Missouri Public Service Commission

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October 29, 2001

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. EO-2001-684

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of an **INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Dennis L. Frey

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Enclosure
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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[3]
OCT 2 9 2001
Missouri Public Service Commission

In the Matter of the Application of Union Electric Company (d/b/a AmerenUE) for an Order Authorizing it to Withdraw from the Midwest ISO to Participate in the Alliance RTO.	))))	Case No. EO-2001-684

INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

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October 29, 2001

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OF THE STATE OF MISSOURI

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MISSOURI PUBLIC SERVICE COMMISSION

Comes Now the Staff ("Staff") of the Missouri Public Service Commission ("Commission"), and for its Initial Brief, respectfully states as follows:

Background

1. On November 7, 1995, in Case No. EM-96-149, Union Electric Company d/b/a AmerenUE ("AmerenUE" or "Company") requested this Commission's authorization to merge with Central Illinois Public Service Company. In February of 1997, the Commission approved the application on the condition that the Company participate in an ISO that would eliminate pancaked transmission rates and would be consistent with FERC Order 888.

2. On January 15, 1998, AmerenUE and a number of other transmission owners filed applications with the Federal Energy Regulatory Commission ("FERC") requesting permission to transfer control of their transmission facilities to the Midwest Independent System Operator (Midwest ISO" or "MISO"). On March 30, 1998, pursuant to the Missouri Commission's Report & Order in the aforementioned merger case, AmerenUE filed an application in Case No. EO-98-413 for this Commission's authorization to participate in the Midwest ISO.

3. On September 16, 1998, the FERC conditionally approved the establishment of the MISO. The transfer of control of the transmission facilities to the MISO was to occur only after a determination that MISO was functionally operational.

4. On May 13, 1999, the Commission issued its Report And Order in EO-98-413, authorizing AmerenUE to join the Midwest ISO. Also approved was a Stipulation And Agreement, which, among other things, provided that AmerenUE, if it sought to withdraw from the MISO, would "file a Notice of Withdrawal with the Commission, and with any other applicable regulatory agency, and such Withdrawal shall become effective when the Commission, and such other agencies, approve or accept such notice, or have otherwise allowed it to become effective."

5. On June 3, 1999, a group of electric utilities calling themselves the Alliance Companies filed an application with the FERC, requesting approval for the creation of the Alliance Regional Transmission Organization ("Alliance RTO" or "ARTO").

6. On December 20, 1999, the FERC issued an order conditionally authorizing ARTO and directing the Alliance Companies to make compliance filings in connection with various aspects of their proposal. Also on December 20, the FERC issued Order 2000, which set out the RTO characteristics and functions that must be demonstrated or complied with in order for an RTO to receive FERC approval. In addition, Order 2000 required that RTOs, including the Alliance RTO, be operational by Dec. 15, 2001.

7. On January 16, 2001, following announcements by Illinois Power Company and Commonwealth Edison that they were withdrawing from the MISO, Ameren Services Company, acting on behalf of both AmerenUE and AmerenCIPS, filed with the FERC an "unconditional" notice of its intent to withdraw from the MISO. Ameren indicated its concern about MISO's

prospects for continued viability in the wake of these other withdrawals and also cited concerns about MISO's continued viability, and about internal power struggles with the small transmission owners. Ameren's entry into the so-called ARTO was conditioned upon its receipt of FERC approval as well as any other required regulatory approvals.

8. During most of the month of February of this year, the Alliance Companies, pursuant to a FERC order, participated in settlement discussions with the Midwest ISO, transmission-owning members of the MISO, energy marketers, and other interested parties. The result was a Settlement Agreement, which was approved by the FERC May 8th. Among other things, the Settlement Agreement recognizes existence of both the MISO and the ARTO and calls for the development of a "Super-Regional" transmission rate that eliminates pancaking of transmission rates across the MISO and ARTO systems. The Settlement Agreement also created an Inter-RTO Cooperation Agreement ("IRCA") under which MISO and ARTO agree to work toward a seamless energy market. Additionally, the Settlement Agreement approved the withdrawal of AmerenUE from the MISO and required AmerenUE to compensate the MISO an amount of $12.5 million for the Company's withdrawal. On May 15th, AmerenUE tendered payment of the $12.5 million.

9. On June 11, 2001, almost five months after filing with the FERC, AmerenUE filed an Application with the Missouri Commission for an Order authorizing it to withdraw from the Midwest ISO in order to participate in the Alliance RTO.

Argument

This brief is organized consistent with the issues set forth in the List of Issues, filed by Staff on behalf of the parties on September 28, 2001. Accordingly, topics bearing on the question whether the Company's proposal to leave the MISO and join the ARTO is "not

detrimental to the public interest" (or, as certain parties would argue "in the public interest") are considered first. Next, the Staff will argue in support of the particular conditions it has recommended. Thereafter, the legal issues raised in this case will be addressed.

1. Should UE's application for permission to withdraw from the Midwest ISO to join the Alliance RTO be approved?

In Staff's view, this ultimate issue in the case boils down to a question of whether the public interest would be better served by AmerenUE membership in the MISO or by membership in the ARTO. If the Commission considers membership in ARTO to be more conducive (or at least, as conducive) to the public interest, then the Commission should approve the Company's Application. On the other hand, if the Commission decides that membership in the MISO will better serve the public interest, then the proposed transfer from MISO to ARTO would be detrimental to the public interest, and AmerenUE's Application should be rejected.

The Staff's position is presented in the testimony of its witness, Dr. Michael Proctor. In summary, the Staff is saying that if the Commission wishes to base its decision in this case on the performance history of the Alliance Companies with regard to launching the ARTO in accordance with the directives and parameters articulated by the FERC in its Order 2000 regarding the structure and functions of an ARTO, the Staff would recommend denial of the Company's request for permission to withdraw from the MISO. Similarly, if the Commission bases its decision on the fact that MISO is a not-for-profit entity and ARTO is for-profit, the Application should likewise be denied. Further, if the Commission's decision is grounded on the likelihood that ARTO will be able to meet the FERC-established start-up date of December 15, 2001, again the Company's Application should be rejected. In regard to this last situation, it is important to keep in mind that AmerenUE has requested that the Commission's approval be

given prior to this start-up date in order not to slow down the ARTO's implementation prior to its start-up.

However, if the Commission chooses to base its decision on a determination that there is a likelihood that National Grid USA, or some similar managing member of ARTO, will be able to rectify the deficiencies in the current situation, then the Staff would recommend approval of the Company's request, albeit subject to a number of conditions each of which is discussed in Section 2 of this Brief.

Following is a more detailed discussion of Staff's position concerning issues bearing on the question whether the proposed transfer from the MISO to the ARTO is not detrimental to the public interest.

a. Will the not-for-profit governance structure of the MISO or the for-profit structure of the ATRO be of greater benefit to the public interest?

The not-for-profit structure of the MISO is of greater benefit to the public interest. Where the Midwest ISO is concerned, the fact that it is a not-for-profit entity means that it does not own transmission assets; hence, the MISO will not be seeking to earn a profit on its transmission assets. (Proctor Rebuttal, Ex. 3, p. 7, lines 2-3). By contrast, the model represented by the ARTO is that of a transmission-owning RTO (a "Transco"), which expects to earn a profit on those assets. (*Id.* at lines 8-10).

Supporters of the for-profit model claim that it is superior because the profit motive will provide the "independent" transmission-owning entity with "greater incentives to provide the transmission services desired by transmission customers and to minimize the costs of providing those services." (Proctor Rebuttal, Ex. 3, p. 8, lines 18-20). And indeed, in a purely competitive world, the argument would carry great weight, inasmuch as ARTO would be forced to provide more attractive services and/or to lower costs. However, an RTO, as the only provider of

transmission service within its specified region, is inherently a monopoly, one requiring the regulatory oversight of the FERC with respect to the rates they charge and the services they offer. As such, when an RTO finds that its profits are being squeezed, it can be expected to do precisely the same thing as any garden-variety, fully integrated and regulated utility would do in similar circumstances; namely, request a rate increase. (Proctor Rebuttal, Ex. 3, p. 9). In such a climate as this, the Commission well knows from its own experience that fashioning incentives for companies to perform better is always a daunting task, as the objective proves elusive.

On the other hand, there is plenty of evidence to indicate that not-for-profit entities can serve the needs of their customers. In addition to being subject to intense regulatory scrutiny (Proctor Rebuttal, Ex. 3, p. 12), the not-for-profit RTO is responsible not to shareholders, but rather to its members, including transmission owners, power marketers, power producers, and transmission-dependent utilities. (Proctor Rebuttal, Ex. 3, p. 11, lines 14-19). In the March 1999 edition of "The Electricity Journal," FERC Commissioner William L. Massey asserted that such entities can indeed operate efficiently, and he pointed to the hundreds of public power agencies and rural electric cooperatives, as well as numerous not-for-profit transmission entities. (Proctor Rebuttal, Ex. 3, p. 9, lines 11-12).

Ultimately, both the for-profit and the not-for-profit entity will have to answer to the regulatory authority. In the event that the FERC views incentives to be desirable for RTOs, performance criteria will need to be established regardless of whether the entity is for-profit or not-for-profit. But what is important is that, in the case of a not-for-profit RTO, customers would have significant input in specifying those criteria, while the for-profit criteria would simply reflect the overall goal of the shareholders. (Proctor Rebuttal, Ex. 3, p. 15, lines 8-14).

Beginning on page 15 of his Rebuttal testimony, Dr. Proctor explores this issue in greater detail. The goal of shareholders of a transmission-owning RTO would be to maximize rate of return. Yet this objective is inconsistent with the fact that transmission service should be regarded as a support service, whose purpose is to move electricity from generator to end-user. As such, the goal of maximizing rate of return on transmission alone could well be incompatible with the overall goal of developing efficient markets for electricity, thereby resulting in a classic case of sub-optimization. (Proctor Rebuttal, Ex. 3, p. 16).

The Staff is concerned that the goal of maximizing rate of return will not necessarily produce a structure conducive to an efficient short-term system for congestion management. (Proctor Rebuttal, Ex. 3, p. 17, lines 17-22). Furthermore, the resultant congestion management system, energy imbalance services or ancillary services, when coupled with performance-based ratemaking ("PBR"), could constitute a structure that would actually cause the for-profit RTO to take a position in the electricity market.

How might this come about? Under the current proposal of the Alliance, the load-serving members are to forecast their loads one day ahead and inform the ARTO as to what generation resources it plans to commit to meeting the load. ARTO then will do its own independent load forecast, and if such forecast yields a higher load, ARTO, in anticipation of a capacity shortage, will contract for additional generation capacity. If it turns out that ARTO has overestimated the load, it will have purchased excess capacity. Under PBR, the ARTO may be given a revenue cap to pay for such things as excess capacity. In order to cut its costs and increase its profits, the ARTO has the incentive to lower its load forecast to cut its risk of having to pay for excess capacity, and thus it will have taken a position in the electricity market. The result would be to

discourage competition and to undermine the credibility of the ARTO. (Proctor Rebuttal, Ex. 3, p. 19).

In addition to short-term concerns, the objective of rate of return maximization can also adversely affect the long-term goal of efficient addition of future capacity by causing a for-profit RTO to over-build transmission facilities. The undesirable results include less-than-optimal location of generation facilities and higher rates to consumers. (Proctor Rebuttal, Ex. 3, p. 23, lines 8-15).

By contrast, a not-for-profit RTO, which does not earn a rate of return on the investment in transmission, is not influenced by an incentive to over-invest. Instead, the not-for-profit RTO uses a market-based approach to the determination of whether the transmission system needs to be upgraded. Accordingly, the not-for-profit RTO will perform load flow studies in order to determine where the congestion on the transmission system has occurred in the past and is likely to occur in the future. Then it becomes a matter of determining how the market values the anticipated congestion. In essence, if the market value of the congestion exceeds the cost to upgrade the transmission system, the system should be upgraded. (Proctor Rebuttal, Ex. 3, p. 25, lines 3-13). A discussion of how a not-for-profit RTO might determine the market value of congestion appears on pages 25-27 of Staff witness Proctor's Rebuttal testimony.

It is to be noted that the action of regulatory bodies such as this Commission can serve to check the tendency of a for-profit RTO to over-build; however, the use of proper incentives to influence the capacity expansion decision would have the advantage of reducing the need for such costly and often retrospective regulatory oversight. (Proctor Rebuttal, Ex. 3, p. 27, lines 23-26).

b. Is AmerenUE's retention of transmission revenues from ARTO rates, based on the rate design set out in the Settlement Agreement between the MISO and ARTO, of benefit to Missouri customers?

Because the increase in generation costs to Missouri citizens from the higher transmission rates associated with the Settlement Agreement has not been presented by AmerenUE in its testimony, it is impossible to determine whether the rate design set out in the Settlement Agreement between the MISO and ARTO will result in net benefits to Missouri customers from Settlement Agreement rates. What is clear, however, is the fact that any loss of excess transmission revenues as windfall gain to transmission owners from the elimination of pancaked transmission rates is really not a valid public interest concern. The FERC has recognized that pancaked transmission rates result in an overall detriment to generation markets and ultimately to end-use electricity customers, and has therefore decreed that pancaked transmission rates are not appropriate as a long-term design for competitive wholesale power markets. Thus, under the current ARTO proposal, the extent of any allowed retention of such revenues is expected to be transitory over a period of some three years. In fact, these excess transmission revenues would not exist today, had the FERC eliminated them through the use of regional transmission rates at the time it moved in Orders 888 and 889 to institute open access. (Proctor Rebuttal, Ex. 3, pp. 31-32).

Since having been authorized under FERC Order 888 to charge separately for transmission services, AmerenUE, has benefited from significant transmission revenues. (Proctor Rebuttal, Ex. 3, p. 32, lines 6-10). This is due largely to the growth of competitive wholesale markets. (Tr. 222, lines 23-24). The Company claims that the interim system of revenue collection and distribution envisioned by the ARTO proposal eliminates pancaked revenues, while enabling the Company, during the interim period of transition, to retain a level of

transmission revenues in excess of what it would be able to retain were it to remain in the Midwest ISO. (Whiteley Surrebuttal, Ex. 2, p. 13, lines 19-23; p. 14, lines 1-4).

It turns out, however, that it is only if one looks at form and ignores substance that one might conclude that pancaked transmission rates are eliminated during the transition period (December 31, 2001 until at least December 31, 2004). As stated by Dr. Proctor, "In essence, the Settlement Agreement allows Ameren to continue to collect pancaked rate revenues for a 'transition period' of at least three years." (Proctor Rebuttal, Ex. 3, p. 32, lines 25-26; p. 33, line 1). Dr. Proctor elaborated on this point at the evidentiary hearing. (Tr. pp. 181-182).

The Alliance Companies have come up with a mechanism by which, during the transition period, the lost revenues of the transmission owners can be measured in a historical test year, and collected in an account known as the Zonal Transition Adjustment ("ZTA") for subsequent allocation first between the MISO and the ARTO and then to their member transmission owners in proportion to the percentage of lost revenues for each transmission owner in the test year. (Proctor Rebuttal, Ex. 3, pp. 32-33; p. 37, lines 11-12). An illustrative calculation of transmission rates using the Alliance Companies' ZTA mechanism appears on pages 33-35 of Dr. Proctor's Rebuttal testimony. The ZTA provides a means by which the transmission-owning membership of the ARTO can, during the transition period, earn in excess of their transmission cost of service.

Furthermore, the Commission should not be concerned about the potential loss by AmerenUE of transitional transmission revenues if it should decide not to permit the Company to join the Alliance RTO. After all, the MISO may still opt to adhere to the rates it agreed to for settlement purposes. Moreover, any reduced transmission revenues resulting from the Company's return to the MISO will contribute to an improved efficiency in the wholesale

generation market, which efficiency would redound to the benefit of both the Company and its customers. Moreover, the current uncertainty enveloping the RTO situation in the Midwest suggests any number of scenarios under which the effect of a Commission decision on AmerenUE's transmission revenues would be rendered moot. (Proctor Rebuttal, Ex. 3, pp. 38-39).

c. Will "seams" between MISO and ARTO continue to affect Missouri transmission customers through payments of pancaked transmission rates?

Because the rate design arising out of the Settlement Agreement applies only to entities joining the MISO or ARTO by February 28, 2001, this seam could result in a pancaked transmission rate for Missouri transmission customers other than UtiliCorp and AmerenUE, two companies that met the deadline. AmerenUE acknowledged this at the hearing. (Tr. 150, lines 24-25; 151, line 1). Of course, it is possible that parties aggrieved by the deadline will bring the matter before the FERC and secure a rescission or waiver.

d. Has the fact that ARTO has yet to establish an independent Board of Directors and a Stakeholder Advisory Committee to provide advice to this Board allowed the ARTO transmission owners to influence the RTO decisions such that those decisions are, or may be, harmful to the public interest, and if so, can this be corrected without imposing additional delays and additional costs?

e. Has the fact that ARTO has yet to establish an independent Board of Directors and a Stakeholder Advisory Committee to provide advice to this Board allowed the ARTO transmission owners to avoid compliance with the requirements of FERC Order No. 2000 or other FERC orders, and if so, can this be corrected without imposing delays or additional costs?

Because the two immediately preceding issues are closely related, the Staff's response here will jointly address both of them. In its Order on RTO Filing in Docket Nos. RT01-99-000 *et al.*, July 12, 2001, the FERC stated: "We further direct that from the date of this order an independent board be established to make all business decisions for the RTO. Until final RTO

approval is granted, a stakeholder advisory committee should advise the independent board." Although it was more than one and one-half years ago that the Alliance Companies proposed a Board of Directors whose members would be prohibited from having financial interests in the markets for electricity, the ARTO has yet to comply with the FERC's directive. (Proctor Rebuttal, Ex. 3, pp. 40-41). Indeed, the Alliance Companies have known for three years that they would have to establish an independent Board. (Tr. 165, lines 11-14). Now, at the time of the filing of this brief, fewer than seven weeks remain until the FERC-ordered start-up date for the RTOs.

The failure of the Alliance Companies to set up an independent Board of Directors has been both frustrating and discouraging. Certainly the Alliance Companies' establishment of a "Bridge Co" to manage the implementation phase of the process did not prevent them from exercising control over the finances and the overall decision-making process. (Proctor Rebuttal, Ex. 3, p. 41, lines 2-3). Eventually the Alliance Companies selected National Grid USA as a "managing member" of the organization. Still, the implementation of an independent Board cannot occur before the FERC decides whether to approve the proposal to appoint National Grid USA. Further, in the event of an approval, the Board of Directors of National Grid USA will likely become the Board of Directors of the ARTO. (Proctor Rebuttal, Ex. 3, p. 45, lines 20-23).

In response to pressure from stakeholders through FERC Alternative Dispute Resolution, the Alliance did propose the establishment of an interim three-member Board of Trustees, with each member appointed by a different interest group. The stakeholders, however do not support this proposal because the Board of Trustees would lack any real authority. (Proctor Rebuttal, Ex. 3, p. 42, lines 16-30; p. 43, lines 1-16).

In addition to an independent Board of Directors, the monopoly status of the ARTO dictates that stakeholders be afforded an opportunity to provide input to the question of what products should be offered. The Alliance Companies have yet to establish a Stakeholder Advisory Committee to perform this function. However, on October, 17, 2001, AmerenUE submitted to this Commission a request to file as a late-filed exhibit, an Offer of Settlement ("Offer") between the Alliance Companies and various other interested parties regarding the immediate formation of a Stakeholder Advisory Committee for ARTO, which Offer was filed on October 12, 2001 with the FERC. Subsequently, on or about October 23, 2001, the commissions of the states of Michigan, Ohio, Indiana, Illinois and West Virginia jointly filed comments with the FERC, indicating that the named commissions were in support of the Offer; however, the commissions took that opportunity to express their disappointment at how little the Offer accomplishes. They pointed out that it proposes a process by which stakeholders can advise an independent Board that the Alliance Companies were obligated to establish, but that does not yet exist, despite the aforementioned July 12, 2001 FERC order requiring its establishment "from the date of [said] order." Further, the state commissions lamented the fact that the implementation of IRCA is proceeding very slowly, and that important business decisions continue to be made by the Alliance transmission owners. The commissions urged the FERC to take the steps required to ensure that the goals of the March, 2001 Settlement Agreement are implemented as soon as possible.

On October 24, 2001, the Pennsylvania Public Utility Commission also filed Initial Comments On Alliance Companies' Offer Of Settlement which takes an approach similar to that of the other state commissions. The Pennsylvania commission noted that the Alliance transmission owners, despite being obligated to establish an independent board, continue to make

crucial business decisions prior to commencement of RTO operations without proper oversight by an independent board, and urged that the FERC "make certain that the formation and implementation of an independent board capable of receiving and providing stakeholder advice is undertaken expeditiously."

In contrast to the Alliance Companies' very recent attempt to establish a stakeholder Advisory Committee, the MISO has long since put in place a Policy Advisory Stakeholder's Group, which has been working to ensure that the desires of customers of the RTO are expressed. Indeed, the input from these and other stakeholders has been a driving force behind the development of MISO. (Proctor Rebuttal, Ex. 3, p. 14).

The Alliance Companies' failure to set up an independent Board of Directors and a Stakeholder Advisory Committee to provide advice to this Board constitutes failure to comply with the requirements of a number of FERC Order 2000 and the July 12, 2001 order, and has allowed the Alliance transmission owners to exert undue influence on RTO formation decisions that will be harmful to the public interest. This situation can be cured only by the immediate installation of a permanent, independent Board of Directors; one that is receiving recommendations from a Stakeholder Advisory Committee.

Whether or not the delay by the Alliance Companies in establishing a permanent, independent Board of Directors will result in delaying the implementation of the ARTO and impose additional costs on the formation of ARTO is yet to be determined. It seems clear, though, that the chances are slim that the Alliance Companies will have ARTO up and running by December 15, 2001, the target operational date for RTOs throughout the country. On the other hand, it appears that the MISO will be operational by the December 15th deadline. (Proctor Rebuttal, Ex. 3, p. 44, lines 1-11).

f. Can ratepayers be harmed by provisions of the ARTO agreements that provide for future transfers of transmission assets at market value?

The transfer of assets by a utility, whether at market value or book value, always carries the potential for harm to ratepayers. This is certainly true of transmission assets. The statutes---specifically, Section 393.190 RSMo. 2000---confer jurisdiction on the Commission to review such transfers. If and when such transfers are proposed, the Commission should at that time exercise its jurisdiction in order to ensure that the ratepayers are not harmed thereby.

Having said that, the Staff would hasten to add that a business decision on the part of AmerenUE not to divest itself of any of its transmission assets to the Alliance Transco would eliminate the associated risk to the Company's Missouri ratepayers. In his prefiled Direct testimony, Company witness Whiteley stated that AmerenUE will be a non-divesting transmission owner; that the Company presently does not have "any intent to sell or contribute [its] transmission assets to the Alliance Transco." Mr. Whiteley added that neither was the Company seeking permission in the instant proceeding to do so. (Whiteley Direct, Ex. 1, p. 18, lines 12-19). The Staff would caution the Commission against taking too much comfort in those assurances. At the hearing, Mr. Whiteley candidly stated, regarding the question of divestiture, that: "We will probably revisit that on a continuing basis..." (Tr. 72, lines 2-2).

g. Was AmerenUE's exit fee payment to the MISO a prudent regulatory expense?

This issue concerns a matter that would normally be raised either in a rate increase case or a complaint rate decrease case. However, the Staff is not opposed to the Company, as a condition to its receipt of Commission authorization to withdraw from the MISO and join the ARTO, agreeing not to seek recovery of its exit fee payment to the MISO.

2. If the Commission decides to approve the Company's request to withdraw from the MISO and to join the ARTO, which (if any) of the following conditions should be required?

The Staff proposes that, in the event the Commission decides to approve the Company's Application, a total of six conditions be imposed. The conditions are classified as either "preliminary" or "subsequent" conditions. Among the preliminary conditions are the following:

a) No transfer unless ARTO is approved by FERC as operational by December 15, 2001.

b) No transfer unless, by December 15, 2001, ARTO has a FERC-approved permanent and independent Board of Directors in place, as well as a Stakeholder Advisory Committee making recommendations to that Board.

c) No transfer unless, by December 15, 2001, ARTO and MISO have implemented the IRCA and are providing non-pancaked transmission service within the ARTO-MISO super-region.

d) No transfer from MISO to ARTO before additional evidence of the December 15, 2001 start-up is filed (December 5), with a follow-up hearing (December 12).

The Staff is of the opinion that the first three conditions above are so basic as to be largely a matter of common sense. Specifically, it is difficult to see how the Commission would approve an Application to transfer to the ARTO before the FERC itself has approved ARTO. It is also difficult to imagine ARTO earning FERC approval before an independent Board of Directors and a Stakeholder Advisory Committee are in place, or before the ARTO is able to offer non-pancaked transmission rates.

The Staff would acknowledge that the FERC's December 15, 2001 target operational date for RTOs, in and of itself, does not have great significance for AmerenUE's Missouri ratepayers. (Proctor Rebuttal, Ex. 3, p. 44, lines 1-2). Furthermore, two days after the Staff filed its Cross-Surrebuttal testimony in this case, the FERC issued a news release announcing that it

would be looking at RTOs, including Midwest RTOs, this month and that it would indicate, by early November of this year, which RTO(s) is (are) approved. Condition d) above is proposed in recognition of these realities. The suggested requirement that a subsequent hearing be held, complete with the preliminary filing of another round of testimony, is intended to afford an opportunity for the Commission and the parties to conduct an eleventh-hour reassessment of the situation in the event the Commission is giving serious consideration to going forward with the approval of AmerenUE's request for transfer. In particular, additional evidence as to the operational status of the ARTO will be considered. If, at that time, it appears that any one of the other preliminary conditions will not be met by December 15, 2001, the parties may then make recommendations as to what action the Commission should take to address the situation. (Tr. 174, lines 7-15).

It should be noted that the Staff's dates of December 5 and December 12 for filing testimony and for holding the hearing are not, in any sense, cast in stone; rather they were used merely to suggest that these event should occur as late in this proceeding as the Commission may deem appropriate, in light of considerations such as the December 15 deadline and the effective date of its order.

In the event that the above conditions are satisfied, the Staff has proposed that the following two "subsequent" conditions be included, should the Commission decide to approve the Company's request:

a) No transfer unless AmerenUE agrees to withdraw from the Alliance if the FERC orders a single RTO in the Midwest, and to take whatever actions are necessary to participate in the single RTO.

b) No transfer unless AmerenUE agrees to withdraw from the ARTO if ARTO is granted a PBR incentive to take a position in the energy market.

As to the first subsequent condition, the Staff sees no reason for the Company to remain in the Alliance even if the Commission has already approved the transfer from MISO to ARTO but the FERC, for any reason, subsequently orders a single RTO in the Midwest. Moreover, the Alliance would no longer exist as an RTO, and there are no reasons being given in this proceeding for AmerenUE to join or maintain membership in such an entity without that entity being an RTO.

The second subsequent condition, dealing with the possibility that the FERC will grant AmerenUE a PBR incentive to take a position in the energy market, is of particular concern to the Staff. On cross-examination, Company witness David A. Whiteley indicated that he didn't understand this condition because the idea of the ARTO taking a position in the market is contrary to one of the requirements of an RTO (*i.e.*, that it not be a participant in the energy market). Mr. Whiteley went on to testify that, nevertheless, in the event the FERC did grant permission for the ARTO to take a position in the energy market, the Company would then be put in the position of having to ask the FERC to withdraw from the ARTO because the FERC had approved something it thought was good for the Alliance. Mr. Whiteley then expressed doubt that, under such circumstances, AmerenUE could succeed in getting permission to withdraw. (Tr. 139-140).

Although Staff is hopeful that the FERC will not eventually establish a PBR incentive that will inadvertently give any for-profit RTO an incentive to take a position in the electricity markets, the Staff is not as confident as Mr. Whiteley that it will not happen. As Dr. Proctor pointed out, this is a very complex issue. (Tr. 176, lines 8-14). To a great extent, the Staff's

misgivings about the for-profit nature of ARTO boil down to a concern that the FERC will put performance-based incentives in place that will result in the ARTO taking a position in the energy market. (Tr. 185, lines 5-10). Although acknowledging the fact that AmerenUE would not be able to withdraw from ARTO without FERC approval, the Staff nevertheless believes that its proposed condition would send a strong signal to the ARTO regarding the potential adverse consequences of ARTO's even proposing PBR incentives that would result in its taking a position in the energy market (Tr. 176-177).

Other parties have offered their own suggested conditions in the event of a Commission approval of the subject Application. To the extent that these conditions are in addition to those suggested by the Staff, the Staff either supports or is not opposed to them.

3. Legal Issues:

a. Independent of the Stipulation and Agreement in Case No. EO-98-413, is the Commission's authorization necessary for AmerenUE to withdraw from the MISO and join the Alliance?

Quite apart from the Stipulation and Agreement in Case No. EO-98-413, Commission authorization is necessary for AmerenUE to withdraw from the MISO and join the Alliance.

AmerenUE, in paragraph 43 on page 12 of its June 11, 2001 Application in Case No. EO-2001-684, states that "AmerenUE will be required to transfer control of its transmission assets to the Alliance RTO once the Alliance RTO is determined to be functionally operational." Section 393.190.1 RSMo. 2000 states, in relevant part:

> **No . . . electrical corporation . . . shall** hereafter sell, assign, lease, **transfer**, mortgage **or otherwise dispose of . . . 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 or public utility, without having first secured from the commission an order authorizing it so to do. Every such** sale, assignment, lease, **transfer**, mortgage, **disposition**, encumbrance, merger **or consolidation**

made other than in accordance with the order of the commission authorizing same shall be void....(Emphasis added.).

Black's Law Dictionary (7th ed. 1999) defines the terms "transfer," "disposition," "control" and "consolidation" as follows:

> **transfer**, *n.* 1. Any mode of disposing of or parting with an asset or an interest in an asset, including the payment of money, release, lease, or creation of a lien or other encumbrance. The term embraces every method – direct or indirect, absolute or conditional, voluntary or involuntary – of disposing of or parting with property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. . . .
>
> **transfer**, *vb.* 1. To convey or remove from one place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of. . . .
>
> **disposition**, *n.* 1. The act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property <a testamentary disposition of all the assets>. . . .
>
> **control**, *n.* The direct or indirect power to direct the management and policies of a person or entity whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct or oversee <the principal exercised control over the agent>.
>
> **consolidation,** *n.* 1. The act or process of uniting, the state of being united. . . .

The turning over of functional control of its transmission assets (*i.e.,* the "authority to manage, direct or oversee") to the ARTO or from the MISO to the ARTO clearly constitutes the "transferring of something to another's care." In other words, AmerenUE is proposing to "otherwise dispose" of its transmission assets by transferring them to the ARTO or from the MISO to the ARTO.

The word "dispose" appears both in Missouri statutory Section 393.190.1 RSMo 2000 and in Section 203 of the Federal Power Act ("FPA"). The FERC, in discussing in Order No. 2000 its jurisdiction under FPA Section 203, makes specific reference to the word "disposition," stating in Order No. 2000, under the subheading "FPA Section 203," that the FERC has the

authority and responsibility under Section 203 to "review mergers and other transactions involving public utilities, including dispositions of jurisdictional facilities by public utilities." FERC Order No. 2000, Statutes And Regulations, Para. 31,089 at 31,039, 31,045 (1999). It seems clear that the FERC regards transactions such as the one here at issue as "dispositions."

In his Direct testimony, Company witness Whiteley states: "The Alliance RTO will also have jurisdictional control over the operation of AmerenUE's transmission assets, however, AmerenUE will retain functional control over these assets." (Whiteley Direct, Ex. 1, p. 20, lines 9-11). On the contrary, it is clear from a number of other documents, including the Company's Application in the instant case and documents filed at the FERC, that the Company intends to turn over functional control of its transmission assets to the ARTO.

Paragraph 41 of the Company's June 11, 2001 Application in the instant case, for example, states, in pertinent part: "AmerenUE will be required to execute an operating agreement with the Alliance RTO to control and operate the transmission assets of AmerenUE in accordance with the operating agreement."

On January 16, 2001, the Alliance Companies, including Ameren on behalf of AmerenUE and AmerenCIPS, made a compliance filing with the FERC in Docket No. RT01-88-000. (Ex. 7). The filing relates more than once therein that "[t]he Alliance RTO will have operational authority for all transmission facilities under its control" and "[t]ransmission owners or control area operators may perform some actual physical operations or tasks, but they will do so under the direction and approval of the RTO." (Ex. 7, pp. 5, 30). The filing also very clearly states that "the compliance filing includes **requests by** the three new members of the Alliance Companies (ComEd, DP&L, Illinois Power and **Ameren**) for authorization **to transfer** ownership and/or **functional control of their facilities to the Alliance RTO**, pursuant to

Section 203 of the FPA." (*Id.* at 47, 52; Emphasis added). The filing notes that "Ameren previously sought authorization to transfer functional control of its transmission facilities to the Midwest ISO . . ." (*Id.* at 51).

On August 31, 2001, the Alliance Companies, including Ameren Services Company on behalf of AmerenUE, made a compliance filing with the FERC including Attachment F, the revised Operating Protocol. (Ex. 9). Respecting "Functional Control," [1] the Operating Protocol states as follows:

> Article 1.3.1: "[t]he **Alliance RTO shall have Functional Control** of the Transmission System . . ." (Ex. 9, Attachment F, p. 1; Emphasis added.).
>
> Article 1.4.1: "Subject to the Alliance RTO's direction, the Transmission Owners, including the Alliance Transco, shall perform physical operations, including switching, on their respective facilities necessary to the **Alliance RTO's exercise of Functional Control**." (*Id.* at 3; Emphasis added.).
>
> Article 1.4.6: "The **Transmission Owners shall obtain approval of the Alliance RTO before taking transmission facilities included in the**

[1] Exhibit A to the Operating Protocol states that "Functional Control," "Transmission Owner," "Transmission System" and "Transmission Provider" are defined in the Alliance RTO's Open Access Transmission Tariff (OATT). The Alliance RTO's OATT filed on August 31, 2001 defines "Functional Control," "Transmission Owner," "Transmission System" and "Transmission Provider" as follows:

> "Functional Control: The ability and obligation of the Alliance RTO to control and manage the construction, maintenance and operation of the Transmission System pursuant to an Operation Agreement."
>
> "Transmission Owner: An entity which:
> (1) prior to transfer of Functional Control of transmission facilities to the Alliance RTO (a) had an open access transmission tariff on file and in effect with the [FERC] or has agreed to file with the [FERC] a seven-factor analysis as described in Order No. 888 to identify its transmission facilities and (c) has executed an Operation Agreement or an Associate Agreement to transfer Functional Control of transmission facilities to the Alliance RTO; or
> (2) is the Alliance Transco at such time as the Alliance RTO begins operations as independent transmission company."
>
> "Transmission System: The facilities owned, controlled or operated by the Transmission Provider that are used to provide transmission service under Part II and Part III of the Tariff. The Transmission System includes facilities, the Functional Control of which has been transferred to the Alliance RTO subject to Commission approval under Section 203 of the Federal Power Act and Non-transferred Transmission Facilities."
>
> "Transmission Provider: The Alliance RTO."

Transmission System out of service, except in cases involving endangerment to the safety of employees or the public or damage to facilities. . . ." (*Id.* at 4; Emphasis added.).

Article 2.1.1: "**The Alliance RTO shall have Functional Control over the *combined transmission facilities* of the Transmission Owners that comprise the Transmission System**, including authority to monitor, direct, review, advise, and approve Transmission Owner's actions and system operations. Functional Control includes the operational authority to direct switching and reactive resource use, to monitor the line flows and voltages, to control the flows and voltage levels, and to act as Security Coordinator." (*Id.* at 5; Emphasis added.).

Article 2.1.7: "**The Alliance RTO shall comply with any *transmission operating obligations imposed by* federal or *state law* or authorities which can no longer be performed solely by the Transmission Owner following transfer of Functional Control of its transmission facilities to the Alliance RTO.**" (*Id.* at 6; Emphasis added..).

Article 2.2.2: "**The Transmission Owners' rights in their transmission facilities shall be subject to the Alliance RTO's Functional Control** of the Transmission System in accordance with the terms of the Operating Protocol. . . ." (*Id.* at 7; Emphasis added.).

Of considerable interest is the use of the phrase "disposition of facilities" to characterize the transfer of functional control of transmission facilities to an RTO. As previously noted, the words "dispose of" appear in Section 393.190.1 relating to events respecting any part of a electrical corporation's works or system, necessary or useful in the performance of duties to the public, that require Commission authorization. Language in the Alliance Companies' January 16, 2001 compliance filing indicates that a transfer of functional control to an RTO constitutes a "disposition of facilities:"

. . . When a **disposition of facilities involves a transfer to a regional transmission entity**, the [FERC] does not apply the same criteria as it applies in merger proceedings to determine whether the proposed transaction is consistent with the public interest. . . . [T]**he proposed transfer of ownership and/or functional control of transmission facilities by ComEd, DP&L, Illinois Power and Ameren to the Alliance RTO** is consistent with the public interest.

(*Id.* at 48.). Thus, the January 16, 2001 Alliance Companies filing with the FERC provides support for the Staff's position that AmerenUE's withdrawing from the Midwest ISO and joining the Alliance RTO are covered by Section 393.190.1.

In fact, in a subsection in FERC Order No. 2000, Statutes And Regulations, Para. 31,089 at 31,213 (1999) entitled "7. States' Roles with Regard to RTOs," the FERC acknowledges that the states are not been preempted respecting authority for state commission approval of a utility joining an RTO:

> **We continue to believe that states have important roles to play in RTO matters. For example, most states must approve a utility joining an RTO,** and several states have required their utilities to turn over their transmission facilities to an independent transmission operator. . . .(Emphasis added.).

In the subsection "3. Operational Authority (Characteristic 3)" of Order No. 2000, the FERC relates that "an RTO must have operational authority for all transmission facilities under its control and also must be security coordinator for the region." The FERC further states that "[o]ne necessary aspect of operational authority as used here refers to the authority to control transmission facilities." FERC Order No. 2000, Statutes And Regulations, Para. 31,089 at 31,090 (1999). The FERC "conclude[s] that those designing the RTO should have flexibility to decide how it would exercise its operational control authority" and announces that it will leave to the discretion of the region the decision on the combination of direct and functional control that works best for its circumstances, but "the RTO must have clear authority to direct all actions that affect the facilities under its control. . . ." *Id.* at 31,091.

Section 393.190.1 also confers jurisdiction on the Commission by virtue of the fact that AmerenUE's proposal constitutes a type of consolidation of the Company's transmission system with those of other utilities. The Company's proposal calls for the consolidation into the

Alliance RTO, of functional control of the transmission assets of AmerenUE, and the various other member entities.

With respect to the distinction between joining an RTO and withdrawing from an ISO (or RTO), the Staff submits that both types of transaction come squarely within this Commission's authority. In this case, the two transactions are inextricably linked. Further, as a practical matter, they would in any foreseeable cases continue to be linked, inasmuch as the FERC has ordered that electric utilities join RTOs.

The Commission's jurisdiction over a transfer of functional control of AmerenUE's transmission is buttressed by other statutory provisions. Section 386.040, among other things, confers on this Commission "...all powers necessary and proper to enable it to carry out fully and effectually all the purposes of this chapter." Section 386.250(7) extends the Commission's jurisdiction "[t]o such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly." The combination of these provisions fully supports the Staff's position that, independent of the Stipulation And Agreement in Case No. EO-98-413, Commission authorization is required for AmerenUE both to withdraw from the MISO and to join the ARTO.

b. What is the appropriate standard for the Commission to use in deciding this case?

The Staff contends that the principal basis of the Commission's jurisdiction in this case is Section 393.190.1. Thus, in order to approve AmerenUE's Application in this case, the Commission must find, at a minimum, that the Company's proposal is not detrimental to the public interest. No standard appears in Section 393.190 RSMo 2000 for determining whether a public utility's request for authorization to sell, assign, lease, transfer, mortgage or otherwise dispose of the whole or any part of its franchise, works or system, necessary or useful in the

performance of its duties to the public should be granted by the Commission. The standard was determined by the Missouri Supreme Court in State ex rel. City of St. Louis v. Public Serv. Cmm'n, 73 S.W.2d 393 (Mo. banc 1934), which was the judicial review of a Commission Report And Order granting the Application of a foreign corporation, not licensed to do business in Missouri, to acquire and hold more than 10% of the stock of two Missouri utilities. In the underlying Commission case, Re Utilities Power & Light Corp., Case Nos. 6722 and 6723, 18 Mo.P.S.C. 1 (1930), Utilities Power & Light Corporation claimed that the requested transfer of stock to it from an intermediary holding company would simplify its corporate structure, result in tax savings, and have no effect on rates, service, or operations. 18 Mo.P.S.C. 3. The Commission held that the proposed transactions involving the mere transferring from an intermediary holding company to the parent holding company of more than 10% of the total capital stock of two Missouri public utility corporations could have "no detrimental effect upon the public interest." Id. at 4.

To determine the meaning of the applicable section in the Public Service Commission Law, the Court looked to the purpose of the Public Service Commission Act and stated:

> . . . The whole purpose of the act is to protect the public. The public served by the utility is interested in the service rendered by the utility and the price charged therefor; investing public is interested in the value and stability of the securities issued by the utility. (Citation omitted) . . .

73 S.W.2d at 399.

The Court stated that "[t]he owners of this stock [sought to be acquired] should have something to say as to whether they can sell it or not; [t]o deny them that right would be to deny them an incident important to ownership of property"; and in such a situation "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." 73 S.W.2d at 400. The Court noted that the state of Maryland has a statute "identical" to the

Missouri statute and that the Maryland Supreme Court had determined "not detrimental to the public" to be the appropriate standard:

> The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of Electric Public Utilities Co. v. Public Service Commission, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public good 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'".

c. Has the Commission conceded that AmerenUE's withdrawal from MISO is in the public interest by failing to object to such a finding by the FERC?

The Company asserts that, because this Commission, along with a number of other state commissions, was a party to the consolidated FERC cases that led to the March 20, 2001 Settlement Agreement and did not object to that Settlement Agreement, the Commission may not now reject the AmerenUE's Application. The Company's assertion is in error.

In paragraph 44 (page 13) of its June 11, 2001 Application initiating this case, AmerenUE "requests that the Commission continue to demonstrate its support of the Settlement Agreement approved by the FERC in its May 8, 2001 Order . . .". This statement is misleading. The Commission did not support the Settlement Agreement. The Commission is not a signatory to the Settlement Agreement. The Commission is among ten state commissions that submitted joint Initial Comments on March 30, 2001 in FERC Docket No. ER01-123-000 et al. In those Initial Comments, the ten state commissions stated that, as non-contesting parties within the meaning of FERC Rule 602, they "are not 'parties to the Settlement' as stated in the Commission's rehearing order of March 26, 2001 in Docket No. ER01-123-001." (Ex. 8, p. 2 n.

1). The Initial Comments further indicate (on page 3) the non-signatory position of the ten state commissions, including this Commission, as follows:

> . . . It is these protections, assuming their full implementation, as well as the right under Section 9.1(b) of the Settlement Agreement to protest future Order No. 2000 compliance filings, that have allowed the State Commissions to conclude that we will not contest this Settlement Agreement.[2]

Page 3 of the Initial Comments also includes the following footnote:

> [2] Several states choose not to contest the settlement for another reason: their state statutes will require them to review, and approve or disapprove, certain requests by their jurisdictional utilities, such as requests to recover amounts paid to the MISO, and to transfer control of transmission assets to the Alliance. Also, one utility, as part of obtaining State Commission authorization to join the MISO, agreed to seek that State Commission's authorization to withdraw from the MISO. By choosing not to contest this settlement, these State Commissions should not be deemed to have prejudged issues coming before them, and instead are reserving judgment until such time as the matters come before them in state proceedings.

Section 9.4 "State Implementation" in the March 20, 2001 Settlement Agreement Involving The Midwest Independent Transmission System Operator, Inc., Certain Transmission Owners In The Midwest ISO, The Alliance Companies And Other Parties ("Settlement Agreement") recognizes that state regulatory approvals may be necessary:

> State Commissions will fully consider any requests for regulatory approvals that may be necessary for transmission owners to participate in the Alliance RTO or the Midwest ISO, respectively, in accordance with state law and procedures. (Ex. 10, p. 23).

At the evidentiary hearing in the instant case, Mr. Whiteley acknowledged that this Commission is not one of the parties that reached settlement in the FERC proceedings that is memorialized by the March 20, 2001 Settlement Agreement. (Tr. 75-76).

This Commission is not the only one of the aforementioned group of state commissions to schedule proceedings on these matters. Attached to Staff's Proposed Procedural Schedule filed with the Commission on August 7, 2001 is a docket entry of the Indiana Utility Regulatory

Commission (Indiana Commission) in Cause Nos. 42027 and 42032. In Cause No. 42032, the Indiana Michigan Power Company, d/b/a American Electric Power (AEP), and Northern Indiana Public Service Company filed a joint petition for approval to transfer functional control of transmission facilities located in Indiana to the Alliance RTO . In Cause No. 42027, PSI Energy, Inc., Indianapolis Power & Light Company, Vectren Energy Delivery of Indiana, Inc., Wabash Valley Power Association, Inc. and Hoosier Energy Rural Electric Cooperative, Inc. filed a joint petition for approval of and related relief concerning their individual and collective participation as transmission owner members in the Midwest ISO. Dr. Proctor noted these proceedings in his rebuttal testimony. (Ex. 3, p.40). Mr. Whiteley testified that he was aware of the AEP and Northern Indiana Public Service proceedings but was not aware of the proceedings involving PSI and others. (Tr. 64).

d. Did AmerenUE violate the Stipulation and Agreement in Case No. EO-98-413 by failing to file with the Commission a notice of withdrawal at the same time the notice was filed at the FERC on January 16, 2001?

As noted in Paragraph 4 above, that Stipulation And Agreement in Case No. EO-98-413, which received Commission approval, provided that AmerenUE, if it sought to withdraw from the MISO, would "file a Notice of Withdrawal with the Commission, and with any other applicable regulatory agency, and such Withdrawal shall become effective when the Commission, and such other agencies, approve or accept such notice, or have otherwise allowed it to become effective."

The Staff's position regarding this issue is based upon the fact that AmerenUE in its Statement of Positions contends that "[b]y participating in the proceeding at FERC to determine whether UE's withdrawal from MISO was in the public interest, and failing to object to the finding made by FERC in the Settlement Agreement that UE's withdrawal from MISO to

participate in the ARTO is in the public interest, the Commission is now estopped from asserting that such withdrawal is not in the public interest in this proceeding." See Missouri Gas Energy v. Public Service Commn, 978 S.W.2d 434 (Mo. App. 1998). Given that the Company so contends, the Staff takes the position that AmerenUE did violate the cited provision of the Stipulation And Agreement. The Company should have filed with this Commission a notice of withdrawal at the same time it filed such notice with the FERC on January 16, 2001. The Company failed to file a notice and instead filed an Application seeking this Commission's approval to withdraw on June 11, 2001, practically five months after its FERC filing, and almost a full month after Ameren's May 15 payment of the $18 million AmerenUE and AmerenCIPS exit fee to the MISO. (Tr. 69, lines 3-6). This despite the fact that, by the very terms of the Case No. EO-98-413 Stipulation and Agreement (S&A), the Company's withdrawal is not yet effective.

Surely the parties who signed the S&A (at least those other than AmerenUE) expected that the Commission was thereby authorized to act as something more than a rubber stamp in this whole process. For the Company to raise this issue is unseemly.

Conclusion

WHEREFORE, for the reasons set forth above, the Staff recommends that the Commission assert its jurisdiction in this case. Furthermore, if the Commission wishes to base its decision in this case: a) on the performance history of the Alliance Companies with regard to launching the ARTO in accordance with the directives and parameters articulated by the FERC, or b) on the fact that MISO is a not-for-profit entity and ARTO is for-profit, or c) on the likelihood that ARTO will be able to meet the FERC-established start-up date of December 15,

2001, the Staff would recommend denial of the Company's request for permission to withdraw from the MISO.

However, if the Commission chooses to base its decision on a determination that there is a likelihood that National Grid USA, or some similar managing member of ARTO, will be able to rectify the deficiencies in the current situation, then the Staff would recommend approval of the Company's request, subject to the series of conditions set forth in Section 2 of this Brief.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 29th day of October 2001.

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