STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

AMEREN ILLINOIS COMPANY d/b/a Ameren Illinois, Petitioner Rate MAP-P Modernization Action Plan - Pricing Filing	))))))	Docket No. 12-0001

BRIEF ON EXCEPTIONS OF AMEREN ILLINOIS COMPANY

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<u>ORAL ARGUMENT REQUESTED</u>

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I. INTRODUCTION AND POSITION SUMMARY

Ameren Illinois Company's ("AIC" or "Company") present rates were established in Dockets 09-0306, et al. (Cons.), where the approved revenue requirements of the three legacy utilities totaled approximately $834 million.[1] In this proceeding to establish initial formula rates, AIC proposes a final revenue requirement of $814 million, or approximately $20 million less than what the Commission determined was just and reasonable in 2010. The Company's filing shows that it has followed through on commitments to tighten its belt. And it has done so while keeping reliability a priority. Infrastructure and smart grid investment currently under review in companion dockets hold the potential to deliver even greater efficiencies and service enhancements. But moving from being *authorized* to proceed with substantial new investment to actually *investing* requires adequate revenues and regulatory certainty. The Administrative Law Judges' ("ALJs") Proposed Order ("ALJPO") provides neither. The Commission must remedy these deficiencies in its final order.

The ALJPO doubles-down (and then some) on the Company's proposed rate reduction by recommending a net revenue requirement of less than $777 million—$57 million less than revenues authorized today, *and far less than recommended by any party in this proceeding*. Putting aside for the moment any debate about traditional ratemaking versus formula rates: a proposed decrease that is almost 200% greater than the Company's proposed reduction is alarming. It will be mathematically impossible for the Company to execute infrastructure investment and smart grid plans at the ALJPO's recommended level of revenues.

The ALJPO recognizes that S.B. 1652 and Article IX of the Public Utilities Act prescribe different methods of ratemaking. AIC does not disagree. But despite the differences in these

[1] This revenue requirement as well as that recommended in the ALJPO are exclusive of Other Revenues.

ratemaking approaches, the purpose of S.B. 1652 surely was not to turn the regulatory compact on its head. The Commission remains a creature of statute, having only such authority as the legislature deems fit to grant it. The Commission may not substitute its judgment for the legislature's. Yet, that is precisely what the ALJPO seeks to accomplish.

Regulatory over-reach abounds in this record. The first commandment of the formula rate legislation—the very reason it exists—is to "[p]rovide for the recovery of the utility's actual costs of delivery services that are prudently incurred and reasonable in amount consistent with Commission practice and law." 220 ILCS 5/9-108.5(c)(1). The ALJPO violates this directive in numerous ways:

- It reduces revenues by approximately $5 million by deducting FIN 48 liabilities from rate base, finding—in disregard of the undisputed evidence on this point—that FIN 48 liabilities are not a "cost-free" source of capital.

- It reduces revenues by approximately $13.5 million through a rate base deduction for accumulated deferred income taxes ("ADIT") on projected plant additions. The ALJPO claims authority to make this deduction based on statutory language that does not exist, but surely would exist had the legislature intended this ratemaking treatment, as it did in other areas of the law that dictate the use of averages.

- It disregards a statutory directive to establish rates based on AIC's "actual capital structure," 220 ILCS 5/9-108.5(c)(2), and imputes a hypothetical capital structure. This and associated rate of return adjustments disallow over $5.4 million from revenues.

- It disregards, without explanation, the Commission's own prior decisions in ruling against the Company on late payment revenues, crediting over $6.6 million of supply-related revenues against the delivery service revenue requirement despite delivery service charges funding none of this amount.

- It effectively normalizes merger and severance-related amortization amounts by changing the amortization period, notwithstanding the statutory requirement for "recovery of existing regulatory assets over the periods previously authorized by the Commission." 220 ILCS 5/9-108/5(c)(4)(G). The result is a revenue decrease of over $2.5 million.

- It disallows recovery of numerous donations to legitimate charitable causes and organizations. The revenue impact is less than half a million dollars, but important social and regulatory values are at stake.

- It finds that the legislature "left room for interpretation" whether future reconciliations must be calculated using an average rate base. Here the ALJPO not only ignores clear statutory language, but also disregards (and the ALJs strike from the record) a duly-enacted resolution of the General Assembly's intent. That the ALJPO elects to disregard a statement of the legislature's intent does not mean that an appellate court will.

Throughout the ALJPO, the authors note each instance (and there are many) where the recommended conclusion is "consistent" with the Commission's final order in Commonwealth Edison Company's ("ComEd") formula rate case, Docket No. 11-0721. There is room to debate whether the facts and circumstances in these cases are the same in all instances, but the Company appreciates the ALJs' desire for consistency with prior Commission orders. The Company will simply note that two wrongs don't make a right, and leave any further comparison to ComEd at that. It is ultimately up to the Commission to decide this case, and a fair resolution of this case will adopt the exceptions discussed in this brief.

II. ARGUMENT

A. Exception 1: ALJPO SECTION V.C.1 "Cash Working Capital", Subsection a, "Pass-Through Taxes", Subsection vi, "Commission Conclusion" (ALJPO, pp. 13-14)

The ALJPO assigns a revenue lag of zero days to pass-through taxes based on purported consistency with the order in Docket No. 11-0721. (ALJPO, p. 14.) The ALJPO chooses consistency with that order over consistency with the Commission's order in AIC's gas rate case, Docket No. 11-0282—an order for the *same utility* that has the same pass-through tax payment practices at issue in this case. As AIC witness Mr. Heintz explained, not all utilities treat pass-through taxes in a similar manner. (Ameren Ex. 4.0 (Heintz Dir.), p. 17.) However, the position taken by Staff (and adopted by the ALJPO) does not examine differences in remittance practices between AIC and ComEd. (<u>See</u> Ameren Ex. 25.0 (Rev.) (Heintz Sur.), p. 8.) For example, the record in this case makes clear that AIC would incur time and expense to change its remittance timing for the EAC. (Ameren Exs. 15.0 (Heintz Reb.), pp. 10-11; 25.0 (Rev.), p. 9.) There is no evidence that ComEd would incur similar time and expense to change its remittance practices. As a similarity between the pass-through taxes practices of AIC and ComEd has not been established in this proceeding, the ALJPO's reliance on ComEd's case for resolution of this issue is inappropriate. The ALJPO thus strives to shoehorn AIC's pass-through taxes into the same treatment developed for ComEd in Docket No. 10-0467, rather than following the subsequent treatment adopted for AIC in Docket No. 11-0282.

The ALJPO also results in the asymmetric treatment of pass-through taxes. The ALJPO concludes that the revenue lag days for pass-through taxes should be set at zero. However, no adjustment was made to the expense leads for the pass-through taxes, thereby artificially decreasing the cash working capital requirement associated with the pass-through taxes and rate base. Should the Commission adopt the ALJPO's recommendation, and, as the Commission maintained in Docket Nos. 09-0306 (Cons.), there is no cost associated with pass-through taxes, there should be no impact on AIC's cash working capital requirement. (Ameren Reply Br., p. 9.) Therefore, if no revenue lag is applied to the revenues associated with pass-through taxes, then no expense lead should be applied to the payments of the pass-through taxes, either.

For these reasons, the exceptions on this issue in Appendix A should be adopted.

B. Exception 2: ALJPO SECTION V.C.2 "ADIT – FIN 48", Subsection f, "Commission Conclusion" (ALJPO, p. 43)

The ALJPO recommendation concerning FIN 48 illustrates the danger of approaching contested issues as a zero-sum proposition pitting a utility against its ratepayers. Whatever level of taxes a government authority imposes on AIC is ultimately passed through to ratepayers. Sound regulatory policy should therefore encourage utilities to minimize tax expense when possible. The ALJPO recommendation not only fails to encourage AIC to take prudent steps to minimize income taxes, but also affirmatively punishes the Company for doing so.[2]

AIC's FIN 48 balance of approximately $40 million exists because the Company asserted tax positions that would, if accepted by the taxing authority, lower its current income tax expense. The IRS, however, "more likely than not" (the standard for characterizing a tax position under FIN 48) will disallow the deductions and demand a check for $40 million, plus interest and penalties. The FIN 48 liabilities at issue were established to account for this eventuality.

The ALJPO sides with Staff and intervenors by recommending that the FIN 48 balance be deducted from rate base. Two reasons are offered for this ratemaking treatment: "the FIN 48 balance represents a source of cost-free capital" and (2) "the Commission does not believe that AIC's position provides any mechanism to protect customers while awaiting IRS review." (ALJPO, p. 43.) The ALJPO is wrong on both counts.

The ALJPO finding that FIN 48 amounts represent "a source of cost-free capital" is clearly erroneous. When a utility asserts a tax position that is deemed uncertain, the amount of the uncertain position is characterized as a FIN 48 liability. Mr. Warren explained, and no party disputes, that interest and penalty expense are accrued on FIN 48 amounts from the date the underlying tax return was due. (Ameren Ex. 18.0 (Warren Reb.), p. 10.) FIN 48 amounts simply do not sit on a utility's books "cost free."

The ALJPO also buys in to the straw man argument that not deducting FIN 48 amounts from rate base somehow harms ratepayers. This is true only if the failure to bestow a windfall on

[2] As noted earlier in this proceeding, as well as in briefs recently filed in Illinois-American Water Company's pending rate case (Docket No. 11-0767), there is no precedent or established practice in Illinois concerning the ratemaking treatment of FIN 48 liabilities. In both proceedings, the respective proposed orders recommend that the utilities' FIN 48 balances be deducted from rate base.

ratepayers is deemed the equivalent of "harm." None of the FIN 48 balance is or was funded by ratepayers. The FIN 48 balance arises *solely* by virtue of tax positions the Company elected to take—tax positions that benefit ratepayers. The Company would be better off had it not taken the uncertain tax position at all—which is what it will be encouraged to do in the future if the ALJPO recommendation stands. (Ameren Init. Br., p. 22; Ameren Ex. 18.0, pp. 12-13.)

The ALJPO suggests that it would be unfair to deprive ratepayers of the immediate benefit of a rate base deduction for the FIN 48 amounts. It reasons that if the tax deductions are allowed, ratepayers "would not receive the benefit of the deferred tax credits in the form of a rate base deduction until the first rate case after the tax returns are no longer subject to IRS review and adjustment." (ALJPO, p. 43.) Left unsaid is, why is this a problem? If an "uncertain" tax position becomes "certain" such that the tax deductions are allowed, then and only then should the deferred tax benefits be flowed through to customers. It is unfair and asymmetrical to flow through the "benefit" of a deferred tax credit that does not yet exist, and may very well never exist.

Moreover, the ALJPO's reference to the "first rate case" appears to ignore the fact that in the formula rate process, rates are set annually—so that the "benefit of the deferred tax credits in the form of a rate base deduction" (although the *less likely* outcome) will accrue to the ratepayers in the annual formula rate process, not some unspecified future rate case. The ALJPO simply fashions a remedy that is in search of a problem.

The formula ratemaking process further ensures that AIC cannot "game" FIN 48 liabilities in a way that deprives ratepayers of the collateral benefits associated with taking uncertain tax positions. The update filing in May 2013 will be based on final 2012 FERC Form 1 data. Whether or not certain tax positions remain uncertain will be reflected in the FERC Form

1, alleviating the need to speculate about whether the IRS will allow or disallow the deductions underlying existing FIN 48 amounts. Relying on actual FERC Form 1 data would have the added benefit of ensuring that AIC and its customers are made whole through the reconciliation process.

Adopting the ALJPO recommendation would make any effort to take prudent, aggressive but defensible tax positions an utterly pointless and irrational exercise. Flowing through a deferred tax credit that does not exist would truly be a "heads the customer wins, tails the Company loses" proposition. The final order should adopt the replacement language set forth in Appendix A.

C. Exception 3: ALJPO SECTION V.C.3 "ADIT – Projected Additions", Subsection f, "Commission Conclusion" (ALJPO, pp. 51-53)

The ALJPO adopts Staff and Intervenors' adjustment to rate base to reflect ADIT generated by 2011 and 2012 plant additions. This recommendation is contrary to law and should be rejected.

Section 16-108.5(c)(6) of the Act is clear. In setting initial formula rates, the statute specifically requires the participating utility to submit FERC Form 1 data, adjusted for "plant additions *and correspondingly updated depreciation reserve and expense* for the calendar year in which the tariff and data are filed . . . ." (Emphasis added.) No other adjustments are required—specifically, there is *no* mention of a derivative adjustment for ADIT.

The ALJPO interprets this "silence" (ALJPO, p. 52) as express authority to make such an adjustment. This interpretation is wrong as a matter of law. Principles of statutory construction dictate that "[t]he enumeration of one thing in a statute is construed as the exclusion of all others." State v. Mikusch, 138 Ill. 2d 242, 250 (1990). Section 16-108.5(c)(6) requires adjustments to (i) plant additions and (ii) depreciation reserve and expense. Because the legislature did not specify that ADIT on projected plant should also be accounted for, it is unlawful to order an adjustment that accounts for ADIT on projected plant. That the legislature did not expressly address the adjustment does not mean that the statute neither authorizes nor prohibits it. Rather, the act of limiting adjustments to two narrow categories creates a presumption that the legislature intentionally withheld authority from the Commission to make additional, un-enumerated adjustments. See Northern Moraine Wastewater Reclamation Dist. v. Ill. Commerce Comm'n, 392 Ill. App. 3d 542, 565, 912 N.E.2d 204, 225 (2nd Dist. 2009).

That the ALJPO deems it necessary to adjust ADIT to purportedly avoid "'artificially increase[d] rates'" (ALJPO, p. 52) is of no import.[3] "[I]t is not within the province of an administrative agency or court to take from or enlarge the meaning of a statute by reading into it language which will, in the opinion of either, correct any supposed omission or defects." American Steel Foundries v. Gordon, 404 Ill. 174, 180-81 (1949); Beckmire v. Ristokrat Clay Prods. Co., 36 Ill. App. 3d 411, 415 (2d Dist. 1976) ("A court . . . must give effect to the legislative intention regardless of the consequences.").

The inclusion of ADIT for projected plant balances also is inconsistent with the EIMA's requirement to use actual costs. 220 ILCS 5/16-108.5(c)(6). ADIT for 2011 and 2012 plant additions cannot be gleaned or derived from the 2010 FERC Form 1. (Ameren Ex. 23.0 (Rev.) (Stafford Sur.), p. 15; Ameren Init. Br., pp. 25-26.) The range of adjustments for ADIT proposed by Staff and Intervenors related to this issue ($108 to $173 million) represents speculation and

[3] This concern is unfounded. The absence of such an adjustment does not mean rate base will be "overstated." By the time rates are in effect for each successive update proceeding, AIC will have actually incurred the capital costs for that projected year. (Ameren Init. Br., p. 27.) Moreover, when rates are reconciled in 2013, any over- or under-recovery produced by rates in effect during 2012 will show up as an adjustment to rates established in 2013 (and effective as of January 2014). (Id., pp. 27-28.) Thus, rates will not be "artificially increased"; rather, establishing and reconciling rates based on actual costs ensures customers will pay rates based on actual costs—no more and no less. (Ameren Ex. 13.0 (Stafford Reb.), p. 22.)

conjecture—a far cry from the "transparent information" reflecting "actual costs" that is supposed to underlie formula rates. 220 ILCS 5/16-108.5(c).

Rolling forward the balance of ADIT on projected plant additions violates the letter and spirit of the EIMA. Parties' invention of new adjustments and the twisting of statutory language promote exactly the type of regulatory uncertainty that will deter future investment. The Commission should adopt AIC's exceptions language included in Appendix A.

D. Exception 4: ALJPO SECTION V.C.4 "Accrued Vacation Pay as Operating Reserve", Subsection e, "Commission Conclusion" (ALJPO, pp. 58-59)

The ALJPO adopts an $11.7 million adjustment to rate base by removing an accrued liability for vacation pay that existed on AIC's balance sheet during 2010. (ALJPO, p. 59; App., p. 6.) The Commission should reject this adjustment for three reasons:

- The accrued liability for vacation pay is not an accumulating reserve of ratepayer-supplied funds that is generally available to AIC for supporting its rate base investment; it is an expense that accrues and is paid off annually within a year.
- The accrual for vacation pay expense for 2010 was reversed and paid off in 2011; in other words, every dollar of vacation pay that accrued in 2010 was paid off before this case commenced and before rates from this case will go into effect.
- The Commission should not simply make this adjustment because it made a similar adjustment in Docket No. 11-0721; the record in this proceeding demonstrates that the premise for the adjustment is fundamentally flawed.

Vacation pay is an accrued expense recorded on AIC's balance sheet. (Ameren Ex. 15.0 (Heinz Reb.), p. 27; Tr. 352-57, 553, 558.) Like other accrued expenses, vacation pay expense is recorded in the period when the services are provided. (Tr. 450-51; 553-54.) The expense is recognized when the employee provides the services that qualify him or her for the compensated absence (in this case, 2010). (Tr. 554.) The employee then cashes in on that earned absence at a later date after the services are provided (in this case, 2011). Each year AIC records an accrual for the vacation pay expense earned that year. (Tr. 354-57.) And each year AIC reverses the prior year's accrual that will be paid out in the current year. (Tr. 558.) The incremental change in the accrual, from variations in the workforce or in salaries or wages paid, is reflected in AIC's income statement and its cash working capital calculation. (Ameren Ex. 15.0, p. 27; Tr. 357.)

The Commission, in Docket No. 11-0721, found ComEd's accrued liability for vacation pay to be a "source of revenue" for the utility and deducted an amount from rate base that reflected the amount of the accrued liability. Commonwealth Edison Co., Order, Docket 11-0721 (May 29, 2012), p. 70. In this proceeding, the ALJPO sides with AG/AARP, CUB and Staff to make the same adjustment because "there is no discernable difference between this proceeding and Docket No. 11-0721 that would properly result in a disparate rate making treatment of the same item between the two dockets." (ALJPO, p. 59.) But the ALJPO is wrong to blindly follow the prior Commission order. The basic premise for the adjustment, namely that the accrual represents a reserve of capital supplied by ratepayers, is demonstrably false. The accrual is not a "source of revenue" that has already been supplied by ratepayers. It is just an annual expense that happens to be recorded in the year prior to when it is paid. Whether the Commission should have made the adjustment in Docket No. 11-0721 is beside the point. It should not be made now.

As Staff concedes, an accrual is "a source of non-investor supplied capital" if it constitutes funds that have already been "supplied by ratepayers." (Tr. 450.) With a reserve of cash already in hand, it is appropriate to deduct that amount from rate base. As an authoritative text explains:

> When expense provisions required to create reserves are allowed in cost of service, the ratepayer is supplying funds to the utility in advance of actual need. The funds so supplied are generally available to the utility for supporting its rate base investment. Thus, the accumulated reserves are deducted from the rate base to avoid customers paying a return on funds they have supplied.

Hahne & Aliff, Accounting For Public Utilities § 4.04[8]. "[F]or a liability balance to represent a source of non-investor supplied capital [however], the assumption is that the utility receives the capital through rates *before* it has paid the expense[.]" (Tr. 451-52 (emphasis added).) The prototypical example is the Commission's recent treatment of the OPEB liability. See, e.g., Ameren Ill. Co., Order, Docket 11-0282 (Jan. 10, 2012), p. 14. The theory there has been that utilities have recovered OPEB expenses in rates that they have retained. Thus, the OPEB liability represents the accumulated amount that remains unfunded by the utility. This is not and cannot be the case here. Each year AIC makes an accrual for the amount of vacation pay that will be earned that year. The next year AIC pays the expense for the prior year, reverses the prior year accrual, and makes a new accrual for the current year's earned vacation pay. This cycle ensures that there is not—and cannot be—a constant build-up of accumulating, unpaid expense that AIC previously has collected in rates and retained. The accrual thus represents not the amount that AIC has kept, but the amount that AIC will most certainly pay in the next year.

That AIC will fully pay this accrued expense within a year further proves the accrual cannot represent "a source of non-investor supplied capital" for the simple reason AIC will have paid out its accrued expense before it collects that expense in rates. Any vacation pay expense accrued in 2010 was paid out in 2011 before this case was filed and before rates from this proceeding go into effect. (Tr. 454-55.) The same will hold true in future formula rate filings. Any expense accrued in 2011 will be paid out in 2012 before it is collected in rates in 2013. Any expense accrued in 2012 will be paid out in 2013 before it is collected in rates in 2014. Proponents of a rate base reduction contend the liability is "ongoing" and "constant." That is true. But so is AIC's payment of the expense. And AIC's payment of the expense will always precede AIC's recovery of the expense in rates. The lag between the time AIC pays out vacation expense and the time it collects the expense in rates for that particular year guarantees the accrual cannot be a free source of ratepayer funds to finance rate base. (Tr. 455, 457.)

The vicious circle favored by proponents of the rate base deduction, however, guarantees AIC will never fully recover its vacation pay expense. If a rate base deduction is adopted here, the rates effective for the remainder of 2012 will not fully recognize the vacation pay expense accrued in 2010 and paid out in 2011. If a rate base deduction is adopted in AIC's update proceeding (Docket No. 12-0293), the rates effective for 2013 will not fully recognize the vacation pay expense accrued in 2011 and paid out in 2012. And so on. AIC will never be made whole. The rate base reduction will not be adjusting the revenue requirement for funds already collected. It will be withholding funds from the revenue requirement already paid.

The Commission should adopt the exceptions for this item set forth in Appendix A.

E. Exception 5: ALJPO SECTION V.C.5 "Account 190 Assets – Unamortized ITCs", Subsection e, "Commission Conclusion" (ALJPO, pp. 64-65)

The ALJPO adopts AG/AARP and CUB's recommendation to exclude the unamortized balance of investment tax credits ("ITCs") from rate base. (ALJPO, p. 65.) It agrees "with AG/AARP and CUB as to the appropriate treatment of this item." (Id.) By way of explanation, the ALJPO simply adopts "the reasons set forth by AG/AARP and CUB." (Id.)

In its Initial and Reply Briefs, AIC pointed out the serious fallacies in the Intervenors' position. (Ameren Init. Br., pp. 32-36; Ameren Reply Br., pp. 21-25.) AIC explained that it was asymmetrical and unfair to hold the expense benefit of the asset against AIC unless it would receive credit for the value of the asset, too. In essence, the Intervenors sought to keep a benefit (reduced income tax expense) while ignoring the asset from which the benefit arose. (See Ameren Ex. 13.0 (Stafford Reb.), pp. 24-25.) If not for the ITCs, there would be no tax benefit.

The only support Intervenors provided for their position—beyond the say-so of their witnesses—was tax guidance that purportedly prohibited unamortized ITCs from being "added" to rate base. (See AG Init. Br., p. 45; CUB Init. Br., p. 23.) AIC explained that this was demonstrably false: both Intervenors acknowledged that one acceptable method of recognizing the ITC tax benefit is to reduce rate base. (Id.) But how can a rate base reduction be an appropriate means of recognizing the tax benefits unless the asset was in rate base to begin with? AIC pointed out that if the Intervenors' logic were accepted, the options for recognizing ITCs are (1) a rate-base reduction and no expense reduction or (2) an expense reduction *plus no rate-base recognition whatsoever*. Even AG/AARP acknowledged that under "the Internal Revenue Code, the deferred investment tax credit cannot be deducted from rate base." (AG Init. Br., p. 44.) Again, this tax guidance *necessarily assumes* that the ITCs are already part of rate base.

The ALJPO nevertheless follows the Intervenors' lead. But it offers no explanation or resolution of the flaws that AIC pointed out in the Intervenors' position. True, the ALJPO adopts "the reasons set forth by" the Intervenors—but this does not help, because the Intervenors never answered the arguments raised by AIC. (See AG/AARP Reply Br., p. 26; CUB Reply Br., pp. 21-22.) Thus, the ruling on this issue is effectively a thumbs-up to the Intervenors, a thumbs-down to AIC, with no response to the Company's substantive positions.

This resolution of the issue presents two problems. First, the adjustment itself is erroneous, as AIC has explained. Second, the lack of a reasoned response to AIC's objections is an independent error. "Meaningful review of regulatory orders is thwarted . . . if the Commission's failure to express the grounds for its decisions operates to shelter them from review." Citizens Utils. Co. v. Ill. Commerce Comm'n, 124 Ill.2d 195, 206 (1988); see also, e.g., Citizens Util. Bd. v. Ill. Commerce Comm'n, 166 Ill.2d 111, 132 (1995) (reversing the Commission where it "failed to articulate a reasoned basis" for its decision). By failing either to give a basis for favoring the Intervenors over AIC or to explain why the adjustment was warranted despite AIC's arguments, the ALJPO lacks necessary explanation. The Commission must have a lawful and reasonable basis for its orders, Brinker Trucking Co. v. Ill. Commerce Comm'n, 19 Ill.2d 354, 357 (1960), and none has been given for the ITC adjustment in this case.

The reality is, no reasonable basis *can* be given for the Intervenors' proposed adjustment. The adjustment is plainly asymmetrical, and no sound basis has been offered in support. If the ITCs do not belong in rate base, then the associated expense benefit should not be recognized either. The ALJPO should accordingly be revised to adopt AIC's arguments and to reject the Intervenors' proposed adjustment. (AIC would point out that because its arguments—unlike the Intervenors'—engaged the opposing positions and rebutted them, it is entirely appropriate to adopt AIC's arguments and reject the adjustment on that basis.) The Commission should adopt AIC's exceptions language included in Appendix A.

F. Exception 6: ALJPO SECTION VI.B.1 "Section 9-227 Donations/Charitable Contributions", Subsection c, "Commission Conclusion" (ALJPO, pp. 77-79)

The ALJPO disallows $67,000 in certain Section 9-227 donations to economic development organizations and other groups that have not filed for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. The Commission should reject the ALJPO's adjustment for three reasons.

First, the Commission previously found in Docket No. 11-0721 that donations to economic development groups are recoverable in formula rates as "public welfare" donations because they contribute to the general good of the public.

Second, the use of Staff's Section 501(c)(3) filter arbitrarily bases cost recovery for Section 9-227 donations solely on the recipient's federal tax status, and ignores the public benefits that stem from donations to non-Section 501(c)(3) groups.

Third, there was no record evidence or cited authority to support the suggestion made for the first time in Staff's Reply Brief that donations to non-Section 501(c)(3) organizations were made in support of political, legislative or lobbying activities.

In its Final Order in Docket No. 11-0721, the Commission rejected Staff's adjustment to disallow Section 9-227 donations to economic development organizations. It found donations to these groups were recoverable under Section 9-227's "public welfare" prong ("for the public welfare *or* for charitable scientific, religious or educational purposes") because they contributed to the general good of the public. Commonwealth Edison Co., Order, Docket 11-0721 (May 29, 2012), p. 98. In this proceeding, AIC seeks to recover donations to similar groups. The ALJPO, however, rejects the Commission's reasoning in Docket No. 11-0721 and accepts Staff's adjustment. In doing so, it endorses Staff's proposal to limit recovery of "public welfare" donations to funds given to organizations with federal tax-exempt status under Section 501(c)(3).

The ALJPO finds the use of a Section 501(c)(3) filter provides "clarity" and is a "practical solution" to determining what donations are recoverable. (ALJPO, p. 78.) The ALJPO is wrong. The use of a Section 501(c)(3) filter arbitrarily limits cost recovery of "public welfare" donations under Section 9-227 based on the recipient's federal tax status.

The "public welfare" prong of Section 9-227 cannot be read so narrowly as to only allow recovery of donations to Section 501(c)(3) organizations. The plain language of Section 9-227 does not support that interpretation. The Commission's Order in Docket No. 11-0721 does not support that interpretation. And the Commission's justification for including in rates donations to community and economic development organizations does not support that interpretation.

The use of a Section 501(c)(3) filter also arbitrarily excludes donations to worthy causes who are tax-exempt under other sections of the Internal Revenue Code.[4] Governmental entities,

[4] This includes business leagues and chambers of commerce that are tax-exempt, non-profits under Section 501(c)(6); civic leagues and social organizations, such as volunteer fire companies, the National Network to End

including public school districts and public libraries, rarely apply for tax-exempt status under Section 501(c)(3). (See Ameren Init. Br., p. 44.) Relying on Section 501(c)(3) as a filter also ignores the use of the donation and the nature of the recipient of the donation. Rather than examining the mission of the group receiving the donation, or the intended use of the funds, review of Section 9-227 "public welfare" donations largely becomes an exercise in simply looking at the recipient's federal tax identification number. As shown by the ALJPO's allowance of the IHSA donation, the Section 501(c)(3) bright-line rule does not distinguish between recipients or judge the value of the donation on a case-by-case basis; it simply bases recovery on the recipient's federal tax status.

The ALJPO states that Section 501(c)(6) organizations are not limited in the same way as Section 501(c)(3) organizations in the areas of political and legislative lobbying activities. (ALJPO, p. 78.) But this simply repeats an unsupported assertion made for the first time in Staff's Reply Brief. There is no basis in the record—indeed no cited authority whatsoever—for this assertion. Nor is there any record support for the ALJPO's suggestion that to allow recovery of the specific donations at issue here would allow AIC to recover from ratepayers expenses stemming from donations to organizations that lobby for political candidates. Indeed, on rebuttal, AIC self-disallowed donations to political groups that had been inadvertently included in the revenue requirement. The statements in the ALJPO suggesting otherwise should be stricken from the Commission's final order.

This is not to argue that donations to economic development groups should always be

(continued…)

Domestic Violence, and the Illinois Women's Institute for Leadership, which are organized under Section 501(c)(4); labor, agricultural and horticultural organizations, such as the Illinois Corn Growers, organized under Section 501(c)(5); the hundreds of thousands of fraternal societies, such as the Elks, the Eagles, the Shriners, the Masons and the Moose that are tax-exempt, non-profits under either Section 501(c)(8) or Section 501(c)(10); and veterans of foreign wars groups (VFWs) that are exempt under Section 501(c)(19).

recovered in rates as "public welfare" donations. As explained in testimony, the standard AIC applies when seeking cost recovery of donations under Section 9-227 is whether it believes that the donation in question falls under the one of the statutory categories. (Ameren Ex. 26.0R (Ogden Sur.), p. 6.) To that end, AIC submitted record evidence in Ameren Exhibit 16.1 that identified the nature of the recipient, the use of the donation, and the Section 9-227 category for each donation included in the revenue requirement. That record information and the Commission's prior ruling in Docket No. 11-0721 indicate that the donations at issue are recoverable. Accordingly, the Commission should reject the ALJPO's adjustment to disallow the donations.

G. Exception 7: ALJPO SECTION VI.B.2 "Account 909", Subsection e, "Commission Conclusion", Subsections i – iii, "Brand Related Expenses", "e-Store Costs", and "Signage Costs" (ALJPO, pp. 88-91)

The ALJPO disallows $500,000 in certain advertising costs AIC incurred in 2010 in connection with the merger of the legacy utilities. These adjustments should be reversed. The Brand Related Expenses primarily benefited customers, not AIC's image. The E-store Costs to purchase AIC products are an ordinary operating expense. And the Signage Costs to replace legacy utility signs are recoverable merger costs. All of these expenses should be recovered.

i. Brand Related Expenses

In 2010, AIC incurred "brand related" costs intended to address concerns with the effectiveness of its customer communications. (Ameren Init., pp. 47-49; Ameren Reply Br., pp. 38-40.) The point of the exercise was to determine how AIC, as it moved forward as a single operating company in Illinois, could improve on past instances of confusion in the media and with consumers that had been prevalent with the legacy companies. It also constituted a coordinated effort by Ameren Illinois to determine the issues of most importance to its customers, such as electric choice, and to tailor communications accordingly with clarity and consistency. The bulk of the costs in question funded the use of focus groups and customer surveys to identify issues and problems with name recognition and name confusion. The end result was a revamping of AIC's post-merger consumer education materials and messages that included new value statements.

The ALJPO finds it unclear how these costs benefited customers, why the issues could not be addressed through the usual customer contacts, and why "such branding expenses" may continue in the future after the merger. (ALJPO, p. 88.) All are fair questions that were addressed in testimony or at the hearing. The dollars spent went toward understanding what customers wanted from their energy delivery provider and educating customers that AIC was the new provider after the legal consolidation of the legacy utilities. (Tr. 148.) There were prior instances of media and customer confusion over the identity of the provider. There was a merger of the legacy utilities. There was a corporate name change, both for Ameren Illinois and Ameren Missouri. There was deregulation happening in the market with electric choice. These are undisputed facts. And they represent the chain of events that precipitated the effort to revisit customer communications that ultimately lead to the decision to hire an outside vendor to conduct customer research, focus groups and surveys to determine what issues matter most to customers and revamp communications accordingly. It was not an effort that could be handled simply with the dollars that funded the usual customer contacts. (Tr. 163-65.) And it was not necessarily an effort that could be handled simply with the dollars spent in 2010. (Tr. 158-59.)

AIC and Ameren affiliates are not the parties principally benefiting from these dollars. The parties expected to principally benefit are the customers. They will be the recipients of any improvements in customer education and service. In prior AIC rate orders, the Commission has emphasized the value of having uniform charges and tariffs among the legacy utilities. The message from the Commission in this regard has been clear: AIC customers benefit from consistent and best practices across the former legacy service territories. Ameren Ill. Co., Order, Docket 11-0282 (Jan. 10, 2012), pp. 136-39; Order, Dockets 09-0306, et al. (cons.) (Apr. 29, 2010), pp. 228, 283; Order, Dockets 07-0585, et al. (Cons.) (Sept. 24, 2008), p. 280; Order, Dockets 06-0070, et al. (Cons.) (Nov. 21, 2006), p. 149. These "branding" expenditures help to fulfill that goal—that AIC interacts with customers in a consistent and clear manner. Accordingly, the Commission should reject the ALJPO's adjustment to disallow these expenses.

ii. E-store Costs

The "E-store" allows an employee to purchase online corporate branded products. It is a typical service provided by large companies. In 2010, AIC incurred costs purchasing AIC products after the merger for the E-store's inventory. The ALJPO concludes the costs to purchase inventory for the "E-store" do not "provide sufficient benefit to customers to warrant their payment of the expenses." (ALJPO, p. 89.) The record evidence says otherwise. (Ameren Init. Br., pp. 49-50; Ameren Reply Br., p. 41.) The online store promotes employee morale and a sense of pride. It also provides a source of branded merchandise for use as recognition awards and at Company sponsored events. The ALJPO believes the availability of branded products is not necessary for the provision of electric service. Granted, it is not the equivalent of putting a pole in the ground or hanging a wire. But the expense incurred in operating this online store is an ordinary operating expense for AIC that should be recovered in rates. Accordingly, the Commission should reject the ALJPO's adjustment to disallow "E-store" costs.

iii. Signage Costs

With the merger of the legacy utilities, AIC incurred costs to replace obsolete signage.

(Ameren Init. Br., pp. 46-47; Ameren Reply Br., pp. 36-38.) The record shows the signage (a lobby sign for the Peoria office, vehicle magnets distributed to contractors and storm responders, and billboards in East Peoria) all shared one thing in common: they had the name and logo of a predecessor utility. (Ameren Ex. 26.0R (Ogden Sur.), p. 13.) The ALJPO finds the costs incurred to replace this signage "duplicative" because ratepayers had paid for the prior sign. (ALJPO, p. 90.) It contends there is not a sufficient reason "to justify having customers pay twice for the same item." (Id.)

The ALJPO's adjustment should be rejected. AIC made a prudent decision to get rid of outdated signs for the former operating companies. The replacement signs were not the "same item"; nor were the new signs "duplicative." AIC replaced the lobby sign to adhere to public notice requirements. (Ameren Ex. 16.0 (Ogden Reb.), p. 19.) It replaced the vehicle magnets to accurately identify employees and contractors in the field to consumers. (Id.) It erected new billboards to provide new Act on Energy messages about energy efficiency and safety. (Id.) These are legitimate expenses after a corporate reorganization that should be recoverable.

According to the ALJPO, there is only one way in which AIC can recover the costs of replacement signage: the signs needed to be worn out or otherwise damaged. (ALJPO, p. 91.) Acquiring companies would have to keep using the name of the former operating utility until the *physical life* of the sign asset had expired. Signs for AmerenCILCO would be used until they fell down. Contractors would wear AmerenIP clothing until they disintegrated. Letters would be printed on AmerenCIPS stationary until it ran out. But the *useful life* of the asset expired once the merger occurred. No business would want to continue to operate under names of entities that no longer existed. Nor should this Commission incentivize utilities to do that.

In Docket No. 11-0282, Staff agreed—and the Commission found—the cost savings produced by the merger of the legacy utilities exceeded the associated costs. Ameren Ill. Co., Order, Docket 11-0282 (Jan. 10, 2012), pp. 8, 33-34. Thus, the Commission decided, as a general matter, that the Public Utilities Act allows AIC to recover costs incurred as a result of the merger. Neither Staff nor the ALJPO finds the signage costs are unreasonable. And the Act says that they are recoverable. Accordingly, the Commission should reject the ALJPO's adjustment.

H. Exception 8: ALJPO SECTION VI.B.3 "Account 930.1 – General Advertising Expenses", Subsection e, "Commission Conclusion" (ALJPO, pp. 94-95)

The ALJPO (pp. 91-95) adopts the proposal advocated by AG/AARP, CUB and Staff to reduce Account 930.1 to remove all corporate sponsorship costs from AIC's revenue requirement. The ALJPO's adjustment results in a decrease to operating expenses in an amount of $263,000. (ALJPO Appx., p. 2.) The Commission should reject the ALJPO's adjustment because the corporate sponsorship costs are not designed primarily to bring AIC's name before the general public in such a way as to improve AIC's image or promote a controversial issue for AIC. The costs of being a "good corporate citizen" are incurred for the benefit of the general public in the communities that AIC serves, not for the sole benefit of AIC.

Included in AIC's general advertising expenses are certain (but not all of the) costs that Company incurred in sponsoring community events within its service territory. The types of events that benefit from AIC's sponsorships vary widely, and include local parades, festivals, plays, concerts, races and the Illinois State Fair. AIC self-excluded a substantial amount of its sponsorship costs ($127,000) where it received a tangible benefit like tickets to the event in exchange for its sponsorship. But included among the expenses that would be excluded if the Commission accepted the ALJPO's disallowance of the remaining sponsorship costs are:

- $2000 for the Special Olympics in Southern Illinois.
- $2500 for the Pekin Area Marigold Festival.

- $12,000 to the Decatur Park District Singers and First Tee.
- $2500 to the Herrin Fiesta Italiana.
- $1500 to the American Lung Association for Springfield Golf Classic.
- $500 to the American Cancer Society – Relay for Life (Franklin Cty).
- $1000 to WCBU Public Radio – Africa in Peoria.
- $10,000 to the Decatur Celebration (family street festival).
- $27,000 to the Peoria Civic Center – Broadway Theatre Series.
- $800 to the Washington Chamber of Commerce – Cherry Festival.
- $1000 to the Illinois Blues Festival.
- $10,000 to the Illinois Dept. of Agriculture – Illinois State Fair.
- $4000 to City of Hillsboro – Lighting for Sports Complex.
- $5000 for the Heart of Illinois Fair in Peoria.
- $2000 to the City of East Peoria – Festival of Lights.
- $5000 to the Decatur Public Schools – Turkey Tournament.
- $1000 to the NAACP of Peoria – Freedom Fund Banquet.
- $4000 to Peoria Civic Center – World Fest.
- $1000 to the Central Illinois Black Expo.
- $2500 to the Ill. Black Chamber of Commerce – Bronze Sponsorship.

(See Ameren Ex. 26.1, pp. 15-16 (ST 2.07R).)

The ALJPO finds "the sponsorships bring AIC's name before the public in a philanthropic light." (ALJPO, p. 94.) It concludes that AIC "should not be free to pass the costs of [being a good corporate citizen] to customers" and proposes disallowance of the remaining sponsorship costs as goodwill advertising under Section 9-225. (Id., p. 95.) But whether AIC is lauded for its sponsorships is not the standard for whether advertising expenses should be disallowed. The standard under Section 9-225 is whether advertising is "designed primarily" to improve the image of AIC, or promote a controversial issue for AIC. These funds do not meet that narrow definition of "goodwill" or "institutional" advertising. As explained in AIC's testimony and briefing (Ameren Init. Br., pp. 52-56; Ameren Reply Br., pp. 43-45), these expenses are not incurred to bring AIC's name before the general public; they are incurred to bring the events to the general public. These events improve the image of the communities, not the sponsors. These events promote causes for the communities, not the sponsors. Sponsorships provide financial support for worthwhile events; they provide opportunities for AIC employees to volunteer; and they provide venues to inform and educate customers on issues concerning energy conservation, supplier choice, energy efficiency, and safety measures. No one can argue that communities are not better off by virtue of the events that AIC sponsors. The events themselves, the opportunities they present, the interactions with consumers—all benefit AIC's customers.

That AIC may receive public recognition because of a sponsorship does not mean that the costs of being a good corporate citizen should be categorically excluded. That is not to argue that these costs should be categorically included either. Such costs should be examined on a case-by-case basis. AIC does not give money to Special Olympics to improve its image. It does not give money to local festivals to promote the utility. Detailed line item information was provided to Staff and Intervenors whereby any party could have proposed selective disallowances, or inquired as to the specifics of the advertising at certain events. That never happened. Absent specific disallowances, it is not appropriate to make a blanket disallowance of all sponsorship costs under the theory that every time AIC sponsors an event, it does so with the primary design of promoting its image or a controversial issue. Accordingly, the Commission should reject the ALJPO's disallowance of Account 930.1 expense.

I. Exception 9: ALJPO SECTION VI.B.4 "Regulatory Asset Amortization", Subsection e, "Commission Conclusion" (ALJPO, pp. 98-99)

The ALJPO finds a "plain reading" of Section 16-108.5(c)(4)(G) of the EIMA "indicates that a participating utility is to recover however many regulatory assets it has over whatever period the Commission previously authorized for each asset." (ALJPO, p. 98.) AIC agrees. However, the ALJPO then sanctions an approach (proposed by AG/AARP) dictating that AIC recover certain of its regulatory assets over periods other than those "previously authorized" by the Commission for recovery of those assets.

Two regulatory assets are at issue here—AIC's merger integration costs and its severance costs. (See Ameren Ex. 2.1, p. 24, lines 33 & 34 (App 7); Ameren Init. Br., p. 56.) The Commission has previously authorized periods of recovery for each. For the $67 million in merger integration costs, the Commission initially (in 2004) authorized recovery over a 4-year period, or at a monthly level of expense of $1.4 million, for the months January 2007 – April 2010. Illinois Power Co. & Ameren Corp., Order, Docket 04-0294 (Sept. 22, 2004), p. 27; Central Ill. Light Co., et al., Order, Dockets 09-0306, et al. (Cons.) (Apr. 29, 2010), p. 100. Subsequently (in 2010), the Commission revised the amortization period, and authorized recovery of the unamortized balance of that asset as of May 1, 2010 (approximately $11.2 million) over a 2-year period, or at a monthly level of expense of approximately $465,000 for the months May 2010 – April 2012. Order, Dockets 09-0306, et al. (Cons.), p. 100. In sum, for the months January 2007 – April 2010, the Commission-authorized level of the expense was $1.4 million; for the months May 2010 – April 2012, it was less. The Commission did *not* (and logically could not) authorize AIC to recover the asset at the lower level of monthly expense prior to May 2010.

For the nearly $2.7 million in severance costs, the Commission authorized recovery over a 3-year period beginning in May 2010, or at a monthly level of expense of $75,000 for the months May 2010 – April 2013. Order, Dockets 09-0306, et al. (Cons.), p. 107. The Commission did *not* (and, again, logically could not) authorize AIC to recover the asset at a higher monthly level expense before May 2010. Notably, prior to the April 29, 2010 Order in Dockets 09-0306, et al. (Cons.), AIC was not authorized to recover its severance costs *at all*; thus, there was *no* Commission-authorized period of recovery for that asset prior to May 2010.

Despite these very clear Commission-authorized periods of recovery for AIC's merger integration costs and severance costs and a "plain reading" of Section 16-108.5(C)(4)(G) directing the Commission to include in AIC's revenue requirement in this case a level of those assets consistent with their previously authorized periods, the ALJPO adopts a different approach. It ignores the actual periods of amortization and monthly expense amounts thereof that the Commission authorized for the period prior to May 2010, and instead treats the monthly amortization amounts that resulted from the Dockets 09-0306, et al. (Cons.) Order retroactively, as if they had been in effect all 12 months of the year 2010. Thus, for the months January 2010 – April 2010, the ALJPO supplants the actual Commission-authorized amortization periods (and resulting monthly expense levels) for AIC's merger integration costs and severance costs with a fictional level of expense for those months which was *never* authorized by the Commission. That approach is contrary to the plain language of Section 16-108.5(c)(4)(G) and inconsistent with the ALJPO's own recognition that it must, consistent with that Section, honor the recovery periods *actually* previously authorized.

Rather than adhering to the EIMA's directive, the ALJPO annualizes, or normalizes, recovery of AIC's merger integration costs and severance costs. Although the ALJPO concludes such annualization or normalization is not inconsistent with any provision of the EIMA (ALJPO, pp. 98-99), a cursory review of the EIMA evinces that is not the case. As explained by AIC in briefing, while there are numerous sections of the Act that discuss establishment of the performance-based formula rate revenue requirement based on the most recent actual data shown on FERC Form 1, there is *no* mention of *annualized* cost inputs to the formula. <u>See</u> <u>generally</u> 220 ILCS 5/16-108.5. Moreover, as Staff and AIC agree, because the formula rates will be set each year, it is not necessary to normalize the amortization expense as actual cost recovery will prevent over- or under-recovery of the expense. (Ameren Ex. 23.0 (Rev.), p. 26; Ameren Init. Br., pp. 57-58; ICC Staff Ex. 18.0, pp. 6-7; Staff Init. Br., p. 23.)

AIC's FERC Form 1 reflects the change in actual monthly amortization amounts for AIC's merger integration costs and severance costs mid-2010 and thus, AIC's actual 2010 amortization expense and the amounts and periods "previously authorized by the Commission" for recovery of those assets. (Ameren Init. Br., pp. 56-57.) The ALJPO should be revised to approve those amounts in AIC's revenue requirement, consistent with the plain directive of the EIMA. The Commission should adopt AIC's exceptions language included in Appendix A.

J. Exception 10: ALJPO SECTION VII "Revenues", Subsection E, "Commission Conclusion" (ALJPO, pp. 104-05)

The Customer Choice and Rate Relief Law of 1997 established a 10-year rate freeze for Illinois electric utilities. AIC's first rate case following the rate freeze, Docket Nos. 06-0070, et al. (Cons.) established unbundled delivery service rates. In that case and the cases that followed, Docket Nos. 07-0585, et al. (Cons.) and 09-0306, et al. (Cons.), electric delivery service revenue requirements were based exclusively on costs and revenues associated with AIC's electric distribution system. Revenues and costs associated with functions other than delivery service, such as power supply and transmission, were accounted for through separate tariffs. The ALJPO recommends that the Commission practice observed in three prior cases be disregarded, so that 100% of late payment revenues are credited to the delivery service revenue requirement. The ALJPO reasons that this is necessary in order to prevent AIC shareholders from allegedly earning a "windfall." (ALJPO, p. 105.)

The final order should reject this recommendation. About 42% of late payment revenues are attributable to delivery service customers. Characterizing AIC's proposal to allocate 42% of late payment revenues to these same customers as a shareholder "windfall" is a rather curious use of the term, for the ALJPO essentially lets ratepayers pay $42 for a $100 bill. Now *that* would be a windfall.

The ALJPO discusses late payment revenues supplied by “ratepayers” without really focusing on what is being paid for in delivery service rates. Delivery service rates reflect the cost of service of AIC’s distribution system. Rates for other services, most notably, power supply and transmission, reflect the cost of those services and are recovered under different tariffs. The ALJPO disregards the separate character of these services and lumps them all together, figuring that since delivery service customers also (in most cases) pay AIC for power supply and transmission, there is “no harm, no foul” in attributing all late payment revenues to delivery service tariffs.

To the extent a problem is perceived with the allocation of late payment revenues, the ALJPO takes a step backwards in fixing it. If the “matching” principle means anything, it means that costs and revenues should be considered together. If rate “unbundling” means anything, it means that separate revenue requirements should be developed for separate service components. And if the legislature’s directive that cost allocation “shall be consistent with the Commission’s most recent order regarding the participating utility’s request for a general increase in its delivery service rates” means anything (see 220 ILCS 5/16-108.5(c)), it means that the ratemaking treatment of late payment revenues ought to be handled the same way in this proceeding as it was in Docket Nos. 09-0306, et al. (Cons.).

The ALJPO considers non-delivery service revenues without considering non-delivery service costs. It disregards the separate nature of (and revenue requirements associated with) services for distribution, transmission and power supply. And, it disregards the law. The final order should substitute the language included in Appendix A in the Commission Conclusion section of the ALJPO.

K. Exception 11: ALJPO SECTION VIII.A "Year-End versus Average Capital Structure", Subsection 4, "Commission Conclusion" (ALJPO, pp. 109)

With regard to capital structure, Section 16-108.5(c)(2) leaves nothing to the imagination: formula rates are to "[r]eflect the utility's *actual capital structure* for the applicable calendar year, excluding goodwill, subject to a determination of prudence and reasonableness consistent with Commission practice and law." (Emphasis added.) Data concerning the "actual capital structure" must be derived from the same place as most other formula rate inputs: "*final* data based on [the] most recently filed FERC Form 1 . . . ." The ALJPO, however, "adopts Staff's proposed *average capital structure* methodology," which produces a capital structure that is not final or actual data. (ALJPO, p. 109 (emphasis added).) This conclusion places the ALJPO's capital structure recommendation at the top of the list of adjustments most offensive to the intent of the EIMA.

In response to the claim that the EIMA's purported silence on actual versus average capital structure allows the Commission to decide the issue either way, AIC can only say what it says in response to the same argument raised in the discussion of average reconciliation rate base and ADIT: No, it does not. (See infra Exceptions 17 and 3.) By requiring the Commission to consider AIC's "actual" capital structure, a capital structure derived by alternative means is precluded.

Any doubts about the legislature's intent were resolved with the recent passage of HR 1157. In expressing "serious concerns" with the Commission's Final Order in Docket No. 11-0721, the House resolved: "No statutory authority was given to the Illinois Commerce Commission to set rate base and capital structure using average numbers that do not represent final year-end values reflected in the FERC Form 1, and the Illinois Commerce Commission's use of such average is contrary to the statute."[5]

Even if the legislature *had* granted authorization for the use of something other than actual capital structure, nothing in the record supports a finding that "Staff's method . . . mitigates the risk of manipulation." (ALJPO, p. 109.) Staff presented no evidence that the "risk" of manipulation by AIC actually exists or has ever occurred. Staff offered only a hypothetical "example" of a utility purposefully delaying a dividend from one year to the next in order to boost the common equity ratio. (Id.) Saying this *could* happen is vastly different from proving that it *has* happened. In any event, the Commission has ample authority to review a utility's capital structure for prudence and reasonableness, and impose remedies where appropriate. (Ameren Ex. 11.0 (Nelson Reb.), p. 8.)

The ALJPO's adoption of Staff's average capital structure methodology should be rejected and the exceptions set forth in Appendix A adopted.

L. Exception 12: ALJPO SECTION VIII.E "Common Equity Ratio/Cap Limit", Subsection 4, "Commission Conclusion" (ALJPO, pp. 127-28)

The ALJPO imposes an unjustified "cap" on AIC's equity balance. There are three reasons why this is improper:

- The ruling is inconsistent with the plain language of Section 16-108.5;
- The calculation of 51.49% equity is inconsistent with other portions of the ALJPO and is unsupported by the evidence;

[5] AIC is cognizant of the ruling of the ALJs of August 22, 2012, striking portions of AIC's Reply Brief that referenced HR 1157 prior to its passage. But a significant change in circumstances occurred when the House passed HR 1157 on August 17, 2012, the Friday before the ALJs' ruling. The General Assembly defines a resolution as an official "action, in the form of a formal legislative document, taken by the Senate alone, the House of Representatives alone, or both the Senate and House acting jointly . . . to express the opinion of one or both houses or to take some action short of enacting a law that is within the province of one or both houses." Illinois General Assembly, Section on Illinois Legislative Glossary, available at http://www.ilga.gov/ legislation/glossary.asp#R (emphasis added). Thus, a resolution does not require action by both houses. Further, a legislative resolution may inform questions of statutory interpretation and legislative intent, and so it is appropriate for AIC to cite to the final HR 1157 in support of its arguments on exceptions. See ComEd Petition for Approval of Initial Clean Air Act Compliance Plan, Order, Docket 93-0027, 1993 Ill. PUC LEXIS 233, *15 (July 8, 1993); Eldred v. Ashcroft, 537 U.S. 186, 227-30 (2003).

- Notwithstanding the legal problems, the suggested conclusion would be bad public policy.

For some undisclosed reason, Staff and the ALJs believe that the General Assembly failed to consider the effect that formula rates would have on a participating utility's operating risk. To the contrary, the General Assembly dictated the formula by which the rate of return on equity would be determined. There is nothing in the record—and neither Staff nor ALJPO have identified anything—to suggest that this formula does not already take into account the effect of formula rates on a participating utility's operating risk.

Moreover, the Commission's own actions show that the formula does produce a lower ROE than would be reached under traditional ratemaking. There is no dispute that the ROE produced by the formula rate provisions for 2010 is 10.05%, as the ALJPO correctly indicates. On May 24, 2011, the Commission issued an order establishing traditional base rates for ComEd in Docket No. 10-0467, using 2010 rate of return data. The ROE established by the Commission using traditional ratemaking methods was 10.5%. Order, Docket 10-0467 (May 24, 2011), p. 154. Thus, traditional ratemaking methods produced a ROE 45 basis points higher than the formula would.

What the ALJPO now proposes is to make an adjustment to the capital structure to achieve what the General Assembly has already accomplished—assuring that formula rates reflect the change in risk affected by the formula rate regime. The ALJPO would both use the lower ROE produced by the formula rate protocols and an adjustment to the capital structure not required by those protocols for the same purpose. This second or double adjustment is not provided for in the formula rate statutory provisions, and would produce a lower return than the formula rate provisions call for. Accordingly, the adjustment to the capital structure should be rejected as being in conflict with the law.

Moreover, the adjustment is not appropriate as based either on "prudence" or Section 9-230, as the ALJPO contends. Section 16-108.5 could not be more straight-forward, instructing plainly that the Commission "[r]eflect the utility's actual capital structure for the applicable calendar year, excluding goodwill, subject to a determination of prudence and reasonableness consistent with the Commission's practice and law." Clearly, the law provides for the actual capital structure to be used to set rates every year for the 10 applicable calendar years. The law provides for review as to prudence and reasonableness, but neither issue was raised with regard to the applicable year; rather parties addressing the issue were concerned about prospective capitalization policies, with IIEC recommending a cap on equity and Staff specifically recommending an informal dialogue to address such concerns.

The Commission has long established standards with regard to prudent and reasonable care by utility management:

> Commerce Commission proceedings and our court have defined prudence as "that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made." . . . In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered.

Illinois Commerce Comm'n on Its Own Mtn, Docket 07-0572, Order (Jan. 5, 2012), p. 2 (quotations and citations omitted).

There was no evidentiary showing of imprudence or unreasonableness in managing the actual capital balance. To the contrary, the record supports the maintenance of a healthy capital structure in light of near junk bond ratings was prudent and reasonable. (Ameren Ex. 24.0 (Martin Sur.), p. 8.) In particular, no party contended that AIC maintains too high a credit rating. Rather, the parties suggested that, somehow, AIC could continue to maintain an adequate rating with a lower level of equity. No party submitted any mathematical or financial calculation to support these suggestions.

Further, the ALJPO appears to approve the balance as a “middle ground” position between a 50% cap on equity balance proposed by the IIEC and the actual calendar year position. The ALJPO rationalizes the ruling based upon hindsight consideration of certain facts warrants adjustment to the actual capital structure, in pertinent part:

> Overall, for the reasons contained in the record, the Commission concurs and finds that AIC has lower operating risk than Ameren and now enjoys a more favorable regulatory environment under Public Acts 97-0616 and 97-0646. These facts warrant an adjustment to AIC's 2010 common equity ratio of 54.28%, which represents circumstances as they were prior to Public Acts 97-0616 and 97-0646 and the benefits ensuing to AIC there under.

(ALJPO, pp. 127-28.) In effect, the ALJPO adopts a hypothetical or proxy equity balance, based upon nothing other than the assumptions that when it comes to equity, less is better, and that the formula rate law does not already take into account the circumstances to which the ALJPO refers. As indicated above, the formula rate ROE equation already sets rates to reflect the specific risks and benefits of the formula rate law.

The finding in the ALJPO relies heavily on arguments made by Staff during briefing intended to bolster the reasonableness of its recommended capital structure resulting from its other adjustments, in light of IIEC’s recommendation to institute a 50% cap on AIC’s equity balance. The position briefed by Staff was not supported or presented by any Staff witness as a viable retroactive “cap” during the course of the hearing. (Staff Init. Br., pp. 32-35.) In the record, Staff even explicitly advised against doing so, noting the credit ratings reports issued in 2012 in response to the enactment of Section 16-108.5 should not be relied upon to establish the equity balance based upon 2010 actuals. (ICC Staff Ex. 8.0 (McNally Dir.), p. 4; <u>see</u> <u>also</u> <u>id.</u>, p. 3, n.3 and n.4.) Staff witness Mr. McNally advised the Commission to use the actual capital structure, as follows:

> Q. Do you recommend an alternative capital structure for developing rates for2012 under formula rates?
>
> A. No. Since AIC's 2010 capital structure evolved prior to the reductions in operating risk resulting from the passage of Public Acts 97-0616 and 97-0646, I do not recommend that the Commission adopt an alternative capital structure for 2012. Nonetheless, it is quite possible that a capital structure containing as much common equity as the capital structures presented in this proceeding would not be prudent and reasonable on a going-forward basis. Therefore, I recommend the Commission order the Company to work with Staff to explore more leveraged capital structures for future years and subsequently provide a report to the Commission with its 2010 formula rate filing.

(Id., p. 4, lines 60-70.)

The 51.49% balance of equity adopted by the ALJPO was not the actual capital structure for the calendar year applicable to this docket. It is not disputed that the Company's position reflects that balance excluding goodwill and all purchase accounting. The 51.49% is not derived from a calculation supported by any expert testimony for the purpose of remedying alleged imprudence or unreasonableness. No such evidence was ever entered in this docket. Rather, 51.49% in substantial part reflects the result Staff's proposed purchase accounting adjustment that the ALJPO elsewhere declines to adopt due to lack of record support. (ALJPO, p. 118.) The balance also reflects the product of the average capital structure approach advocated by Staff, discussed elsewhere in this brief. Both issues should be adjudicated upon their own merits, and where the merits do not support the resulting calculation, the same calculation should not be used to set rates.

Even if one ignores the legal infirmities of the position adopted in the ALJPO, the policy implications alone require the conclusion be corrected. By adopting an after-the-fact cap on equity is hindsight ratemaking that serves only to encourage participating utilities to dividend cash out of utilities and increase leverage ratios even if it results in risking a downgrade to junk bond status. The result could hamper the ability of participating utilities to finance the capital expenditures envisioned pursuant to Section 16-108.5. Further, it is quite possible that a more leveraged capital structure could increase risk increasing the relative interest rates for future financing, thus defeating the purpose of the adjustment in the first place. (Ameren Ex. 14.0 (Martin Reb.), p. 6.) As the record reflects, Ameren Illinois is currently two notches above junk bond status. (Ameren Ex. 24.0, p. 10.) It seems much more logical to hinge decisions to increase the Company's relative debt based upon prudent management considerations, rather than to gamble that the Company can get away with a lower equity capital balance. The "less is more" assumption regarding equity may actually not bear out to the extent that less equity and more debt leverage actually increase the cost of debt in a manner that results in a higher overall rate of return. A rush to rapidly recapitalize AIC to be more leveraged based on conjecture unsupported by detailed calculations is not sound policy.

The very reports relied upon in this proceeding clearly expressed reservation and stated concerns going forward. As AIC witness Mr. Martin testified, Moody's did cite the enactment as a positive credit event, but expressed reservations noting "rating could be downgraded if the Energy Infrastructure Modernization Act (EIMA), a legislation and formula rate making rate procedures are not implemented as intended . . . ." (Ameren Ex. 24.0, p. 10.)

Additionally, the Commission would undermine the informal and transparent capital structure planning process it envisions elsewhere in the ALJPO, where it specifically provides for open meetings with Staff and other interested stakeholders. AIC has no objection to such a process and believes that prospective debt/equity targets can should be vetted in such a forum and debated on the merits.

Finally, the ALJPO invokes Section 9-230 of the Act. This Section requires the Commission to disallow the effects of incremental risk resulting from affiliation with nonregulated businesses. No claim that this has in fact happened has been lodged in this case, and no facts in the record support any type of Section 9-230 adjustment. Section 9-230 provides:

> In determining a reasonable rate of return upon investment for any public utility in any proceeding to establish rates or charges, the Commission shall not include any (i) incremental risk, (ii) increased cost of capital, or (iii) after May 31, 2003, revenue or expense attribute to telephone directory operations, *which is the direct or indirect result of the public utility's affiliation with unregulated or nonutility companies*.

220 ILCS 5/9-230 (emphasis added). Section 9-230 is a limited provision, by its express terms. It addresses only the "incremental risk" or "increased cost of capital" that a public utility experiences because of its "affiliation" with "unregulated or nonutility companies." Thus, Section 9-230 addresses situations in which the relatively risky operations of affiliates spill over into the utility's cost of capital and cause the utility to pay more for debt or equity. In other words, the Commission should set the utility's cost of capital as if it were not affiliated with riskier entities.

Here, the ALJPO accepts Staff's contention that Section 9-230 supports an adjustment to common equity. Staff, however, made no showing that if AIC were a stand-alone company, it would have a lower cost of capital. Without such a showing, no legally sustainable conclusion can be reached that AIC's actual common equity ratio is too high.

M. Exception 13: ALJPO SECTION VIII.F "Balance and Embedded Cost of Long-Term Debt" (ALJPO, p. 128)

Because the ALJPO adopts an average capital structure, it also adopts Staff's proposal to calculate the average balance of long-term debt and determine the embedded cost in the manner specified in 83 Ill. Adm. Code § 285.4000(b). As discussed in Exception 11 (see supra II.K), the use of an average capital structure is not allowed under the EIMA. A year-end capital structure must be used instead, and long-term debt measured accordingly. A year-end capital structure would reflect the maturity of the AmerenCIPS debt, and no adjustment would be required.

(Ameren Ex. 14.0 (Martin Reb.), p. 7.)

N. Exception 14: ALJPO SECTION VIII.G "Balance and Embedded Cost of Preferred Stock" (ALJPO, p. 129)

The discussion in Exception 11 also dictates use of the year-end balance of preferred stock, as apposed to the average balance recommended in the ALJPO. (See supra II.K.)

O. Exception 15: ALJPO SECTION VIII.I "Other" (ALJPO, p. 131)

The ALJPO adopts Staff's recommended changes to the sources and descriptions contained in schedules regarding rate of return on rate base. These changes are more or less technical corrections that will be needed if the Commission adopts Staff's rate of return recommendations. The Company has no objection to the ALJPO or Staff in principle, but requests that, rather than requiring the schedule re-numbering scheme outlined in Staff's brief, the Commission allow AIC to re-number schedules sequentially, and preserve the naming conventions of the formula rate template. Confusion and frustration will otherwise result—for all parties involved.

P. Exception 16: ALJPO SECTION X.B.4 "Schedules to be Included in Rate MAP-P/Tariff Complexity", Subsection e, "Commission Conclusion" (ALJPO, p. 150)

The ALJPO adopts IIEC's proposal to exclude MAP-P tariff Appendices A and B from the compliance filing. (ALJPO, p. 150.) The Company does not take exception to this finding, but suggests the following sentence be added at the end of the Commission Conclusion paragraph: "Specifically, the Commission orders the Company to file Schedules FR-A1 and FR-A1 Rec. along with the Rate MAP-P tariff." This sentence will eliminate any doubt about what should be filed.

Q. Exception 17: ALJPO SECTION X.B.6 "Year End versus Average Rate Base", Subsection g, "Commission Conclusion" (ALJPO, pp. 173-74)

In keeping with the practice of substituting actual data with averages (see supra II.K (Exception 11)), the ALJPO determines that the reconciliation rate base should also be set using average rather than actual data. The resolution of this issue has no revenue impact in this proceeding, but the importance of this issue in future reconciliation proceedings cannot be overstated.

As it did in its discussion of average versus actual year-end capital structure, the ALJPO determines that in resolving the dispute concerning average versus year-end rate base, the "legislature left room for interpretation." (ALJPO, p. 174.) In interpreting a statute, the "cardinal rule of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intent of the legislature." See Collinsville Comm. Unit Sch. Dist. No. 10 v. Regional Bd. of Sch. Trustees of St. Clair Cty., 218 Ill. 2d 175, 186 (2006). The first and foremost source for determining the intent of the legislature is the plain language of the statute. Id. ("The language of the statute, which must be given its plain and ordinary meaning, is the best indicator of the legislature's intent.").

The reconciliation process is described in two sections of the EIMA. Section 16-108.5(c)(6) requires the formula rate tariff to "provide for an annual reconciliation, with interest as described in subsection (d) of this Section, of the revenue requirement reflected in rates for each calendar year . . . with what the revenue requirement would have been had the actual cost information for the applicable calendar year been available at the filing date." 220 ILCS 5/16-108.5(c)(6). For the reconciliation process itself, Section 16-108.5(d)(1) requires a comparison between revenue requirements based on (i) "cost inputs for the prior rate year" and (ii) "the actual costs for the prior rate year." 220 ILCS 5/16-108.5(d)(1).

The EIMA makes it clear that cost inputs for both sides of the reconciliation equation are to be based on "final" data: "The inputs to the performance-based formula rate for the applicable year shall be based on *final* historical data reflected in the utility's most recently filed annual FERC Form 1 . . . ." Id. (emphasis added). The statute leaves nothing to interpretation. "Final" means final and "actual" means actual. Thus, the annual update filing for May 2013 will reconcile the "cost inputs for the prior rate year" (2012) with "the actual costs for the prior rate year" (also 2012). At the risk of stating the obvious, 2012 will be a fully historical period when the update proceeding is filed in May 2013. The "actual costs" for 2012 will be known. The "final historical data" shown on the 2012 FERC Form 1 must be used to derive rate base for rates that will go into effect later in 2013. This final historical data is the year-end rate base.

But the ALJPO delves elsewhere in its search for authority to require that reconciliations use an average rate base. Section 108.5(c)(1) states that a formula rate tariff must provide for "the recovery of the utility's actual costs of delivery services that are prudently incurred and reasonable in amount consistent with Commission practice and law." (ALJPO p. 174 (citing 220 ILCS 5/16-108.5(c)(1)).) The ALJPO observes that this language does not specify exactly how the "actual costs of delivery services" should be determined. The ALJPO then makes the remarkable statement that "the legislature arguably created a system under which under-recoveries by the utility will be the norm" (p. 174), and from there jumps to the conclusion that the use of an average rate base will minimize the reconciled under-recovery the ALJPO assumes will happen each year.

But why this would in fact be the case, and how this has bearing on the legislative intent, is unexplained. To begin with, the opposite is true with respect to the reconciliation balances attributable to rate base: use of a year-end reconciliation rate base *minimizes* those balances. (Tr.

412-14, 416.) The Company also is told not to worry: "Whatever the under-recovered amount is, AIC will earn interest on that amount to the benefit of shareholders." (ALJPO, p. 174.) If there is nothing to worry about regarding reconciliation balances, however, then the policy rationale of minimizing reconciliation balances proposed by the ALJPO to support use of an average reconciliation rate base can be disregarded.

Much more could be said—and has been said—on the issue of statutory interpretation and the holes in the Staff and Intervenor arguments. These are all laid out in the briefs. In the final analysis, the body whose opinion on the subject counts the most is the General Assembly, and here is but a portion of what it has had to say via HR 1157 (the entire resolution is provided as Appendix B):

> WHEREAS, The Energy Infrastructure Modernization Act also provides that the final year-end cost data filed in FERC Form 1 should generally be used to determine rates; and
>
> WHEREAS, No statutory authority was given to the Illinois Commerce Commission to set rate base and capital structure using average numbers that do not represent final year-end values reflected in the FERC Form 1, and the Illinois Commerce Commission's use of such average is contrary to the statute;
>
> * * *
>
> Resolved, by the House Of Representatives of the Ninety-Seventh General Assembly of the State of Illinois, that we express serious concerns that the Illinois Commerce Commission Order, entered on May 29, 2012 in Commission Docket No. 11-0721, fails to reflect the statutory directives and the intent of the Illinois General Assembly by: … (3) determining rate base and capital structure using an average, rather than the year-end amounts as reflected in FERC Form 1.

The Commission should abandon its attempt to hamstring participating utilities with a reconciliation process that relies on average rate base. Substitute language is contained in Appendix A.

R. Exception 18: ALJPO SECTION XII, "Finding and Ordering Paragraphs" (ALJPO, pp. 195-97)

Under the EIMA, "The performance-based formula rate shall be implemented through a tariff filed with the Commission consistent with the provisions of this subsection (c) that shall be applicable to all delivery services customers." 220 ILCS 5/16-108.5(c). Thus, the purpose of the proceeding is, ultimately, to implement the formula rate tariff. In its Petition, AIC "request[ed] that the Illinois Commerce Commission approve the Modernization Action Plan – Pricing tariff, Rate MAP-P, as well as the affected tariffs shown and attached to the Appendix [to the Petition]." In the "affected tariffs," AIC proposed certain revisions to existing tariffs to reflect the implementation of the formula tariff. These revisions are shown in Ameren Exhibit 9.4 and are not contested. AIC believes, however, that the ALJPO does not expressly authorize the placing into effect of the Rate MAP-P tariff or the revised tariffs. Therefore, AIC proposes changes in the ALJPO Findings and Ordering Paragraphs, as shown in Appendix A, to approve implementation of the new formula rate tariff in accordance with the EIMA and to approve the related tariff sheet revisions.

S. Technical Correction 1: ALJPO Appendix, "Statement of Operating Income with Adjustments" and "Adjustments to Operating Income" (ALJPO Appx., pp. 1, 2)

If the ALJPO's conclusion regarding amortization of AIC's merger integration costs and severance costs is approved (it should not be, see supra II.I (Exception 9)), then a technical correction is necessary to the Appendix to the ALJPO. Specifically, the $2.523 million adjustment (representing the approved regulatory asset amortization) on page 1, column c and page 2, column h of the Appendix should be moved from line 9 ("Depreciation & Amort. Expenses") to line 10 ("Regulatory Debits").

III. REQUEST FOR ORAL ARGUMENT

AIC requests oral argument as allowed under 220 ILCS 5/9-201(c) and 83 Ill. Adm. Code § 200.850. Without purporting to limit the Commission's discretion on the scope of issues to be argued, the Company believes the record would benefit from argument of the following issues:

a. The use of average versus year-end rate base in establishing the reconciliation revenue requirement.

b. The use of an actual versus hypothetical or average capital structure.

c. The appropriate ratemaking treatment of accrued vacation pay.

d. The appropriate ratemaking treatment of late payment revenues.

The Commission routinely grants oral argument in proceedings of the magnitude of this one. The Commission would benefit from oral argument on these matters, and it would provide the Commission with an additional opportunity to seek input from the parties.

IV. CONCLUSION

For the reasons set forth above, AIC requests that the Commission adopt the Exceptions discussed above and set forth in the respective sections of Appendix A.

Dated: August 30, 2012

Respectfully submitted,

Ameren Illinois Company
d/b/a Ameren Illinois

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CERTIFICATE OF SERVICE

I, Mark A. Whitt, an attorney, certify that on August 30, 2012, I caused a copy of the foregoing *Brief on Exceptions of Ameren Illinois Company* to be served by electronic mail to the individuals on the Commission's Service List for Docket 12-0001.

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