, the 2013 filing of that report may or may not result in a hearing before the Commission. If it does not, interested parties may not have the opportunity to address the "more leveraged capital structure" issue in a formal proceeding before the Commission. Furthermore, even if the Commission did order a hearing on the 2013 Formula Rate filing (including the report), that proceeding must be completed on an abbreviated schedule. The Commission has only 240 days from the date of the utility's filing, in which to issue an Order.<sup>12</sup>

In summary, parties may not be permitted to influence the development of a more leveraged capital structure on a going forward basis unless they are allowed to participate in the exploration by the Staff and the Company. Even if a later opportunity is available in a formal hearing on Ameren's 2013 formula rate filing, the abbreviated schedule for that proceeding would compromise other parties' opportunity for meaningful participation on a more leveraged capital structure. Therefore, parties should be permitted to participate in the discussions with the Staff and the Company, as well as in the preparation of any report to be submitted to the Commission.

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<sup>12</sup> The Commission has 45 days from the date of the filing to review same, and determine if it will conduct a hearing. It must then enter an Order within 240 days of the date of the filing. This means that parties could have only 195 days to litigate the case, assuming the Commission uses the full 45 days permitted for its preliminary review. (See 220 ILCS 5/16-108.5(d))

Finally, in IIEC's view, the informal process on a leveraged capital structure agreed to by the Company and the Staff does not eliminate the need for a more formal rulemaking to define procedures for the formula rate process (*see* Sec.VII.B.7. below), nor does it eliminate the need for a common equity cap (*see* Section V.C.5.below).

## **5. Common Equity Ratio/Cap Limit**

Ameren argues that IIEC's proposal for a common equity ratio cap/trigger<sup>13</sup> is "ill considered, arbitrary, reckless and unnecessary." (Ameren Br. at 74) For the reasons discussed in IIEC's initial brief, including its effect on the utility's capital costs, the equity component of Ameren's capital structure warrants close scrutiny. (IIEC Br. at 51-56). IIEC's proposed procedural trigger (cap) can assure appropriate investigation. Ameren makes several arguments in support of its broad statement.

First, Ameren argues that the Commission has ample authority to investigate the prudence of the company's capital structure. (*Id.*) The Company apparently believes that IIEC's common equity cap/trigger is therefore not necessary. Ameren is wrong. As noted in Section V. C.4. above, the Commission has only a relatively brief period of time to review each annual formula rate filing (only 45 days). Absent a Commission decision to conduct a hearing, there is no real opportunity for any interested party to challenge or test the reasonableness of the utility's formula rate capital structure. The parties are permitted to file a complaint, however, they must do so within the initial

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<sup>13</sup> In this proceeding, IIEC's proposal has been referred to both as a cap and a trigger, and IIEC uses the terms interchangeably. In operation, the cap operates as a procedural trigger that would require an investigative hearing if exceeded. (IIEC Br. at 55-56).

45 day period for Commission review of the filing. However, because of a procedural Catch-22, parties must determine the bases for and file a complaint without the benefit of any discovery, since the statute does not grant interested parties discovery rights unless a hearing is initiated by the Commission.<sup>14</sup> If the Commission fails to initiate a hearing within the specified review period, the formula rate inputs (including presumably the capital structure) set out in the filing are considered just and reasonable and immune from challenge in any subsequent rate proceeding. (220 ILCS 5/16-108.5(d)). Under these circumstances, a common equity ratio cap/trigger of 50% is appropriate and necessary.

Under IIEC's proposal, if Ameren's equity percentage exceeded the cap, it would trigger a Commission hearing under Section 16.108.5(d). In that proceeding, Ameren would be required to demonstrate the reasonableness of its capital structure, the equity percentage in particular. As the Staff has stated, utilities have "a clear incentive" to increase their common equity ratio under the formula rate law. (See Staff Br. at 32). IIEC's proposed cap would give utilities an added incentive to guard against inflating the common equity component of their capital structures.

Second, Ameren criticizes IIEC's cap proposal as ill considered because it is based solely on Mr. Gorman's observation that the common equity component of Ameren's proposed is higher than the common equity ratio approved in Ameren's 2009 rate case. (Ameren Br. at 74). Again Ameren is incorrect. It is true that Mr. Gorman observed that the 54.28% common equity ratio

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<sup>14</sup> In the *ComEd Formula Rate Case* the Commission dealt with the problems generated by the inability of parties to conduct discovery by requiring that ComEd initiate its annual formula rate filings by filing a Petition with the Commission. (See *ComEd Formula Rate Order* at 156.)

Ameren proposes in this case was higher than the equity ratio approved in Ameren's 2009 rate cases. (Gorman IIEC Ex. 1.0 at 12-13:263-270). It is not true that this observation was the sole basis for Mr. Gorman's recommendation. He also testified that:

- (i) the capital structure approved in the 2009 rate case had supported an investment grade bond rating for the Ameren companies;
- (ii) Ameren's operating risk had declined; and
- (iii) the 50% cap/trigger he proposed was set at a level above the level that supported Ameren's bond rating. (Gorman IIEC Ex. 1.0 at 13-14:270-304, Gorman IIEC Ex. 4.0 at 3-5:52-106).

Thus, Mr. Gorman's 50% cap is not arbitrary or unsupported, and it will not jeopardize Ameren's credit ratings.

Third, Ameren also argues that IIEC's 50% common equity cap/trigger is arbitrary, because the Commission approved an equity ratio of 53.272% for Ameren in its most recent gas rate case, Dkt. 11-0282. (Ameren Br. at 74). Ameren criticism ignores or overlooks the following facts:

- (i) the formula rate process does not apply to gas operations, assuring rate case examination of gas equity ratios (*see* 220 ILCS 5/16-108.5); and
- (ii) Ameren's regulatory risk and cost recovery risk have declined as a result of the formula rate law, lowering its operating risk and justifying less common equity in its capital structure. (Gorman IIEC Ex. 1.0 at 5:109-116).

In any case, the significance of Ameren's approved gas capital structure is dubious, since the common equity ratio approved by the Commission decision pre-dated effectiveness of the formula rate statute and the approval could not possibly reflect the risk lowering effect of the formula rate

law, even if it applied to gas operations. The evidentiary hearings in Dkt. 11-0282 were completed on September 16, 2011. (Ameren Illinois Company IIEC Dkt. 11-0282 Final Order January 10, 2012 at 2). Section 16-108.5 became effective on October 26, 2011 and effective as amended on December 31, 2011. These facts make any comparison to the equity ratio approved in that case irrelevant to the issues in this case. For similar reasons, Ameren's observation that Mr. Gorman did not object to the Company's capital structure in that case is also irrelevant. (*See Ameren Br. at 74*).

Finally, Ameren admits in its Brief that its credit ratings, including its bond ratings, have improved since the adoption of the formula rate legislation. (Ameren Br. at 75) This is an undeniable fact. Yet, that fact is not reflected in the actual capital structure Ameren proposes for use in this case; Ameren's equity component has increased, despite its lower risk. This change suggests that the incentive to increase equity Staff noted is already having an effect that warrants active oversight.

Mr. Gorman testified that the change in Illinois' regulatory procedures has produced a material reduction in Ameren's operating risk that requires a change in the actual capital structure Ameren proposes as prudent and reasonable for determining formula rates in this case. (Gorman IIEC Ex. 4.0 at 6:121-128). IIEC demonstrated that the average common equity ratio for electric utilities consistently has been around 48% over the last five years. (*See Gorman IIEC Ex. 4.1*). Establishing a cap or trigger at 50% is, therefore, a conservative proposal that will preserve Ameren's financial integrity and minimize its cost of capital. (Gorman IIEC Ex. 4.0 at 7:147-149).

Although Staff argues rigorous oversight of the utility capital structure is required because Section 16-108.5 gives utilities an incentive to increase their common equity (Staff Br. at 32), Staff does not specifically address IIEC's common equity cap/trigger. (*See*, Staff Br. at 32-33). However, Staff's proposed common equity ratio of 51.49% (Staff Br. at 34) reflects the reduced operating risk produced by the new formula rate regime. Staff's proposed capital structure is thus more prudent and more reasonable than Ameren's actual capital structure, which does not reflect the reduction in operating risk. Staff also has recognized that even the 51.4% common equity ratio it proposes may be higher than necessary under the new formula rate regime. (*See* Staff Br. at 33.).

Under these circumstances, an investigation of a more leveraged capital structure is appropriate. In the interim, adoption of IIEC's 50% of common equity ratio cap or trigger would be appropriate, and provide rigorous oversight of Ameren's capital structure. The cap/trigger is not a hard cap. If exceeded it would simply trigger a hearing (such as this proceeding) in which the Commission would consider the prudence and reasonableness of the utility's capital structure. For example, adoption of the 50% cap/trigger would not prevent the Commission from adopting Staff's proposal in this case -- if the Commission found that a capital structure with 51.4% common equity is prudent and reasonable based on the evidence in this case.

## VIII. FORMULA RATE TARIFF

### B. Contested Formula/Tariff Filing Issues

#### 1. Incentive Compensation - Stated Level/Test of Reasonableness

IIEC proposes a cap/trigger on incentive compensation expense equal to the average of incentive compensation expense amounts approved in Ameren's last three rate cases. (Gorman IIEC Ex. 1.0 at 16-19:340-416) Incentive compensation expense in excess of the cap would trigger a hearing on the prudence and reasonableness of the expense. (*Id.* at 16:355-356). Staff and Ameren disagree with IIEC's proposal. (Ameren Br. at 81; Staff Br. at 48).

#### *Response to Ameren*

Ameren argues that the cap proposal is a recommendation that the utility recover something other than its actual cost. (Ameren Br. at 82). Ameren's argument appears to be based on the assumption that the formula rate law allows the utility to recover all its actual costs. However, the utility is allowed to recover only actual costs that are prudently incurred and reasonable in amount. (220 ILCS 5/16-108.5(c)(1)). IIEC's cap is intended to act as a procedural trigger that would require a hearing on the prudence and reasonableness of expenses that exceed the cap. It would not prevent recovery of any prudent and reasonable delivery service cost.

IIEC's proposed cap also is not intended to prevent Commission review of any incentive compensation expense below the cap level. Those costs must also be for prudent and reasonable. Therefore, the cap would not permit recovery of incentive compensation expense that does not satisfy the statutory tests: prudently incurred and reasonable in amount.

Ameren argues that there is no lack of scrutiny of incentive compensation expenses (or any other expense) under the formula rate law and that there is no need for “aggressive management” of this expense. (Ameren Br. at 82-83). IIEC disagrees.

The formula rate law provides for annual formula rate filings/updates/reconciliations by the utility based on actual costs shown on the relevant FERC Form 1. (*See* 220 ILCS 5/16-108.5(d)). However, the statute does not require the utility to show that costs recorded on its FERC Form 1 have been prudently and reasonably incurred, only to update its formula rate inputs based on that form. (*See* 220 ILCS 5/16-108.5(d)(1)). The Commission has only 45 days to determine if it will conduct a hearing on the updated data. The Commission cannot benefit from the input of the Commission Staff or any customer, since no potential party has any right to discovery or other participation. (*Id.*). Furthermore, the formula rate law effectively shifts (to customers or Staff) the burden of going forward on issues of prudence and reasonableness of utility expenses and costs recorded in FERC Form 1. Under such a regime it is reasonable to put in place a mechanism, like IIEC’s proposed cap, that gives utilities an incentive to aggressively manage these costs.

Ameren’s arguments implying that IIEC’s cap is an absolute cap on its cost recovery have been addressed in the discussions above. (*See* Ameren Br. at 83-84 (discussing the cap as a ceiling)). Finally, Ameren argues that IIEC’s intended procedural cap on incentive compensation violates the formula rate statute. Section 16-108.5(c)(4)(A) allows a utility to recover incentive compensation that is based on the achievement of certain operational metrics. (220 ILCS 5/16-108.5(c)(4)(A)). Ameren ignores or overlooks provisions of the same section limiting recovery

of incentive compensation costs to “actual delivery service costs that are prudently and reasonably incurred.” (*Id.*). Because IIEC’s proposed cap operates as a trigger for a hearing to determine the prudence and reasonableness of reported incentive compensation expense, it is fully consistent with the formula rate law.

*Response to Staff*

Staff misunderstands IIEC’s proposal. Staff asserts that IIEC’s cap would substitute an assumed amount of incentive compensation expense for Ameren’s actual cost and presume that amount to be prudent and reasonable. (Staff Br. at 48). As noted above, IIEC is proposing a procedural cap, not an absolute ceiling on (or even a floor for) incentive compensation recovery. Although IIEC’s cap would act as a trigger for a hearing on the main criteria for cost recovery (prudent and reasonable), Staff suggests that it agrees that IIEC’s proposal is unnecessary. IIEC has explained the need for the proposed cap above and in its opening Brief at pages 57-58.

For the reasons stated above and for the reasons stated in its Brief at pages 57-58 IIEC’s cap on incentive compensation should be adopted.

**2. Incentive Compensation - Metrics/Requirements**

IIEC proposes that the incentive compensation payments included in Ameren’s formula rate be tied to the operational metrics described in the formula rate law. (IIEC Br. at 58-59; 220 ILCS 5/16-108.5(f)). Specifically, IIEC recommends that Ameren be required to demonstrate it has met the metrics that track the improvements formula rates support. (IIEC Br. at 58-59). Ameren and the Staff oppose IIEC’s recommendation. (Ameren Br. at 85-86, Staff Br. at 48-49).

Initially both Staff and Ameren appear to argue that IIEC's proposal is not consistent with the formula rate law. Staff indicates that it does not understand Section 16-108.5 to impose a requirement for incentive compensation expense recovery in formula rates in the manner described by IIEC witness Gorman. (Staff Br. at 49). Ameren states that IIEC's proposal should be rejected because there is no statutory basis for Mr. Gorman's incentive compensation recovery proposal. (Ameren Br. at 85). Both Staff and Ameren overlook the fact that the Commission also is required to determine whether incentive compensation costs incurred by Ameren are prudent and reasonable. (See, 220 ILCS 5/16-108.5(c)(1)). The Commission's determination of the prudence and reasonableness of Ameren's incentive compensation costs can consider whether the costs are achieving anticipated system reliability, safety and efficiency gains -- areas measured by the metrics described in Section 16-108.5(f). In addition, Section 16-108.5(c)(4)(A) clearly contemplates that recovery of incentive compensation expense will be ". . . based on the achievement of operational metrics . . ." described in that Section. (220 ILCS 5/16-108.5(c)(4)(A)). Ameren's recovery of incentive compensation can be conditioned on achievement of the metrics identified by IIEC.

Ameren argues that IIEC's proposal is simplistic in that it ties Ameren's recovery of incentive compensation expense to achievement of a limited number of performance metrics. (Ameren Br. at 85-86). IIEC has no objection to broadening the spectrum of metrics that must be met as a condition of recovering incentive compensation through the formula rate.

For the reasons stated above, and for the reasons stated at pages 58-59 of IIEC's Brief, IIEC's recommendation to conditions the recovery of incentive compensation costs on achieving the improvements required by the General Assembly should be adopted.

### **3. Affiliate Service Charges - Stated Level/Test of Reasonableness**

IIEC has also proposed a cap/trigger for affiliate service charges. (Gorman IIEC Ex. 1.0 at 17-19:344-406; IIEC Br. at 59-60). Ameren and the Staff object to IIEC's cap. (Ameren Br. at 86-87; Staff Br. at 49-50). Both Staff and the Company suggest that IIEC's proposal does not comport with the formula rate law, Sec. 16-108.5. (Staff Br. at 49; Ameren Br. at 87). However, neither Ameren nor Staff explain how or why a procedural cap on affiliate service charges, operating as a trigger for a hearing on the prudence and reasonableness of the costs, is inconsistent with the formula rate law or is not within the Commission's authority to issue rules for the administration of the formula rate law. (*See*, 220 ILCS 5/16-108.5(d)(3)).

Furthermore, Staff and Ameren's arguments are based largely on the premise that IIEC's proposed cap is an absolute cap. As IIEC made clear in its Brief (*See*, IIEC Br. at 59-60) and in this Reply Brief, the cap is a procedural device to trigger scrutiny of proposed costs. (*See* Section VIII.B.1.).

Staff also agrees with Ameren's argument that IIEC's proposal is unnecessary given the formula rate reconciliation process. (*See*, Staff Br. at 50, citing to Nelson, Ameren Ex. 21.0 Rev. at 9-10). As IIEC noted above (Section V.C.4.), the time constraints on the Commission's review of Ameren's annual formula rate filing, which includes the reconciliation, justify a procedural

prompt to signal a need for closer scrutiny of certain costs. (220 ILCS 5/16-108.5(d)). As the Commission indicated in its review of ComEd’s formula rate, the statutory period for reconciliation under Section 16-108.5 “is simply not ‘ample time’ to assess ComEd’s costs.” (*ComEd Formula Rate Order* at 158). Also, the Commission’s decision on conducting a hearing must be made without the benefit of discovery by the Staff or customers. (*See*, 220 ILCS 5/16-108.5(d)). A cap to trigger a hearing on the prudence and reasonableness of Ameren’s affiliate costs above the cap would provide customers with additional protection under the process described under Section 16-108.5(d). A cap also would provide Ameren with the incentive to include in FERC Form 1 only those costs and expenses that are prudently incurred and reasonable in amount. (220 ILCS 5/16-108.5(c)(1)).

While the Commission declined to adopt a similar cap/trigger mechanism in the recently concluded *ComEd Formula Rate Case* (Staff Br. at 50, *citing ComEd Formula Rate Order* at 158), the Commission found merit in the concerns prompting IIEC’s proposal. The Commission found that “IIEC’s concern is not unjustified regarding this issue. Otherwise, Section 7-101 and Section 7-102 of the Public Utilities Act would not have much meaning.”<sup>15</sup> (*ComEd. Formula Rate Order* at 158).

The Commission did not approve IIEC’s proposal because the Commission adopted what it described as a “better approach.” (*Id.*). The Commission’s better approach

. . . would involve the heightened scrutiny that IIEC seeks, and which would place all concerned on notice as to the possible issues regarding expenses from ComEd’s affiliates, is to require any

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<sup>15</sup> Section 7-101 and 7-102 of the Public Utilities Act governs the utility’s relationship with its affiliates. (220 ILCS 5/7-101 and 5/7-102).

documentation (of affiliate charges), upon initiation of a rate case or later, to abide by the general scrutiny that is involved in S. Ct. Rule 191 for affidavits supporting summary judgment. . . . The Commission also notes that this requirement is not particularly onerous upon a utility, it really just requires that the person who knows about the affiliate transactions to state, up front, that knowledge upon an initial filing when ComEd makes its initial rate filings.  
(*ComEd Formula Rate Order* at 158-159 (explanation added)).

If the Commission adopts that “better approach” in this case, as it did in the *ComEd Formula Rate Case*, IIEC accepts that there is no need to adopt its cap on affiliate charges. However, IIEC still considers a procedural cap/trigger to be the superior approach.

#### **4. Rate Case Expense - Stated Level/Test of Reasonableness**

IIEC proposed a cap or trigger for rate case expense. (Gorman IIEC Ex. 1.0 at 16-18:344-385). IIEC presented the reasons supporting that proposal in its Brief. (IIEC Br. at 60-61). Staff and Ameren oppose IIEC’s cap/trigger on rate case expense. (Ameren Br. at 87-88; Staff Br. at 50-52). While IIEC continues to believe that its proposed cap/trigger is appropriate and consistent with the formula rate law it recognizes that the Commission rejected a similar cap in the recently completed *ComEd Formula Rate case*. (*ComEd Formula Rate Order* at 156-158). Staff notes the Commission’s action in the *ComEd Formula Rate Case* in its Brief. (Staff Br. at 52.) The Commission’s rejection of IIEC’s proposed cap is based on its analysis of recent Commission decisions and case law as well as Section 9-229 of the Public Utilities Act. (220 ILCS 5/9-229).

In order to minimize the disputed issues in this case, and in consideration of the Commission’s analysis of applicable statutory and case law, which specifically requires that the

Commission determine the justness and reasonableness of expenses incurred to prepare and litigate a rate case filing, IIEC no longer believes that its cap is absolutely necessary as an additional protection for utility customers. Therefore, IIEC is no longer requesting that its proposed cap/trigger on rate case expense be implemented in this proceeding.

#### **5. Schedules to be Included in Rate MAP-P/Tariff Complexity**

IIEC, the Commission, the Commission Staff and the Commercial Group support a more concise, intelligible version of Rate MAP-P. (*ComEd Formula Rate Order* at 153; IIEC Br. at 61-66; Staff Br. at 53; CG Br. at 7). Staff proposes that Rate MAP-P include Schedules FR-A1 and FR-A1 Rec to maintain consistency between Ameren's formula rate tariff and the formula rate tariff approved in the *ComEd Formula Rate Case*. (Staff Br. at 53). IIEC agrees with the Staff. Ameren opposes use of a shortened Rate MAP-P (Ameren Br. at 88-89). Necessarily, Ameren also disagrees with the Commission's determination in the *ComEd Formula Rate case* that a more abbreviated version of the proposed formula rate tariff was appropriate. (Ameren Br. at 88). Ameren identifies several reasons for its disagreement. First, it suggests that the information and formulae contained in its extensive version of Rate MAP-P are needed for a complete understanding of the tariff and that no party has argued differently. In fact, IIEC witness Stephens testified that Rate MAP-P, as proposed by Ameren, was not conducive to customer understanding, did not enhance transparency, and, in fact, operated in exactly the opposite fashion. (Stephens, IIEC Ex. 3.0 at 5-6:95-124). IIEC is supported by the Commercial Group in this observation. (CG Br. at 7).

As a factual matter, Rate MAP-P is not as transparent as Ameren would have the Commission believe. The record shows that, despite its volume and complexity, the proposed tariff does not contain all of the information necessary to make the revenue requirement calculation. (*See*, IIEC Cross-Ex. 1, Ameren Resp. to IIEC DR 7.01). Thus, Ameren’s tariff contains more detail, but still fails to make the process transparent to customers who lack access to the information and calculations that are not included in the tariff. (IIEC Br. at 65).

While Ameren argues in its Brief that the information and formulas contained in the hundreds of pages of schedules is needed for a complete understanding of the tariff, (Ameren Br. at 88), Ameren’s rate design witness, Mr. Mill, has testified that whether or not the schedules are included in rate MAP-P is of “little consequence” to Ameren. (Mill, Ameren Ex. 22.0 at 6:112-113). Ameren cannot have it both ways. It cannot argue on one hand that the schedules are needed for complete “understanding of the tariff” while its expert witness on the subject testifies that including the schedules are of “little consequence.”

Ameren purports to speak on behalf of customers and stakeholders in recommending the inclusion of the schedules in the tariff. (Ameren Br. at 89-90). However, two large and sophisticated customer groups (IIEC and the Commercial Group) and the Commission Staff support a simpler formula rate tariff. No customer group has opposed the simpler version of the tariff. The simplified version of the tariff still contains the necessary elements of the formula for determining the Ameren revenue requirement that customer charges will be based on, without the extraneous and confusing schedules.

Ameren argues that rate MAP-P is no less complicated if the subject schedules are excluded. (Ameren Br. at 88). However, Ameren does not explain why this is so. Ameren's argument is also contradicted by the Commission's conclusion in the *ComEd Formula Rate Order* that these types of additional schedules did, in fact, make the tariff more complex. (See *ComEd Formula Rate Order* at 153 - stating "IIEC's recommendation is well-taken regarding simplification of ComEd's tariffs pursuant to Section 16-108.5. . . and is hereby adopted.").

Next, Ameren argues that because the formula rate law intended a transparent formula ratemaking process, inclusion of the hundreds of pages of schedules and multiple formulae, is consistent with that intent. (See, Ameren Br. at 89). As noted above the testimony in this case demonstrates that the tariff does not add to transparency, and in fact, has the opposite effect. (See, Stephens, IIEC Ex. 3.0 at 5-6:95-114).

Ameren argues that the schedules should be included with the tariff because they can easily be disregarded by those not interested in the detail. (See, Ameren Br. at 89). Ameren's argument proves too much. If the schedules can be disregarded, they apparently are not necessary for a "complete understanding of the tariff," as Ameren has argued. (See, Ameren Br. at 88). Ameren's argument also suggests that an abbreviated version of the tariff will be understood and understandable without the addition of dozens of pages of schedules and formulae.

In addition, Ameren argues that it has been its experience that members of the energy community prefer more information, not less. (Ameren Br. at 89). Ameren ignores the fact that in

this case it is experienced members of the energy community, IIEC and the Commercial Group, recommending the use of more abbreviated version of rate MAP-P.

Ameren attempts to distinguish the decision on the tariff complexity issue, in the ComEd Formula Rate case from this case. (Ameren Br. at 90). Specifically, Ameren argues that it has presented additional facts in this case that were not present in the ComEd case. (*Id.*). However, Ameren has not identified exactly what those additional facts are. More telling is the fact that Ameren's own rate expert, Mr. Mill, has confirmed that Ameren's rate MAP-P was modeled on ComEd's tariff. (*See* Mill, Ameren Ex. 1.0 Rev. at 7:347-351).

Mr. Mill also testified that adopting comparable rate designs for ComEd and Ameren would facilitate a more efficient review process. (*Id.*). Though Ameren argues in its brief for a tariff distinct from the approved ComEd tariff, the testimony of its witnesses supports adoption of a formula rate tariff like ComEd's. IIEC agrees that, in fact, the tariffs should be made similar.

Finally, Ameren argues that it is important for all members of the energy community to have access to the dozens of pages of schedules and formulae in its proposed tariff -- even though Ameren has suggested most can be ignored by customers. (Ameren Br. at 90). There is no reason why these schedules and formulae cannot be made part of standard filing requirements for each utility formula rate filing, as the Commission directed in the ComEd Formula Rate Case. (*ComEd Formula Rate Order* at 153). There is no need to include these schedules in the formula rate tariff itself to provide customers access to that detailed information.

Consistent with the Commission's determination in the *ComEd Formula Rate Case* the Commission should ensure that the ComEd tariff and the Ameren tariff are similar in design and structure, a result Ameren witness Mill has implicitly endorsed. (Mill, Ameren Ex. 1.0 Rev. at 7:347-351). Therefore, the Commission should adopt the same simplified tariff approach for Ameren that it did for ComEd, as recommended by IIEC and Staff.

#### **6. Filing of Final Approved Formula Template/Schedules with ICC**

Staff proposes that the schedules and formulae excluded from Rate MAP-P (as discussed in Section VIII.B.5. above) be filed on the Commission's e-docket with a copy to the manager of accounting of the Commission. (See Staff Br. at 55; Ameren Br. at 91). IIEC certainly has no objection to such a procedure. It is consistent with the idea that the schedules and formulae in question should be made a part of the utility annual formula rate filing, as directed by the Commission in the *ComEd Formula Rate Case*. (*ComEd Formula Rate Order* at 153). Nor does IIEC object to the idea that the schedules and formulae, as filed, should form the basis for the revenue requirement calculation made in Rate MAP-P itself. In fact, the Commission could, in the formula rate process rulemaking that was initiated by the *ComEd Formula Rate Order*, develop a rule requiring such a filing and setting forth the intended purpose and use of those schedules and formulae.

However, IIEC respectfully disagrees with the Staff's recommendation that the Commission should require such a filing and make clear that it is adopting "as the formula" all of the subject schedules. Contrary to Staff's position in brief, Staff witness Hathhorn explained on cross-

examination that she intended her recommendation (however worded) “to be consistent with what the Commission ordered in the Commonwealth Edison case, Docket 11-0721.” (Hathhorn, June 21 Tr. at 237-238). The *ComEd Formula Rate Order* requires the subject schedules be made a part of the utility filing, not adopted as the formula. (*ComEd Formula Rate Order* at 153).

IIEC also disputes the reason given in Staff’s brief for its recommendation to adopt the schedules, as the formula. Staff argues that the Commission does not have the authority to approve changes to the formula rate in subsequent reconciliation proceeding. (*See* Staff Br. at 54-55; Ameren Br. at 91). Section 16-108.5(d)(3) does prevent “changes to the structure or protocols of the performance-based formula rate approved pursuant to subsection (c).” (220 ILCS 5/16.108.5(d)(3) (emphasis added)). This subsection prevents changes to the formula rate itself in the context of an annual formula rate filing made under subsection (d) of Section 16-108.5. This section does not, however, prevent the Commission’s modification of the information and schedules, *etc.* that it requires the utility to file as a supplement to the formula rate. Furthermore, the Commission is authorized to make changes to the formula rate itself, but under distinct provisions of the PUA. Section 16-108.5 provides in pertinent part:

Subsequent changes to the performance-based formula rate structure or protocol shall be made as set forth in Section 9-201 of this Act, but nothing in this subsection (c) is intended to limit the Commission’s authority under Article IX and other provisions of this Act to initiate an investigation of a participating utility’s performance-based formula rate tariff, provided that any such changes shall be consistent with paragraphs (1) through (6) of subsection (c). Any changes ordered by the Commission shall be made at the same time new rates take effect following the Commission’s next order pursuant to subsection (d) of this section, provided the new rates take effect no

less than 30 days after the date on which the Commission issues an Order adopting the change. (220 ILCS 5/16-108.5(c)).

Thus, the Commission has ample authority to make changes to the formula rate, even under the Staff's incorrect interpretation of Section 16-108.5(d)(3). Therefore, the Commission does not need to make the schedules a part of the approved formula because it cannot make changes to the formula rate in a reconciliation proceeding.

### **7. Rulemaking - Formula Rate Process**

The Commission Staff argues that the Commission initiated a rulemaking in the ComEd Formula Rate Case “to create a systematic approach governing the formula rate process.” (Staff Br. at 54, *citing ComEd Formula Rate Order* at 153). Staff suggests that any rule developed in that process would apply to both Ameren and ComEd. Staff, therefore, recommends the Commission follow the approach taken in the ComEd Formula rate case. (Staff Br. at 54). IIEC agrees.

Ameren, however, disagrees. (Ameren Br. at 91-92). Ameren's opposition to the rulemaking ordered in the ComEd Formula Rate Case is based on several arguments. First, Ameren reasons that “many of the details associated with the formula rate filing are prescribed by law, Part 285 filing requirements, and the Commission's decisions in the formula rate cases.” (Ameren Br. at 91). Ameren's argument is not persuasive. The argument constitutes an admission that some, but not all, of the details of the formula rate filings are not fully addressed in the current law, Part 285, or the formula rate cases. Thus, there is a need for the rulemaking.

Furthermore, Ameren obviously does not feel bound by prior Commission formula rate decisions, since it objects to the rulemaking ordered by the Commission in the ComEd formula rate

case. This suggests that development of appropriate rules for the formula ratemaking process, which are binding on all utilities electing to file a formula rate, would be a better approach than a case-by-case determination in individual formula rate cases. Ameren's argument clearly demonstrates the need for standardization of formula rate procedures through the implementation of appropriate rules governing the formula rate process.

Second, Ameren argues that there is no need for a rulemaking. (Ameren Br. at 91). This argument ignores the fact that the legislature itself contemplated that the Commission would develop rules for the implementation of the formula rate law. (220 ILCS 5/16-108.5(c)(3)). For example, such rules could identify the Part 285 schedules the Commission deems relevant to a formula rate filing, allowing input from its Staff and interested parties on the issue. The Commission would not be forced to rely on utility discretion to file the Part 285 schedules the utility deems relevant.

Ameren goes on to suggest that it would be a waste of time and resources for the Commission, the Staff, the utilities and their customers, to implement rules for the formula rates because the rate may be in effect for only five years. (*See*, Ameren Br. at 91-92). However, the Commission itself has noted “. . . that Section 16-108.5 of the Public Utilities Act is not easy to comprehend, but it will last for 10 to 11 years, unless it is dramatically altered by the General Assembly or the Appellate or Supreme Courts.” (*ComEd Formula Rate Order* at 153). The formula rate law represents a fundamental change to utility ratemaking in Illinois. The law is structured in such a way as to shift a significant portion of the traditional evidentiary burdens from utilities to the Commission Staff and customers with respect to the prudence and reasonableness of utility

expenditures. The law will govern ratepayer rates to cover billions of dollars in infrastructure improvements, which in turn will directly result in annual rate increases for their customers. Under such circumstances, a rulemaking to establish rules for administration of law over the next ten to eleven years is good public policy, not the unnecessary burden suggested by Ameren's arguments.

The Commission should, consistent with its determination in the ComEd Formula Rate Case, reject Ameren's proposal to terminate the rulemaking process.

### **C. Contested Reconciliation Issues**

#### **1. Year End or Average Rate Base**

For the reasons stated in section II.C.8 above, IIEC respectfully asks that, in its deliberations on this issue, the Commission consider jointly IIEC's responses in this section and in the earlier section on the initial rate setting process.

The key to Ameren's arguments on the reconciliation rate base determination is the utility's strained construction of the formula rate statute. As noted in IIEC's earlier discussion of average and year-end rate base approaches, Ameren asks the Commission to reconcile costs for the year that rates are in effect with the revenue requirement and rates based on the statutorily defined cost inputs from completely different years. These cannot be the "actual costs" to which the projected revenue requirement will be reconciled.

Section 16-108.5(c) prescribes cost inputs from two specific years as the basis for the projected revenue requirement and rates the Commission must determine -- based on the utility's most recently filed FERC Form 1 and projected costs for the filing year. (220 ILCS 5/16-

108.5(c)(6)). Later, a reconciliation adjustment is determined, based on “an annual reconciliation, with interest, . . . of the revenue requirement reflected in rates . . . with what the revenue requirement would have been had the actual information for the applicable calendar year been available at the filing date.” (*Id.*) (emphasis added)). At no point in that statutory process are costs from the year rates will be in effect a factor -- not for setting rates, and not for reconciling revenue requirements. Ameren’s interpretation of the statute serves only to inflate the rate base used to determine initial and reconciliation rates.

Ameren also argues that the requirement for filing “final data based on its most recently filed FERC Form 1” requires the use of a year-end rate base for reconciliation. Using the ordinary meaning of those words, that phrase appears on its face to require data that is (a) no longer subject to revision, (b) based on what the Company submitted to FERC, and (c) shown on its most recent Form 1. In numerous places in the legislation enacting the formula rate, the word “final” is given that ordinary meaning, not a self-serving “end-of-year” definition. (*See, e.g.*, 220 ILCS 5/16-108.5(d)(3) (“The Commission’s determinations . . . shall be final upon entry . . . .”); 220 ILCS 5/16-108.5(e) (“incorporate the findings of any final rate design orders of the Commission”); 220 ILCS 5/16-108.6(e) (“Following the date of a Commission order approving the final annual report or the date on which the final report is deemed accepted . . . .”)). Ameren argues to inject additional meaning that the General Assembly did not. Ameren reads that language as requiring the particular end-of-year figures the utility has selected from its FERC Form 1. That specialized meaning would conflict – unnecessarily – with the statute’s objective of accurate determination and recovery of

Ameren's actual prudent and reasonable costs. (See IIEC Br. at 15-16, 26-27, 43-50; also 220 ILCS 5/16-108.5(c); 220 ILCS 5/9-101 *et seq.* (PUA Article IX)).

Nothing in this record suggests that the revenue requirement assembled in accordance with the formula rate statute, or even Ameren's proposed tariff spreadsheets is intended to represent Ameren's "actual costs" during the year rates are in effect. The Commission certainly has not accepted Ameren's reading in its authoritative interpretation of the formula rate statute. (*ComEd Formula Rate Case* at 18).

By its terms, the formula rate statute is intended to assure timely recovery of a participating utility's actual costs. (Ameren Br. at 101; Mill, June 20 Tr. at 82). Contrary to that purpose, Ameren's proposed Implementation of the statutory language would stretch cost determination and recovery over a 5-year period, while reconciling revenue requirements for a specific year to costs in a year never considered in determining the revenue or rates being reconciled. The Commission should reject that interpretation, as it did in the *ComEd Formula Rate Case*. (*ComEd Formula Rate Case* at 18).

Ameren's 's strained interpretation is inconsistent with the structure of the formula rate process, which is based on recovery of the utility's actual costs, for a specific rate year. As implemented in the *ComEd Formula Rate Case*, the formula rate process uses the actual costs shown on Ameren's most recent FERC Form 1, augments those data with rate base projections for the year in which the rate filing is made. A revenue requirement for that year – the rate year – is determined and new rates implemented less than six months later, with a reconciliation (in the utility's next

annual filing) of the projected revenue requirement and rates with Ameren's actual costs, as reported on its (next) FERC Form 1 for the rate year, with interest paid (to the utility or to customers) on any reconciliation adjustment. (*ComEd Formula Rate Case* at 17-21; 220 ILCS 5/16-108.5(c)(6), 5/16-108.5(d)). Under Ameren's interpretation, the focus becomes a calendar rate year never mentioned in the formula rate statute -- a year for which the statute requires no cost data, and a year that is remote from any cost data that are required. (Ameren Br. at 98, 100; IIEC Br. at 40, 46). In fact, under Ameren's interpretation, revenue requirements and rates would be based on cost information as remote as the permitted extremes for traditional rate cases. (Ameren Br. at 100; 83 Ill. Adm. Code 287.20). Unavoidably, the recovery of actual costs would be subordinated to the use of remote cost bases to justify a year-end rate base amount, and rate instability would likely increase, since constant, potentially large, reconciliation adjustments would be required. Also, an additional year of delay is added to the recovery of the costs proved through the utility's most recent FERC Form 1 data and filing year cost projections. (*See* Ameren Br. at 100).

Because the statute -- as written -- contemplates a different ratemaking process, the results of Ameren's proposed implementation are significantly less accurate determinations of actual costs and less timely recovery. (*Id.*). The inconsistencies between the formula rate statute as written and Ameren's proposed implementation are striking: Ameren's focus, the period rates are in effect, is never mentioned in the formula rate statute; the revenue requirement determination would reflect costs remote from the claimed rate period; and initial rates for the rate year would be "reconciled"

to actual costs for an unrelated year that was never considered in setting the initial rates being reconciled. (220 ILCS 5/16-108.5(c), 5/16-108.5(d); Ameren Br. at 100).

Ameren's proposed implementation of the formula rate statute is fundamentally inconsistent with the statute's approach, which looks to actual costs for a particular year for which costs are documented, and with the statute's objective, which is recovery of the utility's actual costs, accomplished through initial and reconciliation rates based on documented actual costs and near-term projections.

## **2. Interest Rate on Under/Over Collections**

IIEC continues to support the AG-AARP and Staff positions on the rejection of the use of Ameren's weighted average cost of capital as the interest rate on reconciliation balances.

## **X. CONCLUSION**

For the reasons stated herein, IIEC respectfully requests the Commission adopt the positions taken and recommendations made by IIEC herein.

Respectively submitted,

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