BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of	)	
Union Electric Company for Authority	)	
To Continue the Transfer of	)	Case No. EO-2011-0128
Functional Control of Its Transmission	)	
System to the Midwest Independent	)	
Transmission System Operator, Inc.	)	

AMEREN MISSOURI'S STATEMENT OF POSITION

COME NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"), by and through counsel, and hereby submits its Statement of Position on the issues in this case.

1. Is an extension of the term of the Commission's permission for Ameren Missouri to transfer functional control of Ameren Missouri's transmission system to the Midwest ISO, on the terms and conditions set out in the Non-Unanimous Stipulation and Agreement filed in this docket on November 17, 2011, not detrimental to the public interest?

Yes. The essentially undisputed evidence in this case will be that over the next three years continued Midwest ISO participation will provide $105 million of benefit to Ameren Missouri and its customers. Those benefits are principally in the form of trade benefits made possible from the ability to participate in the Midwest ISO's markets (principally the energy markets and, to a lesser extent, the ancillary services and capacity markets). Moreover, while the cost-benefit study results presented in this case do not extend beyond 2014, the evidence will show that there is no basis to conclude that substantial benefits will not continue through 2015 and 2016.

Based upon "concerns" expressed in the rebuttal testimonies of some of the other parties in this case, Ameren Missouri indicated (through the surrebuttal testimony of Ameren Missouri witness Ajay Arora) that it is no longer seeking ongoing permission to transfer functional control of its transmission system to the Midwest ISO (as it had requested in its August 10, 2011

Amended Application), but rather, is requesting that permission to continue the transfer of functional control be on the following specific terms and conditions:

i. Extension of permission to transfer functional control of the Company's transmission to the Midwest ISO through May 31, 2016 (with provision for additional time necessary to re-establishing functional control or transfer to another Regional Transmission Organization ("RTO") if permission is not extended beyond then), and a determination that such participation is prudent, reasonable, and not detrimental to the public interest;

ii. Preparation and filing of an additional cost-benefit study by November 15, 2015, according to a process that would be materially the same as that followed in Case No. EO-2008-0318, with the study to be a "CRA-like" study and to account for, at a minimum, the Southwest Power Pool ("SPP") Day 2 Market and the Midwest ISO's Resource Adequacy proposal;

iii. Otherwise, participation to be substantially on the same terms and conditions contained in subparagraphs b through h of paragraph 16 of the Company's original Application; and

iv. Provision for a party to this case or the Commission on its own motion to initiate a docket prior to November 15, 2015, to investigate whether a material event occurring after this docket is of such a magnitude that it presents a substantial risk that continued participation in the Midwest ISO has become detrimental to the public interest.

Ameren Missouri, the Staff, MIEC and the Midwest ISO have agreed that participation on the foregoing terms is appropriate, as reflected in the Non-Unanimous Stipulation and Agreement filed in this docket on November 17, 2011. The evidence will also show that there is little or no concern about these proposed terms from OPC. Indeed, the evidence will be clear on the following point: the transfer of functional control of Ameren Missouri's transmission system to the Midwest ISO is not detrimental to the public interest and should continue; conversely, any order from this Commission that would preclude continuation of that transfer would immediately cost customers tens of millions of dollars in foregone benefits that Midwest ISO participation brings them.

Concerns raised by other parties in this proceeding—the Missouri Joint Municipal Electric Utility Commission ("MJMEUC") and The Empire District Electric Company ("Empire")—are, frankly, irrelevant to any of the issues in this proceeding. The testimony by MJMEUC witnesses is nothing more than unsupported speculation of a "sky-is-falling" view that the Midwest ISO's capacity market will somehow become a PJM-type market—at some unknown time and with some unquantified impact – and if this were to occur that it would be harmful to Ameren Missouri and its customers. Speculation such as this is irrelevant to this proceeding, especially given the conditions proposed by Ameren Missouri as to its continued participation in the Midwest ISO now agreed upon by the Staff, MIEC and the Midwest ISO. Testimony by Empire witnesses is equally irrelevant. These witnesses wish to inject the potential harm (unquantified, as well) others outside Ameren Missouri's service territory may face because of Ameren Missouri's continued participation in the Midwest ISO if Entergy Arkansas leaves SPP and also becomes a member of the Midwest ISO. This testimony, too, is

nothing more than speculation and, as seen in Ameren Missouri's position on Issue No. 2 below, irrelevant to the issue of the public interest in this proceeding.

2. What constitutes proving "not detrimental to the public interest" in File No. EO-2011-0128?

(a) What "public" is the appropriate public?
(b) What "interest" is the appropriate interest?
(c) How is "not detrimental" measured?

Traditionally, the Commission has considered whether to approve the transfer of functional control of a public utility to an RTO under Section 393.190.1, RSMo 2000, which states:

> No . . . electrical corporation . . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person, public utility, without having first secured from the commission an order authorizing it to do so.

The statute, however, does not establish the particular standard for the Commission to use in deciding whether to authorize an electric utility to transfer functional control of its transmission system.

Since at least 1934, however, Missouri courts have held that the Commission's duty and authority under statutes such as Section 393.190 does not go so far as to ensure that the public *must benefit* from the transfer:

> To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be *benefited*, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public *detriment*. "In the public interest," in such cases, can reasonably mean no more than not detrimental to the public.

State ex rel. City of St. Louis v. Pub. Serv. Comm'n, 73 S.W.2d 393, 400 (Mo. *banc* 1934), *citing Elec. Pub. Util. Co. v. Pub. Serv. Comm'n*, 140 A. 840, 844 (Md. 1928) (emphasis in original).

Consequently, the Commission's authority in this case is limited to deciding, based upon the substantial and competent evidence of record, whether the proposed continuation of the transfer of functional control of Ameren Missouri's transmission system to the Midwest ISO is detrimental to the public interest.[1] Stated another way, the Commission must approve Ameren Missouri's continued participation in the Midwest ISO if its continued participation would not be detrimental to the public interest.

A public utility, in exchange for its exclusive right to serve customer in its certificated service territory, is required to subject itself to a certain degree of control by the State's public utility authority; however, the Public Service Commission's authority over that public utility is not unlimited. The Commission is a body of limited jurisdiction and has only those powers expressly given it by the Public Service Commission Law. *City of St. Louis*, 73 S.W.2d at 399. Particularly, where there is no detriment to the public, the Commission cannot act to deprive the owners of a utility the right to exercise an incident important to ownership—that is, the right to manage its business. *Id*. at 400; *see also State ex rel. City of St. Joseph v. Pub. Serv. Comm'n*, 30 S.W.2d 8 (Mo. *banc* 1930) (holding that management of water company could not be interfered with as long as the result thereof did not affect public's rights); *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177 (Mo. App. W.D. 1960) (holding that regulatory power of Commission does not extend to the general management of the utility incident to ownership).

Because the right of a utility to transfer its property is an important incident of its ownership of property, such a right should not be denied "unless there is compelling evidence on the record showing a public detriment is likely to occur." *In re Kansas City Power and Light*

[1] Although Ameren Missouri has elected to seek Commission permission under Section 393.190.1 to continue the transfer of functional control, there exists a question regarding whether the Commission in fact has jurisdiction over such a transfer, given that Ameren Missouri is neither selling its transmission assets nor encumbering them. We sometimes refer to the transfer of functional control of the Company's transmission assets as "Midwest ISO participation."

Co., Case No. EM-2001-464 (Order Approving Stipulation and Agreement and Closing Case, issued Aug. 2, 2001, 2001 Mo. PSC LEXIS 1657), *citing In re Missouri Gas Company*, 3 Mo. P.S.C.3d 216, 221 (1994). Additionally, the detriment must be a "*direct* and *present* detriment" (emphasis added). *In re Kansas City Power and Light Co.*, Case No. EM-2001-464 (Order). The burden to establish that the transfer is not detrimental to the public is on the Company, as the applicant. The Company is not, however, required to demonstrate any affirmative benefit from the transfer. *In re Sho-Me Power Corporation*, Case No. EO-93-259 (Report and Order, issued September 17, 1993, 1993 Mo. PSC LEXIS 48).

Consequently, the standard that asks the Commission to determine whether the proposed transfer is detrimental—rather than particularly beneficial—to the public makes sense. Otherwise, the requirement that the utility make a particular decision because the Commission views it as somehow more advantageous than another non-detrimental option constitutes an encroachment of the right of the owners of the utility to manage the business they own and exercise business judgment with respect to that management.

In the context of this proceeding, what "public" is the appropriate public to consider when determining whether a proposal is detrimental and what interest should be considered? The answer to this question can be found in the purpose of a Section 393.190.1 proceeding before the Commission, which is to "ensure the continuation of adequate service to the public." *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. W.D. 1980). That the primary concern is the continuation of adequate service to the public is made clear in the Commission's own rules which require an electric utility to set out reasons why the proposed sale of an asset or a merger or consolidation or a purchase of the stock of another utility is "not detrimental to the public." 4 C.S.R. 240-3.110(1)(D), 240-3.115(1)(D), 240-3.125(1)(C). If the

primary interest is to ensure continued service, then, the particular "public" to be considered is, logically, the public served by the utility customers *who are served by the facilities being transferred* (Ameren Missouri's retail customers here).

The Commission's duty to ensure continued adequate service to the utility's customers in a proceeding brought under Section 398.190.1 is seen in *Environ. Util., LLC, v. Pub. Serv. Comm'n*, 219 S.W.3d 256 (Mo. App. W.D. 2007). In that case, the Commission refused to approve a sale that did not dispose of all of the utility's operating assets because it would mean that the remaining distressed utility would be unable to "safely and effectively operate its current system." *Id*. at 263. The Western District Court of Appeals upheld the Commission's withholding of approval, finding that the partial sale was detrimental to the public because customers of the remaining utility would receive substandard service and the customers of the portion proposed for sale could see the cost of their service double. *Id*. at 266. The Commission generally considers the ability of the utility to provide continued service to the public when it considers proposals under Section 393.190.1. *See, e.g., In re: Joint Application of Union Elec. Co. and Gasconade Elec. Coop. for an Order Approving a Change in Electric Service Supplier*, Case No. EO-2002-178, 2002 Mo. PSC LEXIS 130 at *9, 11 Mo. P.S.C. 3d 98 (Report and Order dated January 24, 2002) ("Second, the Commission will consider the ability of each party to the territorial agreement to provide adequate service to the customers in its exclusive service area.").

If the utility's customers constitute the "public" and continued service is the "interest" to be considered when determining whether a utility's proposal is not detrimental to the public, then how is "not detrimental" to be measured? Other than facts and opinions regarding the impact of the proposal on the utility's ability to continue providing safe and adequate service to its

customers, another obvious consideration is the economic impact (the benefit or detriment) of the proposal on the utility's customers. *See, e.g., State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. 2003) (holding that Commission erred by failing to consider recoupment of the acquisition costs "as part of the cost analysis when determining whether the proposed merger would be detrimental to the public"). Other considerations could well include the reliability of the interconnected power system (an issue that has not been raised in this docket), as an example. Ameren Missouri believes this consideration is appropriate to this proceeding.

3. May the Commission impose the conditions on such a transfer that are reflected at page 12, lines 22 – 28 of the Rebuttal Testimony of Ryan Kind? If so, should the Commission do so?

No. Imposition of such conditions would be unlawful and unreasonable.

As stated above, the right of a utility to transfer its property is an important incident of its ownership of property and such a right should not be denied unless there is compelling evidence on the record showing a public detriment is likely to occur. Those who assert that the transfer would be detrimental to the public interest bear the burden of going forward with compelling evidence of a likely direct and present detriment sufficient to establish that the transfer would in fact be detrimental to the public interest. *In re Gateway Pipeline Company, Inc.*, Case No. GM-2001-585 (Report and Order, issued October 9, 2001, 2001 Mo. PSC LEXIS 1371); *State ex rel. City of St. Louis*, 73 S.W.2d at 400; Section 386.430, RSMo.; *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. *banc* 1991) (the party asserting the affirmative of an issue [i.e., that the transfer <u>is</u> detrimental] bears the burden of proof on that issue). OPC asserts that without the imposition of a condition on Ameren Missouri's transfer of functional control to the Midwest ISO the transfer would be detrimental to the public.

The sole determination to be made by the Commission pursuant to Section 393.190.1 is whether Ameren Missouri's proposal would be detrimental to the public interest; in other words, there is no provision in that statute authorizing the Commission to impose conditions on its approval of a transfer, encumbrance or "other disposition" of a public utility. It is not that the General Assembly overlooked the fact that the Commission needed its authorization to impose conditions in certain instances. Section 393.170.3, for example, specifically authorizes the Commission to impose "reasonable and necessary" conditions on the grant of a certificate of convenience and necessity authorizing the construction of a transmission line. Still, Ameren Missouri does not dispute the adoption of appropriate conditions by the Commission which are reasonable and necessary to *remove* a "substantial detriment to the public interest" arising from a proposed transfer under Section 393.190.1. *See Re: Union Elec. Co*., 2005 WL 433375 at *34 (Mo. P.S.C. Feb. 10, 2005) (Report and Order). But when the transfer is already beneficial (i.e., not detrimental, as here) there is no basis for the Commission to impose any conditions.

As the Commission has acknowledged in the past, even where it is explicitly authorized to impose conditions, its authority to impose such conditions is not absolute. In *State ex rel. Webb Tri-State Gas Co. v. Pub. Serv. Comm'n*, 452 S.W.2d 568 (Mo. App. W.D. 1970), the appellate court affirmed the Commission's refusal to impose a condition on area certificate which would require the applicant natural gas utility to reimburse intervenor liquid propane gas dealers for financial losses they might suffer. In affirming the Commission's order, the Western District Court of Appeals found no legal authority for the Commission to impose such a condition and that the condition was unenforceable. 452 S.W.2d at 588. Consequently, the condition proposed by certain parties in this action must be one which the Commission has the authority to enter and one which the Commission has the authority to enforce.

OPC "recommends" that the Commission extend permission for Midwest ISO participation, but that the Commission condition the extension of Ameren Missouri's participation in the Midwest ISO on the following:

> Ameren Missouri shall construct and own any and all transmission projects proposed for Ameren Missouri's certificated retail service territory, unless Ameren Missouri requests and receives approval from the Commission for an entity other than Ameren Missouri to pursue, in part or in whole, construction and/or ownership of the proposed project(s), which entity shall have a certificate of convenience and necessity issued by the Missouri Public Service Commission for the proposed project(s).

The Commission has no power to impose such a condition.

a. *The Commission does not have the authority to order Ameren Missouri to "construct and own" all transmission projects located in its certificated retail service territory.*

Because Ameren Missouri is a public utility, Ameren Missouri has a statutory duty to provide safe and adequate service to retail customers located within its certificated service territory. Section 393.130.1, RSMo. That means that Ameren Missouri must provide service to all customers who want it and who are located within that service territory, and that means that all customers located within that service territory must take service from Ameren Missouri and from no other provider. But that is the only significance of a "certificated service territory." How Ameren Missouri provides service in its certificated service territory – what power plants it builds, which transmission lines it builds and at what voltages, where it locates substations, what kind of coal it buys, what kind of transformers it buys, what distribution lines it needs – is up to Ameren Missouri's management.

The Commission has no authority to dictate to Ameren Missouri what assets it must build, or where they must be built. To do so would be a clear case of taking over the management of the public utility, a power that an unbroken line of case law in Missouri

demonstrates the Commission does not have.[2] This is not to say that if Ameren Missouri imprudently fails to build a transmission line or a power plant that it needs to discharge its service obligation to its retail customers, the Commission would have no authority to take steps such that Ameren Missouri discharges its obligation to provide safe and adequate service, and it does not mean that the Commission would lack ratemaking authority when it comes to setting Ameren Missouri's rates in view of such an imprudent decision. But having the authority to ensure that Ameren Missouri provides safe and adequate service and that its rates are just and reasonable by preventing ratepayers from paying rates that, but for such imprudence, would have been lower by $X is not the same as dictating to a public utility's management what decisions it must make. By its terms, the proposed condition purports to dictate that Ameren Missouri build regional transmission lines even if Ameren Missouri does not need those lines to discharge its service obligation.

b. *The extension of permission for participate in the Midwest ISO is demonstrably not detrimental to the public interest without any conditions; the Commission cannot, therefore, impose such conditions on the permission sought herein.*

OPC theorizes that if Ameren Missouri does not build a regional transmission line but an Ameren Missouri affiliate builds it instead, this will mean higher overall costs (not quantified in any way) for consumers; more accurately, they theorize that it *could* mean higher overall costs. OPC has not said that it will, in fact, mean higher costs, nor can it because it does not know that this would be true. And OPC cannot say that even if there were higher costs that this would turn the huge benefit from Midwest ISO participation that is demonstrated by the Company's cost-

[2] This limitation on the Commission's authority has been addressed in this Statement of Position and it has been repeatedly recognized by the Commission, including quite recently in its Report and Order (at page 44) in the Company's last rate case, Case No. ER-2011-0028 ("However, the Commission, while it has the power to regulate Ameren Missouri, does not have the power to take over the management of the utility.") *citing State ex rel. Harline v. Pub. Serv. Comm'n,* 343 S.W.2d 177, 182 (Mo. App. W.D. 1960).

benefit study into participation that is detrimental to the public interest. OPC speculates that this *could* be true, but that's all it is – speculation. As noted earlier, only if that participation is detrimental to the public interest may the Commission deny Ameren Missouri the right to transfer functional control of the transmission assets Ameren Missouri owns.

But more fundamentally, in order to deny permission for the transfer (i.e., continued Midwest ISO participation) it is the *transfer* for which permission is sought that must cause the detriment and the detriment must be direct and present. In other words, even if OPC has issues with (or objects to) the operation in Missouri of an Ameren Missouri affiliate that builds regional transmission projects, those issues have nothing to do with this case unless (a) the detriment they express concerns about would occur because of the transfer, not because of something else, and (b) there is a direct and present detriment arising from that operation that renders the transfer, today (for the limited term at issue here) detrimental to the public interest. Neither condition (a) or (b) is satisfied here.

With respect to condition (a), it appears OPC's theory (that there could be a detriment if an Ameren Missouri affiliate builds regional transmission and that this detriment has something to do with Ameren Missouri's Midwest ISO participation) arises from what is sometimes referred to as a "right of first refusal" ("ROFR") in the Midwest ISO's Transmission Owner's Agreement ("TOA"). More specifically, OPC's theory arises from their apparent belief that the ROFR in the TOA somehow gives Ameren Missouri a superior right (over one of its affiliates) to build transmission projects in its service territory. It appears then that OPC theorizes that Ameren Missouri can use the ROFR to preclude others (i.e., an Ameren Missouri affiliate) from building. Because OPC theorizes that this power stems from the TOA they then tie their

attempts to in effect preclude operation in Missouri by an Ameren Missouri affiliate to Ameren Missouri's Midwest ISO participation. OPC's theories are flawed in at least two respects.

First, Midwest ISO participation has nothing to do with these concerns. This is because under the "ROFR" in the Midwest ISO TOA any transmission owner that is owned by the same holding company has the right to build regional projects approved by the Midwest ISO, and has the right to connect to the transmission systems of its affiliated transmission owners. Regardless of what the TOA itself provides (e.g., if it did provide that Ameren Missouri had some kind of superior right), under FERC Order 1000 issued in July of this year such a superior right would no longer exist, whether Ameren Missouri is in the Midwest ISO or out of it. That is because FERC Order 1000 has essentially eliminated the ROFR. [3]

In summary, if Ameren Missouri is in the Midwest ISO, Ameren Missouri has no right to tell its affiliate (that is also a Midwest ISO transmission owner) that it can't build a regional project in Missouri, and if Ameren Missouri is not in the Midwest ISO, Ameren Missouri still has no such right. So even if the overall rates Missouri customers might pay could be higher if an Ameren Missouri affiliate builds the project as opposed to Ameren Missouri, that is not *because of the transfer of functional control* of Ameren Missouri's transmission system to the Midwest ISO. It is not because of the transfer because Midwest ISO participation doesn't give Ameren Missouri a superior right to build such transmission vis-à-vis its affiliates who are also transmission owners in the Midwest ISO.

Second, even if one assumed that pre-FERC Order 1000 Missouri could avoid its share of regionally beneficial transmission projects approved after Ameren Missouri leaves the Midwest ISO, this is not now the case, as Ms. Borkowski explains in her surrebuttal testimony. Post-FERC Order 1000, if regionally beneficial transmission projects are built and if Missouri

[3] The elimination must take place by October 2012.

benefits, Missouri will have to pay its fair share of the cost of those projects *regardless of whether Ameren Missouri participates in the Midwest ISO*.[4] That means that *if* (and a big "if" it is) Missouri's share of the cost of regional transmission projects that are approved during the extended permission term sought in this case (net of the benefits the projects bring to Missouri) ends up exceeding the huge benefits of Midwest ISO participation over that period of time, this will not have been because Ameren Missouri continued the transfer of functional control to the Midwest ISO. To the contrary, it will be because FERC Order 1000 doesn't allow Missouri to avoid paying for regionally beneficial transmission projects regardless of whether Ameren Missouri participates in the Midwest ISO. This largely moots as an issue in this case the allocation of costs of regionally beneficial projects because a cost-benefit study addressing which RTO Ameren Missouri should participate in or whether to participate in no RTO at all can no longer assume that not participating in a particular RTO will allow one to avoid a fair share of the costs of regionally beneficial transmission projects.

With respect to condition (b), even if somehow construction of regional projects in Missouri by an Ameren Missouri affiliate were assumed to have something to do with the transfer of functional control at issue in this case, there has been no showing that any alleged detriment relating to the construction of a regional transmission line in Missouri by an Ameren Missouri affiliate would come anywhere near to turning this beneficial transfer into a transfer that is detrimental to the public interest. That the cost would be greater, or that it would be greater by enough to turn Ameren Missouri's MISO participation from being beneficial to being detrimental is extremely speculative, even if one assumed that MISO participation has anything to do with this issue, which it does not.

[4] Even pre-FERC Order 1000 it is difficult to conceive of a federal transmission policy that would require that certain transmission be built and that would then force customers in only some locations to pay for it when customers in other locations are benefitting from it.

In summary, continuing the *transfer of functional control* is not the act or event that leads to the speculative detriment OPC is apparently trying to mitigate with the proposed condition. Ameren Missouri is going to have to pay its fair share of the costs of regionally beneficial transmission projects, whether there has been that transfer or whether there has not been that transfer. And not only does the "ROFR" in the TOA not give Ameren Missouri the power to prevent an affiliate from building Missouri transmission, but even if historically it did the ROFR has been eliminated by FERC Order 1000 so Ameren Missouri would no longer have such a right. And there is no evidence that even if it were true that construction of regional transmission in Missouri by an Ameren Missouri affiliate would lead to higher rates that would wipe out the huge benefit derived from Ameren Missouri's continued Midwest ISO participation. At bottom, the drivers behind the proposed condition have nothing to do with the issue in this case: whether the continuation of the transfer (that all agree should be continued) itself is detrimental to the public interest.

c. *An entity building transmission facilities in Ameren Missouri's certificated service territory either needs a Certificate of Convenience and Necessity ("CCN") or it does not need one. The Commission cannot "create" jurisdiction by imposing a condition on Ameren Missouri in this docket.*

Not only has OPC made no showing of a present and direct detriment sufficient to overcome the huge benefit of Midwest ISO participation shown by the Company that would justify its proposed condition, but the issue of whether an entity must have a CCN to build transmission in Ameren Missouri's service territory is an issue for a CCN case, or for a complaint case if the Commission believes an entity is proceeding without a CCN when it is required to have one. It is not an issue for this docket.

We would also point out that the fact that Ameren Missouri has a defined territory within which it must serve retail customers (and within which retail customers must take service) has nothing to do with what an entity that may not be subject to this Commission's jurisdiction can or cannot do on, above, or below the land that happens to be within Ameren Missouri's service territory. Yet the terms of this proposed unlawful condition suggest that Ameren Missouri is somehow supposed to stop others from constructing transmission facilities within its service territory, unless this Commission says otherwise. Ameren Missouri, as a Missouri corporation, has only those powers given corporations under Missouri law and only those powers over its service territory that are authorized by statute. Ameren Missouri certainly has no power to dictate to a separate company what it can or cannot do. Again, if another company is taking steps the Commission believes are within its jurisdiction then it is up to the Commission to assert that jurisdiction. If in fact jurisdiction exists, the General Assembly has given the Commission the tools it needs to enforce it and to protect retail customers in Missouri.

Moreover, this Commission has no power to do indirectly what it cannot lawfully do directly; that is, to not only take over Ameren Missouri's management by telling it what it must build as already addressed in point (a) above, but to attempt to use Ameren Missouri as a vehicle to impose regulation on an Ameren Missouri affiliate (such as Ameren Transmission Company ("ATX")) that may desire to build a transmission project in Missouri through a condition imposed on Ameren Missouri in a case to which that affiliate is not a party. If the Commission would have jurisdiction over ATX on a given set of facts, then the Commission can use that jurisdiction. If it doesn't have jurisdiction on a given set of facts, then the Commission cannot directly (or indirectly) reach beyond the bounds of the authority the General Assembly has given it. The investigatory docket agreed upon under the Partial Stipulation will help provide

information about what the actual facts are. At bottom, these CCN-related issues have no place in this docket.

d. *The proposed condition raises serious questions relating to preemption by Federal law.*

It is obvious that the purpose of the proposed condition is to give this Commission the ability to dictate what entity (Ameren Missouri or an Ameren Missouri affiliate) is to build a particular regional transmission line, depending on whether this Commission believes it ought to be built, and depending on what the cost allocations related to such a project will be if Ameren Missouri or one of its affiliates builds it. This raises serious questions of federal preemption. It is highly questionable whether states can usurp the FERC-approved process for approval of regionally beneficial transmission projects or for the allocation of the costs of those projects in the manner reflected in the proposed condition. This is because Congress has given the FERC jurisdiction to regulate the transmission and wholesale sale of electric energy in interstate commerce and over the facilities for such transmission. 16 U.S.C.S. § 824(b)(1) (Federal Power Act ("FPA") Section 201).

The Midwest ISO's tariff and the TOA (which is a part of the tariff) prescribe the rules by which regionally beneficial transmission projects will be built, the rules regarding what entities can build them, and the rules by which the costs of such lines will be recovered from those that benefit from them. As noted earlier, an Ameren Missouri affiliate that is a transmission owner has the right to build regional projects the Midwest ISO approves; neither the TOA nor the fact that Ameren Missouri has a "certificated service territory" give Ameren Missouri a superior right to do so. Under federal law, the FERC has been given exclusive jurisdiction to decide what the rates associated with these interstate transmission lines will be. Given that the FERC-approved scheme for regional transmission project approval already gives

an Ameren Missouri affiliate the right to build such lines, already determines the process for approving such lines, and already sets the rates associated with such lines, a condition like the one OPC advocates very likely runs afoul of federal preemption principles and would thus be unlawful.

OPC's proposed condition purports to usurp the entire system created by the FERC's approval of the creation of the Midwest ISO, and with its FERC-approved rules relating to transmission facilities to be built in its footprint. The condition purports to give this Commission the power to make inquiries the FERC has already made about matters within the FERC's exclusive jurisdiction. The case of *Appalachian Power Company v. Public Service Commission of West Virginia*, 812 F.2d 898 (4th Cir. 1987) is instructive. In that case, the West Virginia Public Service Commission ("WVPSC"), in a WVPSC rate case, denied retail rate recovery of a portion of the costs allocated to a utility pursuant to a Transmission Equalization Agreement ("TEA") among the utility (Appalachian Power Company, or "APC") and several of its affiliates who operated in different states. The TEA was effectively the agreement by which the operation of the combined transmission systems of these affiliated utilities (all of which were part of the American Electric Power Company ("AEP") holding company and whose combined transmission systems spanned several states) was coordinated. This kind of coordination is, today, generally conducted by RTOs such as the Midwest ISO, as is the case for Ameren Missouri.

In granting summary judgment for APC, the district court concluded that "FERC's authority under the FPA to regulate the transmission and wholesale rates charged for transmission of energy in interstate commerce includes the power to determine the reasonableness of any contract affecting a rate or charge for the use of facilities involved in the

transmission of energy from one state to another." *Id.* at 902. Moreover, the district court found that because "the FPA provides a complete scheme for regulation of transmission of energy in commerce and ensures protection of a broader public interest than that protected by the states, there is no place for the type of state authority asserted by the PSC." *Id.* The Court of Appeals affirmed, holding that "[b]ecause it is fundamentally at odds with the scheme Congress has established in the FPA to allow the states to change the arrangements filed with or established by FERC, we find the authority the PSC asserts here violative of the supremecy clause." *Id.* at 905.

The same considerations are relevant regarding the proposed condition. This is because the condition sought to be imposed in effect purports to allow this Commission to second-guess how, when, where, and by whom regional transmission lines will be built, yet those questions are already addressed under the Midwest ISO's tariff (through the TOA), which itself has already been approved by the FERC.

Given the broad authority delegated to the FERC and affirmed by the courts, the only inquiry this Commission could make in a proceeding where Ameren Missouri would come to it (as contemplated by the condition) and ask for permission to "allow" an Ameren Missouri affiliate to build a project is whether the project should be built, by whom, and at what rate. But as noted those are the same inquiries the FERC has already made in approving the Midwest ISO's tariff. *Cf. id.* at 903 (In addressing the WVPSC's argument that its inquiry was "different," the court said that it disagreed, finding that "the prudence inquiry the PSC wishes to make is not different from the FERC inquiry into the justness and reasonableness of the TEA."). The court noted that state interference does not have to be actual: "The Supreme Court's recent *Nantahala* decision supports our conclusion that states are powerless to exert authority that

potentially conflicts with FERC determinations regarding rates or agreements affecting rates." *Id.* (emphasis added).

The court also recognized the problem with state commissions becoming involved in reviewing matters committed to the FERC's jurisdiction by the FPA: "Contrasted with this broad public interest protected by federal regulation is the narrower state public interest advanced by PSC regulation." *Id.* at 905. To allow the WVPSC to make an identical, independent inquiry into matters committed to the FERC's authority created the risk that "the FERC and the PSC would reach conflicting conclusions regarding the impact of the agreement on their respective publics. [But] [o]nly FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the FPA." *Id.* It is obvious that the proposed condition seeks to protect what its proponents view as Missouri's interest in retaining control over regional transmission lines, meaning it would run afoul of the same considerations found in *Appalachian Power* to violate the supremacy clause.

The proposed condition, if imposed, would also prohibit or prevent the voluntary coordination of electric utilities in violation of Section 205 of the Public Utility Regulatory Policies Act of 1978 ("PURPA") (16 U.S.C.S § 824a-1). Section 205 of PURPA allows the FERC, either on its own motion or upon application, to exempt an electric utility from any provision of state law (which would include an order from this Commission) that prohibits or prevents the voluntary coordination of electric utilities. This statute has been applied to prevent state commissions from interfering with RTO membership (because RTO membership is the voluntary coordination of electric utilities). *See New PJM* Companies, 105 FERC ¶ 61,251, 2003 WL 22809753 (F.E.R.C. Nov. 25, 2003) (Order Setting Matter for Public Hearing), and

107 FERC ¶ 61,271, 2004 WL 1368166 (F.E.R.C. Jun. 17, 2004 (Order on Initial Decision and Order on Hearing). Yet, this is what OPC is asking this Commission to do.

The proposed condition prohibits or prevents Ameren Missouri's Midwest ISO participation because Ameren Missouri would either have to participate, but accept an unlawful condition to do so, or withdraw. To condition a utility's participation in an RTO on its adherence to an unlawful condition is tantamount to preventing its participation. And while PURPA Section 205 provides that the FERC cannot exempt a utility from a state law if the law is "designed to protect public health, safety, or welfare," the proposed condition fails to qualify as such because protecting Missouri customers from paying for regional transmission projects that Missouri objects to (or from paying for such projects built by an entity that is allowed to build them even if Missouri prefers they be built by another entity) does not qualify as protection of public health, safety, or welfare. Congress did not intend that protection of a state's economic regulation of electric utilities would qualify as an element of "public welfare" deserving protection against FERC's pre-emptive power found in the statute. 2003 WL 22809753 at *31.

The bottom line is that OPC is asking the Commission to adopt a condition that puts it squarely in conflict with federal law, and to do so absent a showing that the condition is necessary to prevent Ameren Missouri's continued participation in the Midwest ISO from being detrimental to the public interest.

4. May the Commission impose the condition on such a transfer that is reflected at page 17, lines 1 – 3 of the Rebuttal Testimony of Ryan Kind? If so, should the Commission do so?

No. Such a condition is unlawful and unreasonable.

OPC seeks to impose yet another condition on Ameren Missouri's continued participation in the Midwest ISO: that Ameren Missouri "cease having Ameren Services

represent it at MISO and instead have its own representative actively participating in the MISO Transmission Owners Committee and as needed in other MISO stakeholders groups."

OPC's proposed condition is ill-advised and unreasonable for three reasons. First, as explained in great detail in this Position Statement, the Commission does not have the authority to engage in the management decisions of Ameren Missouri. A condition requiring Ameren Missouri to participate in the day-to-day operations of the Midwest ISO in a specific manner—particularly where OPC can offer not one documented instance of harm from the current manner in which Ameren Missouri is represented at the RTO—constitutes a blatant violation of the utility's right to govern itself in its business dealings.

Second, OPC's proposed condition is impossible to carry out under the terms of the Midwest ISO's governing documents by which Ameren Missouri must abide. Those documents provide that when there are multiple Midwest ISO members owned by a single holding company those members, collectively, only have one vote (with very limited exceptions). In other words, Ameren Missouri does not have its own vote to cast; consequently, the proposed condition is unenforceable. The evidence at hearing will be that OPC witness Mr. Kind acknowledges that the proposed condition would be nearly impossible to put into effect. As *State ex rel. Webb Tri-State Gas Co.*, 452 S.W.2d 568, held, the inability to enforce a particular condition is a valid ground for rejecting that condition.

Third, the proposed condition is unnecessary. While Mr. Kind admits that he can cite no particular example of any harm arising from Ameren Services' representation of Ameren Missouri at the Midwest ISO, testimony at hearing (by Ameren Missouri witnesses Jaime Haro and Maureen Borkowski) will convincingly demonstrate that representation of Ameren Missouri by Ameren Services has benefitted Ameren Missouri. The imposition of a condition based upon

some speculative concern of "divergent interests" of different Ameren entities is not the substantial evidence necessary to support the imposition of this condition on Ameren Missouri's continued participation in the Midwest ISO.

5. ***If the Commission agrees that an extension of the term for Ameren Missouri to transfer functional control of Ameren Missouri's transmission system to the Midwest ISO should be granted on the terms outlined at page 19, line 19 to page 21, line 2, should the conditions as proposed by Marlin Vrbas in his testimony, pp. 13-16, be required of Ameren Missouri before any continued transfer of authority is granted? What continuing opportunities and mechanisms for re-examining Ameren Missouri's participation in MISO, if any, should be granted to the parties in this case?***

With respect to the first question posed in this issue, the answer is "no." Mr. Vrbas's expressions of concerns at pages 13 to 16 of his rebuttal testimony and the "conditions" he discussed have all been addressed by Ameren Missouri's proposed participation terms, set forth in Mr. Arora's surrebuttal testimony as noted above,[5] which calls for a defined term of participation and a mandatory cost-benefit study that would examine in detail the issues Mr. Vrbas raises. Moreover, Mr. Vrbas raises parochial concerns of MJMEUC, which do not fall within the public interest as explained in Issue No. 2, above because in a Section 393.170.1 case only conditions that are necessary to prevent the proposed transfer from being detrimental to the public interest – and in the context of this statute that means the utility's ratepayers that are depending on the assets to be transferred for service – may be imposed.

With respect to the second question posed in this issue, the "continuing opportunities and mechanisms" that should be "granted" are those reflected in item 4 of the proposed participation terms set forth in the portion of Mr. Arora's surrebuttal testimony, cited above.

[5] Terms which the Staff, MIEC and the Midwest ISO all agree (save the one the Company is no longer asking for regarding treatment of the costs of the next cost-benefit study) are appropriate and render Ameren Missouri's continued participation in the Midwest ISO not detrimental to the public interest.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail on counsel for the parties of record to this case, on this 17 day of November, 2011.

/s/James B. Lowery
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